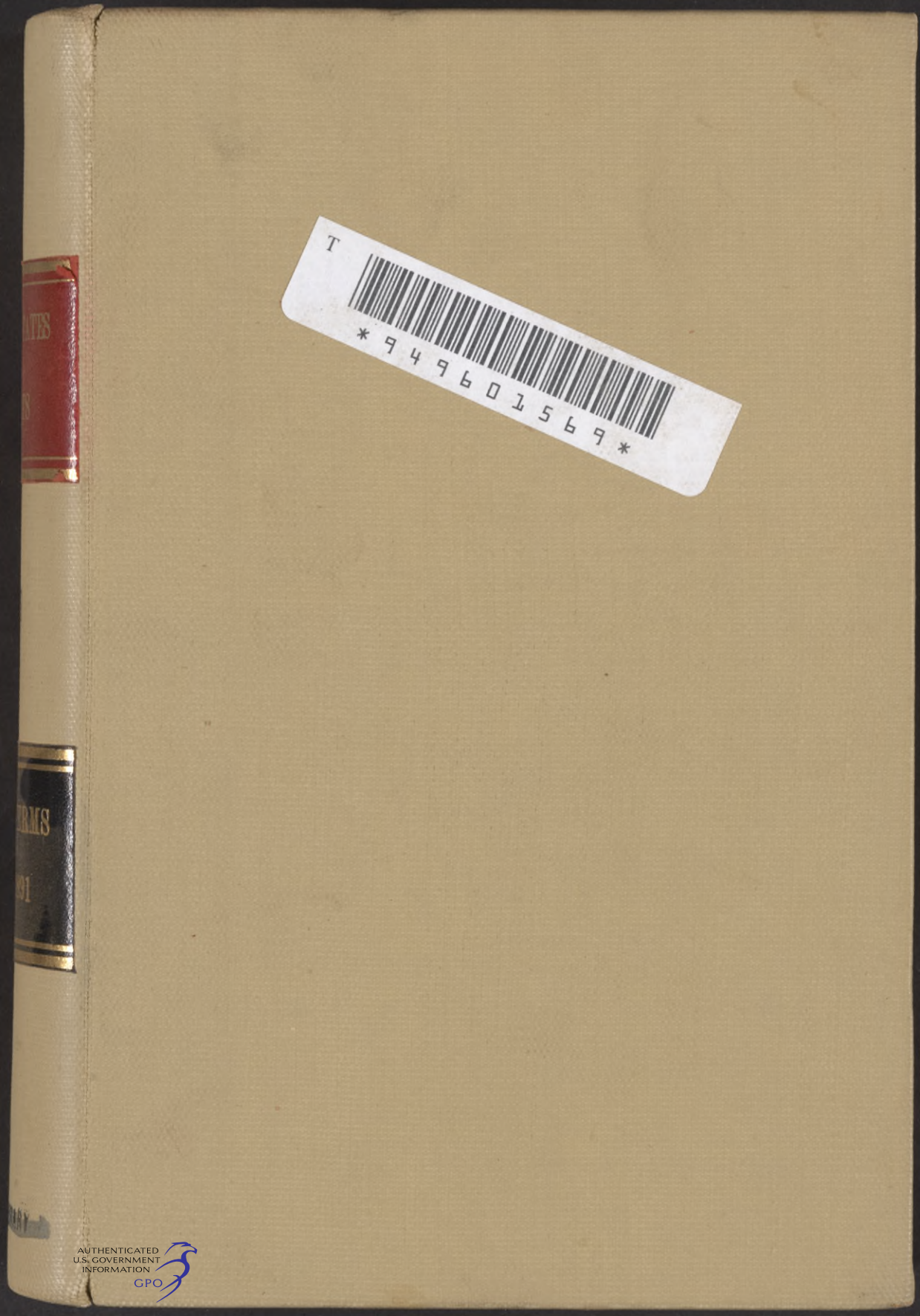

T
9496015699
AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

UNITED STATES REPORTS

VOLUME 141

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1890

AND

OCTOBER TERM, 1891

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1892

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief 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.

HENRY BILLINGS BROWN, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

October Term, 1891, began October 12. The Chief Justice was absent, by reason of illness in his family, until October 28, when he took his seat. Mr. Justice Bradley was (with the exception of October 26) absent, by reason of illness, till November 9, when he took his seat. Mr. Justice Gray was absent, by reason of illness, until November 2, when he took his seat.

CORRECTION.

In Volume 140, the opinion in *Rogers* v. *Durant*, commencing on page 300, was delivered by THE CHIEF JUSTICE, and not by MR. JUSTICE FIELD. Holders of the original edition of that volume are requested to make the correction.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

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.

I.

CASES ADJUDGED

AT

OCTOBER TERM, 1890.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1890.

In re GARNETT AND OTHERS.

ORIGINAL.

No. 10. Original. Argued March 9, 10, 1891. — Decided May 25, 1891.

The law of limited liability is part of the maritime law of the United States, and is in force upon navigable rivers above tide water, and applies to enrolled and licensed vessels exclusively engaged in commerce on such a river.

On the 2d of February, 1891, leave was granted to *Mr. Walter Van Rensselaer Berry* to file the petition of Garnett, Stubbs & Co. and several others for a writ of prohibition to prohibit the judge of the District Court of the United States for the Eastern Division of the Southern District of Georgia from proceeding with a suit in admiralty in that court, in which John Lawton, owner of the steamer Katie, had libelled that vessel and summoned the petitioners as defendants. Leave was granted, and the petition was filed, to which was attached a copy of the libel.

It appeared that the Katie was a steamer engaged in the carrying trade between Augusta on the Savannah River and Savannah, on the same river, both in the State of Georgia; that in October, 1887, she received from the various peti-

tioners, and from various points along the river, cotton to be transported for each petitioner; and that while making the voyage she took fire and some of the cotton was burned, and other bales were thrown overboard. The owners or consignees of the cotton which had been damaged or lost brought suits against Lawton, as a common carrier, to recover in each case, its value. There were ten actions in all, and their aggregate claims were about sixteen thousand dollars.

Thereupon Lawton filed the libel in question alleging, as set forth in the petition, "that the amount sued for in said cases, and the loss and damage happening by means of or by reason of said fire, exceeded the value of said steamboat and her freight on said voyage, and that said fire was not caused by any negligence of said libellant or of the master and crew of said steamboat, and that under the act of Congress, approved March 3, 1851, as amended by the act of Congress, approved June 19, 1886, said libellant was not in any wise liable for said loss or damage; and claiming further, in the event of any liability, the benefit of the limitation provided in the third and fourth sections of said act of March 3, 1851, a copy of said libel and its 'Exhibits' being hereunto annexed."

The petition further alleged "That afterwards, to wit, on the 8th day of March, 1888, an appraisement of said steamboat and freight was had, said steamboat being appraised at $3300 and the freight at $196.75, making a total of $3496.75, for which said sum the said John Lawton entered into the usual stipulation on May 4, 1889."

From the answer of the district judge it appeared that the defendants in the admiralty suit had demurred to the libel and had moved to dismiss the same "because the fourth section of the act of Congress approved June 19, 1886, is alleged to be unconstitutional;" and that the court had overruled the demurrer, and dismissed the motion, and ordered the cause to proceed.

This fourth section is as follows: "Section 4. That section 4289, of the Revised Statutes, be amended so as to read as follows: 'Section 4289. The provisions of the seven preceding sections and of section eighteen of an act entitled "An act to re-

move certain burdens on the American merchant marine, and to encourage the American foreign carrying trade, and other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges and lighters.'" 24 Stat. 80, 81.

Mr. Samuel B. Adams for the petitioner.

I. Our main contention is that the words here used are none of them limited, as an act of Congress must be in order to be valid; even if the validity of such legislation is not confined to the commerce clause of the Constitution, and may be supported by the clause touching the admiralty and maritime jurisdiction of the courts of the United States, and even although this act can be regarded as simply a regulation of the vessel itself.

We must bear in mind that we are not attacking an act of a State, where the legislature has all the powers except those prohibited, but an act of Congress, concerning whose powers it has been properly said in Potter's "Dwarris on Statutes and Constitutions," pages 367 and 368: "When those powers are questioned, the only duty of the court is to see whether the grant of specific powers is broad enough to embrace the act." To the same effect are the decisions of this court in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *Trade Mark Cases*, 100 U. S. 82, 93; and in *Gilman* v. *Philadelphia*, 3 Wall. 713, 725, 726.

In the *Trade Mark Cases* this court, in holding that the words "any person or firm" were too broad, uses this clear and emphatic language, "When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find, on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited it is in excess of the power of Congress."

Argument for Petitioner.

We fully recognize the familiar principle that a law may be constitutional in part and bad in part. Under this principle the words "sea-going vessels," covering maritime commerce, may be saved because they are capable of separation from the rest of the clause; but the courts never change, limit or restrict (which would change) the natural and obvious meaning of words so as to amend the statute into harmony with the fundamental law. If the words used are susceptible of two constructions, one that will harmonize the law with the Constitution, and another which will bring it into hostility, the courts will adopt the former construction. But when the words used are clear and unambiguous, and these words evince an unconstitutional exercise of power, the courts cannot save the law. One of the main purposes of the law as it previously stood, (although the excepting clause was more comprehensive than the necessities of this purpose demanded,) was to save internal commerce from the operation of the limited liability sections. And it seems to us clear that one of the main purposes of the amendment was to include this internal commerce. Whether this was a controlling purpose or not, every word used which can in any wise be applied to the case at bar, is broad enough to necessarily cover every form of internal commerce carried on by water, and every form of craft, no matter how insignificant its draft, and no matter how exclusively local and humble its business. This court will be asked, in order to save the law, that it limit this act of 1886 to the constitutional limitations of Congress, when the purpose of the law is that it be unlimited and unrestricted. If this act be good, there is no limit to the power of Congress in the regulation of commerce. The Constitution does not restrict it to water, and therefore it can pass an act limiting ever so radically the liability of a common carrier anywhere, no matter how thoroughly internal and local its business. *The Genesee Chief*, 12 How. 443, 452; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 8, 9.

If this law can find support in the admiralty and maritime jurisdiction clause, then, we repeat, it is still, in all of the terms that are germane, entirely too broad, unless this court

can hold that this jurisdiction covers all localities where it chances to be a "little damp," and, under the guise of jurisdiction, the United States courts can be given the power to practically destroy the rights of citizens who are compelled to patronize ships.

Wherever it is applicable, the law was radical enough before. Under the decision of the majority of this court, in *Providence and New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, in the case of loss happening by fire, the owner of the ship is not liable at all unless the neglect was shown to be his own personal neglect, and even then, his liability is confined to his interest in the ship.

On account of the importance of the proposition that "it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear" in order to save an act from the objection of unconstitutionality, we refer, in addition to the *Trade Mark Cases*, to the following: *United States* v. *Reese*, 92 U. S. 214, 220, 221; *Virginia Coupon Cases*, 114 U. S. 269, 304, 305 (a civil case which applies the principle recognized in the *Trade Mark Cases*, and in *United States* v. *Reese*); *Spraigue* v. *Thompson*, 118 U. S. 90; *Allen* v. *Louisiana*, 103 U. S. 80; *State Tonnage Tax Cases*, 12 Wall. 204, 217, 219; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; and *Lord* v. *Steamship Co.*, 102 U. S. 541.

II. The commerce clause of the Constitution, upon which we submit this legislation must be based, and to which the decisions of this court and of other United States courts refer such legislation for its sanction, not only does not authorize, but it prohibits any act by Congress broad enough to control or regulate internal commerce or traffic between citizens of the same State. This clause was intended to place such commerce beyond its control. See *Veazie* v. *Moore*, 14 How. 573 *et seq.*; *Gibbons* v. *Ogden*, 9 Wheat. 194, 195; *Moore* v. *American Transportation Company*, 24 How. 37 and 39; *The Daniel Ball*, 10 Wall. 564, 565; *The Trade Mark Cases*, 100 U. S. 95 *et seq.*; *Lord* v. *Steamship Company*, 102 U. S. 543; *Sands* v. *River Company*, 123 U. S. 295.

III. Authority for this legislation cannot be found in the clause providing that the judicial power shall extend to all cases of admiralty and maritime jurisdiction.

We admit that the jurisdiction of the admiralty court is not circumscribed by the commerce clause; that the courts may try cases involving vessels engaged in purely internal commerce, and questions appertaining to such commerce. But this affects only the *forum*. It does not concern the substantial rights of the parties.

A shipowner entitled to the benefits of the limited liability act of 1851, need not go into a court of admiralty at all; his rights are secured independently of the tribunal. He may assert them by a plea to a common law action in any court. See *The Scotland*, 105 U. S. 33, 34. Generally it will be found that the remedies of the District Court are more full and complete, but the shipowner is not confined to this court, and his rights are the same in any tribunal. If this be so, the correlative rights of his patrons ought to be the same, no matter in what tribunal they may be adjudicated.

Other cases, in addition to those heretofore cited, hold that the validity of this legislation depends upon the commerce clause. See *The War Eagle*, 6 Bissell, 366; *Lord* v. *Steamship Co.*, 4 Sawyer, 292; *The Mamie*, 5 Fed. Rep. 821; the same case is affirmed in 8 Fed. Rep. 367; *American Transportation Co.* v. *Moore*, 5 Michigan, 392 and 393; *Headrich* v. *Virginia &c. Railway Co.*, 48 Georgia, 549.

If, then, this legislation can be separated from its effect upon the traffic rights and obligations of the parties concerned, and can be confined to a mere regulation of vessels, we insist that no authoritative decision can be found which will sustain the validity of a law of Congress requiring a vessel engaged solely in internal commerce, and entirely disconnected from interstate or foreign commerce, to be licensed, or which otherwise regulates such a vessel. Many can be cited against this power of Congress, and some of the decisions hereinbefore discussed are in point on this branch of the case.

In *Gibbons* v. *Ogden*, in discussing the power of Congress

over navigation, under the commerce clause, the court limits it to that which is in some manner connected with foreign nations or among the several States, or with the Indian tribes. 9 Wheat. 1, 197.

In the *Passenger Cases*, 7 How. 283, 400, Mr. Justice McLean says: "If Congress should impose a tonnage duty on vessels which ply between ports within the same State, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void."

In *Sinot* v. *Davenport*, 22 How. 227, this court held that an act of the State of Alabama, which was broad enough to regulate vessels under the control of Congress was void, but in treating of the control of Congress over ships, the court, on page 243, recognizes the limitation contended for by us, a limitation which the act of 1886 not merely ignores, but proposes to repudiate.

The case of *The Bright Star*, 1 Wool. C. C., is very much in point. The question decided by Mr. Justice Miller was whether she was compelled to take out a license, and was under the inspection laws. This question had been determined in the negative by the judge of the District Court, and his decision was, on appeal, affirmed in a full and exhaustive opinion. Mr. Justice Miller holds that it is not in the power of Congress to regulate vessels confined to internal commerce, and "that Congress has in its legislation steadily kept this in view." See also *The Oconte*, 5 Bissell, 463; *The War Eagle*, 6 Bissell, 366. In *The Thomas Swan*, 6 Ben. 42, Judge Blatchford approves and follows Judge Miller's opinion, holding that *The Thomas Swan* does not fall within the principle of *The Daniel Ball*, *ubi supra*. See also *Gilman* v. *Philadelphia*, 3 Wall. 557, cited by Judge Miller in 1 Woolworth.

IV. In conclusion, we submit what we have heretofore incidentally noticed, that if this legislation can be based upon the jurisdictional clause of the Constitution, and if the commerce clause can be expunged, yet still it cannot be constitutional. In any event, in order for the courts of the United States to have jurisdiction, the waters must be navigable

waters of the United States which, as already noticed, are waters which by themselves, or by their connection with other waters, form a continuous channel for commerce among the States, or with foreign countries. See *The Genesee Chief*, 12 How. 443; *Allen* v. *Newberry*, 21 How. 244; *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *Steamer St. Lawrence*, 1 Black, 522; *Butler* v. *Boston Steamship Co.*, 130 U. S. 527.

Mr. R. G. Erwin opposing.

Mr. Justice Bradley delivered the opinion of the court.

This is a petition for a writ of prohibition to be directed to the judge of the District Court of the United States for the Eastern Division of the Southern District of Georgia, to prohibit said judge from taking further cognizance of a certain suit instituted before him in said court. The suit sought to be prohibited is a libel filed in said court by John Lawton, owner of the steamboat Katie, seeking a decree for limited liability for the loss and damage which accrued by fire on said steamboat in the Savannah River on the 12th of October, 1887. A copy of this libel is annexed to the petition for prohibition. It sets out the facts that Lawton was the owner of the steamboat; that she was an enrolled vessel of the United States, duly licensed to carry on the coasting trade; that she had for twenty years been engaged in transporting merchandise, goods and commodities from and to the ports of Savannah and Augusta, and intermediate ports and landings on the Savannah River, in the States of South Carolina and Georgia; and that some of the said goods were transported by said steamboat as one of the through lines of carriers, issuing through bills of lading to and from ports and places within the State of Georgia, and ports and places in other States of the United States and foreign countries.

The libel then states that on the 8th of October, 1887, the said steamboat left Augusta for Savannah and intermediate places on the river in South Carolina and Georgia, intending to load a cargo chiefly of cotton, being properly manned and

equipped; that on the 10th day of October, having then on board 643 bales of cotton, she left a landing called Burton's Ferry, and shortly after struck on a sand bar, and notwithstanding the utmost endeavor of master and crew, remained there till October 12th, when fire was discovered in the cotton near the bow of the steamboat; that the fire spread with great rapidity, and some of the bales of cotton had to be thrown overboard to prevent it from spreading more; and after three hours of the hardest and most hazardous work, the master and crew succeeded in clearing the bow of the burning cotton, and saving the vessel and a portion of the cargo, but leaving the vessel much burned and damaged. A list of the cargo was attached to the libel, which proceeded to state that nearly all of the consignees of the cotton lost or damaged had brought suits against the libellant; and a list of the suits was also appended to the libel, in two of which attachments were issued; that the amount thus sued for, and the loss and damage happening by means of said fire, exceeded the value of the said steamboat and her freight on said voyage; that the fire was not caused by any negligence of the libellant, or of the master and crew, and that by reason of the exception against fire contained in the bills of lading and receipts, the libellant was not liable for the loss and damage caused by said fire; that libellant did not know the cause of the fire nor had any information as to the cause, not being on board of the vessel at the time; and that all the loss, destruction and damage to the bales of cotton happened by means of said fire, and that said fire was not caused by the design or neglect of the libellant, but was solely caused without his privity or knowledge.

After an allegation that the Savannah River is a navigable stream lying partly in Georgia and partly in South Carolina, and that the contracts for carrying the cotton were maritime contracts, the libellant proceeded to contest his entire liability, under the act of Congress in that behalf, and under the bills of lading; and if he should be held liable he claimed the benefit of limited liability. The libel concluded with the usual prayer for appraisement of the vessel, and a monition to all persons claiming damages to appear, etc.

The petitioners, who now come to this court for a prohibition, allege that they are cotton factors and commission merchants, residing and doing business in Savannah, and that they were the consignees of the cotton constituting the cargo of the said steamboat, except a few bales. They state that the said steamboat was engaged exclusively in inland navigation of the Savannah River, between the ports of Augusta and Savannah and intermediate ports and places on either side of the said river, and that she was not a sea-going vessel. They further state the various suits brought by them, respectively, namely, ten different suits, mostly in the city court of Savannah, for different sums, amounting in the aggregate to nearly sixteen thousand dollars; and that in all of said suits, except two attachments, personal service was made on the said Lawton, the owner of said steamboat. The petitioners further state the filing of the said libel, and that an appraisement of the steamboat and freight had been made, amounting to a total of $3496.75, for which sum the said Lawton had entered into the usual stipulation. They further state that afterwards, on the 9th of April, 1888, they objected to the said District Court taking further cognizance of the case, and moved to dismiss the libel on the grounds that the said court was without jurisdiction in the premises, and that the 4th section of the act of Congress, approved June 19, 1886, on which the said action was based, is unconstitutional and void; but that the said court overruled the said motion and determined to proceed with the further cognizance of the cause. The petitioners further state, and rely upon the fact, that the greater part of the cotton was shipped by Georgia consignors, from divers points or places within the State of Georgia, to be transported to Savannah, Georgia, to consignees who were residents and citizens of Savannah, and was the subject of a commerce strictly internal.

The act of Congress to which the petitioners refer as being the act on which the libel of Lawton was based, and which they contend is unconstitutional and void, is the 4th section of the act approved June 19, 1886, entitled, "An act to abolish certain fees for official services to American vessels, and to

amend the laws relating to shipping, commissioners, seamen and owners of vessels, and for other purposes." 24 Stat. 79. By the section referred to, section 4289 of the Revised Statutes was amended so as to read as follows: "Sec. 4289. The provisions of the seven preceding sections, and of section eighteen of an act entitled 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes, approved June 26, 1884, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges and lighters.'" The purport and effect of this section is apparent from an inspection of the original limited liability act passed March 3, 1851. 9 Stat. 635, c. 43. After exempting ship owners from liability for loss or damage occasioned by fire on board of their ships, happening without any design or neglect of theirs; and for loss of precious metals or jewelry of which they or the masters of their vessels have not received written notice; and declaring that their liability shall in no case exceed the value of their interest in the ship and freight then pending, for any loss, damage or injury to any property caused by the master, crew or other persons, without their privity or knowledge; and making other provisions for carrying out the design of the act; a final clause is added in the words following, to wit: "This act shall not apply to the owner or owners of any canal-boat, barge or lighter, or to any vessel of any description whatever, used in rivers or inland navigation." The whole act was afterwards carried into the Revised Statutes and constitutes sections 4281 to 4289, inclusive, the section respecting precious metals and jewelry having been somewhat enlarged by an amendment made in 1871. The final words of the act above quoted constitute section 4289 of the Revised Statutes, which, as before stated, was amended by the act of 1886 so as to make the limited liability act apply to all kinds of vessels, not only sea-going vessels, but those used on lakes or rivers, or in inland navigation, including canal-boats, barges and lighters. The 4th section of the act of 1886 also regulates

the application of the 18th section of an act approved June 26, 1884, 23 Stat. 57, which reduced the individual liability of a ship owner for all debts and liabilities of the ship to the proportion of his individual share in the vessel. This section requires no further notice. The only question in the case therefore is, whether the 4th section of the act of 1886, extending the limited liability act to vessels used on a river in inland navigation, like the steamboat in question, is, as contended, unconstitutional and void.

It is unnecessary to inquire whether the section is valid as to all the kinds of vessels named in it; if it is valid as to the kind to which the steamboat Katie belongs it is sufficient for the purposes of this case. And this question we think can be solved by a reference to two or three propositions which have become the settled law of this country.

It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. The subject has frequently been up for consideration by this court for many years past, and but one view has been expressed. It was gone over so fully, however, in the late case of *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, that we cannot do better than to quote a single passage from the opinion of the court in that case. We there said:

"The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law. *Norwich Co.* v. *Wright*, 13 Wall. 104, 127; *The Lottawana*, 21 Wall. 558, 577; *The Scotland*, 105 U. S. 24, 29, 31; *Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*,

109 U. S. 578, 593. In *The Lottawana* we said: 'It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.' p. 577. Again, on page 575, speaking of the maritime jurisdiction referred to in the Constitution, and the system of law to be administered thereby, it was said: 'The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' In *The Scotland* this language was used: 'But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases.' p. 31. Again, in the same case, p. 29, we said: 'But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawana* . . . the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law.' And in *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.* it was said: 'The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule, administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law.' p. 593.

"These quotations are believed to express the general, if

not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black, 522, 526, 527; *The Lottawana*, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted.

"It being clear, then, that the law of limited liability of ship owners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily co-extensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends — on the sea and the great inland lakes, and the navigable waters connecting therewith. *Waring* v. *Clarke*, 5 How. 441; *The Genesee Chief* v. *Fitzhugh*, 12 How. 443; *Jackson* v. *The Magnolia*, 20 How. 296; *Commercial Transportation Co.* v. *Fitzhugh*, 1 Black, 574." pp. 555–557.

It being established, therefore, that the law of limited liability is part of the maritime law of the United States, it only remains to determine whether that law may be applied to navigable rivers above tide water, such as the Savannah River, and to vessels engaged in commerce on such a river, like the

steamboat Katie, in this case. Of this there can be no doubt whatever. The question has been settled by a long course of decisions, some of which are here referred to. *Genesee Chief* v. *Fitzhugh*, 12 How. 443; *Fretz* v. *Bull*, 12 How. 466; *Jackson* v. *The Magnolia*, 20 How. 296; *Nelson* v. *Leland*, 22 How. 48; *The Propeller Commerce*, 1 Black, 574; *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *Ex parte Boyer*, 109 U. S. 629. In all of these cases it was held that the admiralty and maritime jurisdiction granted to the Federal government by the Constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers. In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single State. Mr. Justice Clifford, in the opinion of the court in *The Belfast*, said: "Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. (1) Contracts, claims or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. (2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the Admiralty Courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter depends entirely upon locality. . . . Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States, as the sea itself. Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants." pp. 637, 640.

Jackson v. *The Magnolia* was a case of collision between two steamboats on the Alabama River, far above tide water, and within the jurisdiction of a county. A libel in admiralty was filed by one of the parties in the District Court of the United States, which was dismissed on the ground of want of jurisdiction. This court reversed the decree and maintained the admiralty jurisdiction. Mr. Justice Grier, delivering the opinion of the court, said: "Before the adoption of the present constitution, each State, in the exercise of its sovereign power, had its own Court of Admiralty, having jurisdiction over the harbors, creeks, inlets and public navigable waters, connected with the sea. This jurisdiction was exercised not only over rivers, creeks and inlets, which were boundaries to or passed through other States, but also where they were wholly within the State. Such a distinction was unknown, nor (as it appears from the decision of this court in the case of *Waring* v. *Clarke*, 5 How. 441) had these courts been driven from the exercise of jurisdiction over torts committed on navigable water within the body of a county, by the jealousy of the common law courts. When, therefore, the exercise of admiralty and maritime jurisdiction over its public rivers, ports and havens was surrendered by each State to the government of the United States, without an exception as to subjects or places, this court cannot interpolate one into the constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent." p. 298.

In *Nelson* v. *Leland*, the same conclusion was reached, and the same doctrine maintained. That was also a case of collision between a steamer and a flat-boat on the Yazoo River, which lies wholly in the State of Mississippi, and empties into the Mississippi River.

In the case of *The Propeller Commerce* it was held that in order to bring a case of collision within the admiralty jurisdiction of the Federal courts it is not necessary to show that either of the vessels was engaged in foreign commerce, or commerce between the States. Maritime torts, such as collision, etc., committed on navigable waters above tide water, are cognizable in the admiralty, without reference to the voyage or destination of either vessel.

Opinion of the Court.

In the case of *The Belfast*, it was decided that on an ordinary contract of affreightment the shipper has a maritime lien which may be enforced in the admiralty courts, although the contract be for transportation between ports and places within the same State, provided it be upon navigable waters, to which the general jurisdiction of the admiralty extends.

In the case of *The Montello*, it was held that Fox River, in Wisconsin, is a navigable river, although made such by artificial improvements, and that a steamer navigating the same is subject to the laws of the United States with regard to the enrolment and license of vessels, and is liable to be proceeded against in admiralty for non-compliance with such laws.

In *Ex parte Boyer*, it was decided that the admiralty jurisdiction extends to a steam canal-boat, in case of collision between her and another canal-boat, whilst the two boats were navigating the Illinois and Lake Michigan Canal, although the libellant's boat was bound from one place in Illinois to another place in the same State. Mr. Justice Blatchford, delivering the opinion of the court in that case, said: "Within the principles laid down by this court in the cases of *The Daniel Ball*, 10 Wall. 557, and *The Montello*, 20 Wall. 430, which extended the salutary views of admiralty jurisdiction applied in *The Genesee Chief*, 12 How. 443, *The Hine* v. *Trevor*, 4 Wall. 555, and *The Eagle*, 8 Wall. 15, we have no doubt of the jurisdiction of the District Court in this case. Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the District Court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State. *The Belfast*, 7 Wall. 624." pp. 631, 632.

In view of the principles laid down in the cases now referred to, we have no hesitation in saying that the Savannah River, from its mouth to the highest point to which it is navigable, is subject to the maritime law and the admiralty jurisdiction of the United States. It follows, as a matter of course, that Congress, having already, by the act of 1851, amended the maritime law by giving the benefit of a limited liability to the owners of all vessels navigating the oceans and great lakes of the country, and withholding it from the owners of vessels used in rivers or inland navigation, was perfectly competent to abolish that restriction in 1886, and extend the same beneficent rule to the latter class also. We think that the act in question, namely, the 4th section of the act of 1886, is a constitutional and valid law.

As regards the steamboat itself, and the business in which she was engaged, in view of the authorities already referred to, there is not the slightest doubt that the case was one within the admiralty jurisdiction. The steamboat was a regularly enrolled and licensed vessel of the United States, and was engaged in maritime commerce on the Savannah River, one of the navigable rivers of the United States.

The writ of prohibition is denied.

PULLMAN'S PALACE CAR COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 1. Argued October 18, 1888. — Reargument ordered November 5, 1888. — Reargued March 6, 1890. — Decided May 25, 1891.

A statute of a State, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, under which a corporation of another State, engaged in running railroad cars into, through and out of the State, and having at all times a large number of such cars within the State, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of

Statement of the Case.

railroad over which its cars are run within the State bears to the whole number of miles in this and other States over which its cars are run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States.

This was an action brought by the State of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the Court of Common Pleas of the county of Dauphin in the State of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that State, for the years 1870 to 1880 inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other States over which its cars were run.

All these taxes were levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations, incorporated by the laws of Pennsylvania or of any other State, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870–1874 were levied under the statute of May 1, 1868, c. 69, § 5, which applied to corporations of every kind, with certain exceptions not material to this case, and fixed the amount of the tax at half a mill on every one per cent of dividend. Penn. Laws, 1868, p. 109. The taxes for 1875–1877 were levied under the statute of April 24, 1874, c. 31, § 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every one per cent of dividend. Penn. Laws, 1874, p. 70. The taxes for 1878–1880 were levied under the statutes of March 20, 1877, c. 5, § 3, and of June 7, 1879, c. 122, § 4, applicable to all corporations, except building associations, banks, savings institutions and foreign insurance companies, and fixing the tax at half a mill on each one per cent of dividend of six per cent or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. Penn. Laws, 1877, p. 8; 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the court, which found the following facts: "The defendant is a corporation of the State of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining-room cars to the various railroad companies with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about one hundred coaches and cars engaged in this way in the State during that time. The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."

Upon these facts the court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used;" and therefore gave judgment for the State.

That judgment was affirmed, upon writ of error, by the Supreme Court of the State, for reasons stated in its opinion as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth, as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for

which the corporation was created. The fact that they also are operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160.

Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Mr. Edward S. Isham and *Mr. William Barry* argued for the plaintiff in error at the argument on the 18th of October, 1888.

Mr. Edward S. Isham and *Mr. John S. Runnells* argued for the plaintiff in error at the argument on the 6th of March, 1890.

Mr. W. S. Kirkpatrick, Attorney General of the State of Pennsylvania, argued for the defendant in error at both arguments. *Mr. John F. Sanderson*, Deputy Attorney General of that State, was with him on the brief in both cases.

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

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate

commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness* v. *Russell*, 118 U. S. 663, 679; *Walworth* v. *Harris*, 129 U. S. 355; Story on Conflict of Laws, § 550; Wharton on Conflict of Laws, §§ 297–311. As observed by Mr. Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no situs, except that of the domicil of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. *Lane County* v. *Oregon*, 7 Wall. 71, 77; *Railroad Co.*

v. *Pennsylvania*, 15 Wall. 300, 323, 324, 328; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 29; *Tappan* v. *Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517, 524; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. *Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, 211; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, 549; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 124; *Leloup* v. *Mobile*, 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicil of their owners. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.

Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different

States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." *Railroad Co.* v. *Maryland*, 21 Wall. 456, 470.

In *Gloucester Ferry Co.* v. *Pennsylvania*, on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation

of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." 114 U. S. 211.

Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. *Moran* v. *New Orleans*, 112 U. S. 69, 74; *Pickard* v. *Pullman's Southern Car Co.*, 117 U. S. 34, 43; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Leloup* v. *Mobile*, 127 U. S. 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 209; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, 552. This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and

jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the Constitution and laws of the United States.

Opinion of the Court.

In the *State Railroad Tax Cases*, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local situs at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its situs, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green* v. *Van Buskirk*, 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county

by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. *Delaware Railroad Tax*, 18 Wall. 206; *Erie Railroad* v. *Pennsylvania*, 21 Wall. 492." 92 U. S. 608, 611.

So in *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the State, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

Even more in point is the case of *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the state of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the situs of all its personal property; but for

purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124.

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its situs at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Field and Mr. Justice Harlan, dissenting.

Dissenting Opinion: Bradley, Field, Harlan, JJ.

I dissent from the judgment of the court in this case, and will state briefly my reasons. I concede that all property, personal as well as real, within a State, and belonging there, may be taxed by the State. Of that there can be no doubt. But where property does not belong in the State another question arises. It is the question of the jurisdiction of the State over the property. It is stated in the opinion of the court as a fundamental proposition on which the opinion really turns that all personal as well as real property within a State is subject to the laws thereof. I conceive that that proposition is not maintainable as a general and absolute proposition. Amongst independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the States of this government are not independent nations. There is such a thing as a Constitution of the United States, and there is such a thing as a government of the United States, and there are many things, and many persons, and many articles of property that a State cannot lay the weight of its finger upon, because it would be contrary to the Constitution of the United States. Certainly, property merely carried through a State cannot be taxed by the State. Such a tax would be a duty — which a State cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New York, for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the State, but it is not subject to taxation there. It is not generally subject to the laws of the State as other property is. So if a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to the police regulations of that State whilst within it, but it would be repugnant to the Constitution of the United States to tax it. We have decided this very question in the *Case of State Freight Tax*, 15 Wall. 232. The point was directly raised and decided that property on its passage through a State in the course of interstate commerce cannot be taxed by the State, because taxation is incidentally regula-

tion, and a State cannot regulate interstate commerce. The same doctrine was recognized in *Coe* v. *Errol*, 116 U. S. 517.

And surely a State cannot interfere with the officers of the United States, in the performance of their duties, whether acting under the Judicial, Military, Postal, or Revenue Departments. They are entirely free from state control. So a citizen of the United States, or any other person, in the performance of any duty, or in the exercise of any privilege, under the Constitution or laws of the United States, is absolutely free from state control in relation to such matters. So that the general proposition, that all persons and personal property within a State is subject to the laws of the State, unless materially modified, cannot be true.

But, when personal property is permanently located within a State for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the State and to the burdens of taxation; as well when owned by persons residing out of the State, as when owned by persons residing in the State. It has then acquired a *situs* in the State where it is found.

A man residing in New York may own a store, a factory or a mine in Alabama, stocked with goods, utensils or materials for sale or use in that State. There is no question that the situs of personal property so situated is in the State where it is found, and that it may be subjected to double taxation, — in the State of the owner's residence, as a part of the general mass of his estate; and in the State of its situs. Although this is a consequence which often bears hardly on the owner, yet it is too firmly sanctioned by the law to be disturbed, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several States. The rule would undoubtedly be more just if it made the property taxable, like lands and real estate, only in the place where it is permanently situated.

Personal as well as real property may have a situs of its own, independent of the owner's residence, even when employed in interstate or foreign commerce. An office or warehouse, connected with a steamship line, or with a continental railway, may be provided with furniture and all the apparatus

and appliances usual in such establishments. Such property would be subject to the *lex rei sitæ* and to local taxation, though solely devoted to the purposes of the business of those lines. But the ships that traverse the sea, and the cars that traverse the land, in those lines, being the vehicles of commerce, interstate or foreign, and intended for its movement from one State or country to another, and having no fixed or permanent situs or home, except at the residence of the owner, cannot, without an invasion of the powers and duties of the Federal government, be subjected to the burdens of taxation in the places where they only go or come in the transaction of their business, except where they belong. *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596; *Morgan* v. *Parham*, 16 Wall. 471; *Transportation Co.* v. *Wheeling*, 99 U. S. 273. To contend that there is any difference between cars or trains of cars and ocean steamships in this regard, is to lose sight of the essential qualities of things. This is a matter that does not depend upon the affirmative action of Congress. The regulation of ships and vessels, by act of Congress, does not make them the instruments of commerce. They would be equally so if no such affirmative regulations existed. For the States to interfere with them in either case would be to interfere with, and to assume the exercise of, that power which, by the Constitution, has been surrendered by the States to the government of the United States, namely, the power to regulate commerce.

Reference is made in the opinion of the court to the case of *Railroad Company* v. *Maryland*, 21 Wall. 456, in which it was said that commerce on land between the different States is strikingly dissimilar in many respects from commerce on water; but that was said in reference to the highways of transportation in the two cases, and the difference of control which the State has in one case from that which it can possibly have in the other. A railroad is laid on the soil of the State, by virtue of authority granted by the State, and is constantly subject to the police jurisdiction of the State; whilst the sea and navigable rivers are highways created by nature, and are not subject to state control. The question in that case

related to the power of the State over its own corporation, in reference to its rate of fares and the remuneration it was required to pay to the State for its franchises — an entirely different question from that which arises in the present case.

Reference is also made to expressions used in the opinion in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, which, standing alone, would seem to concede the right of a State to tax foreign corporations engaged in foreign or interstate commerce, if such property is within the jurisdiction of the State. But the whole scope of that opinion is to show that neither the vehicles of commerce coming within the State, nor the capital of such corporations, is taxable there; but only the property having a situs there, as the wharf used for landing passengers and freight. The entire series of decisions to that effect are cited and relied on.

Of course I do not mean to say that either railroad cars or ships are to be free from taxation, but I do say that they are not taxable by those States in which they are only transiently present in the transaction of their commercial operations. A British ship coming to the harbor of New York from Liverpool ever so regularly and spending half its time (when not on the ocean) in that harbor, cannot be taxed by the State of New York (harbor, pilotage and quarantine dues not being taxes). So New York ships plying regularly to the port of New Orleans, so that one of the line may be always lying at the latter port, cannot be taxed by the State of Louisiana. (See cases above cited.) No more can a train of cars belonging in Pennsylvania, and running regularly from Philadelphia to New York, or to Chicago, be taxed by the State of New York, in the one case, or by Illinois, in the other. If it may lawfully be taxed by these States, it may lawfully be taxed by all the intermediate States, New Jersey, Ohio and Indiana. And then we should have back again all the confusion and competition and state jealousies which existed before the adoption of the Constitution, and for putting an end to which the Constitution was adopted.

In the opinion of the court it is suggested that if all the States should adopt as equitable a rule of proportioning the

taxes on the Pullman Company as that adopted by Pennsylvania, a just system of taxation of the whole capital stock of the company would be the result. Yes, if — ! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all, — as to the relative power of the State and general governments over the regulation of internal commerce, — as to the right of the States to resume those powers which have been vested in the government of the United States.

It seems to me that the real question in the present case is as to the situs of the cars in question. They are used in interstate commerce, between Pennsylvania, New York and the Western States. Their legal situs no more depends on the States or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad Company to carry passengers on the Ohio or Mississippi. If such steamboats belonged to a company located at Chicago, and were changed from time to time as their condition as to repairs and the convenience of the owners might render necessary, is it possible that the States in which they were running and landing in the exercise of interstate commerce could subject them to taxation? No one, I think, would contend this. It seems to me that the cars in question belonging to the Pullman Car Company are in precisely the same category.

The case of the *Western Union Telegraph Company* v. *Massachusetts*, 125 U. S. 530, is entirely different from the present. In that case there was no question as to the situs of the property taxed. It was situated within the State, consisting of poles, and wires, and offices and a general plant for telegraphic purposes. The property belonged in Massachusetts, and was consequently taxable there. There was a phase of that case which led some of the justices of the court to doubt as to the proper decision to be made. The difficulty was this: The tax was, in terms, made upon a certain proportional part of the capital stock of the company. That proportion was regulated by the number of miles of telegraph within

the State, as compared with the number of miles of telegraph belonging to the company in the whole country. It was objected that the property of the company situated in Massachusetts had no necessary relation to the said proportion of the capital stock; because the aggregate value of the stock might depend on property, franchises and amount of business outside of Massachusetts, largely out of proportion to the miles of telegraph lines outside of that State. But the difficulty of getting at the true value of the property within the State, and of adopting any other rule for ascertaining it, as well as the failure of the company to show that the rule adopted produced any unfair results, finally induced an acquiescence in the decision; but expressly on the ground that though the tax was nominally on the shares of the capital stock of the company, it was in effect a tax upon the property owned and used by it in Massachusetts, the proportional length of the lines in that State to their entire length throughout the whole country being merely used as the basis for ascertaining the value of that property. The same difficulty as to the method of determining value exists in the present case which existed in that; but the more serious difficulty lies in the question of the situs of the property, and the consequent jurisdiction of the State of Pennsylvania to tax it. It is not fast property; it does not consist of real estate; it does not attach itself to the land; it is movable and engaged in interstate commerce, not in Pennsylvania alone, but in that and other States, and the question is, how can such property be taxed by a State to which it does not belong? It is indirectly, but virtually, taxing the passengers, many of them carried from New York to Chicago, or from Chicago to New York, and most of them from one State to another. It is clearly a burden on interstate commerce. The opinion of the court is based on the idea that the cars are taxable in Pennsylvania because a certain number continuously abide there. But how can they be said to abide there when they only stop at Philadelphia and other stations to take on passengers? And it is all the same whether they cross the State entirely, or run into or out of other States with a terminus in Pennsylvania.

Counsel for Appellant.

It is only by virtue of such of its property as is situated in Pennsylvania that the Pullman Company can be taxed there. Its capital stock, as such, is certainly not taxable there. In the case of *Western Union Telegraph Co.* v. *Massachusetts*, the tax was sustained only on the ground that it was a tax on the property *in* Massachusetts. The idea that the capital stock, as such, could be taxed was repudiated. The State can no more tax the capital stock of a foreign corporation than it can tax the capital of a foreign person. Pennsylvania cannot tax a citizen and resident of New York, either for the whole or any portion of his general property or capital. It can only tax such property of that citizen as may be located and have a situs in Pennsylvania. *State Tax on Foreign Bonds*, 15 Wall. 300. And it is exactly the same with a foreign corporation. Its capital, as such, is not taxable. *Gloucester Ferry Co.* v. *Pennsylvania*, *qua supra*. To hold otherwise would lead to the most oppressive and unjust proceedings. It would lead to a course of spoliation and reprisals that would endanger the harmony of the Union.

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

PULLMAN'S PALACE CAR COMPANY *v.* HAYWARD.

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

No. 38. Argued March 6, 7, 1890. — Decided May 25, 1891.

Following *Pullman's Palace Car Co.* v. *Pennsylvania*, *ante*, 18, the judgment of the court below is affirmed.

The case is stated in the opinion.

Mr. Edward S. Isham and *Mr. John S. Runnells* for appellant.

Mr. L. B. Kellogg, Attorney General of the State of Kansas, and *Mr. W. W. Scott* for appellees.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity by Pullman's Palace Car Company, a corporation of Illinois, and having its place of business and its principal office in that State, against the treasurers of fifty counties in Kansas, the Atchison, Topeka and Santa Fé Railroad Company and eight other railroad companies, corporations of Kansas, the Missouri Pacific Railway Company, a corporation of Missouri, and the Union Pacific Railroad Company, "a corporation organized and existing under the laws of the United States of America, and a resident and citizen of the State of Nebraska," to restrain the collection of a tax assessed in 1885 and 1886, by the board of railroad assessors of the State of Kansas, to the said railroad corporations, upon sleeping cars, dining-room cars and parlor cars, owned by the plaintiff, and by it let to those corporations, and employed exclusively in interstate commerce; and apportioned among the counties aforesaid according to the mileage of the railroads in each county; and levied accordingly in those counties; and all which taxes were assessed, apportioned and levied under the Compiled Laws of Kansas of 1885, c. 107, art. 7, the material parts of which are copied in the margin.[1]

---

[1] Sec. 26. For the purpose of assessment of railroads and the property of railroad corporations, the lieutenant governor, secretary of state, treasurer of state, auditor of state and the attorney general are hereby constituted a board of railroad assessors, who are empowered, and it is hereby made their duty, to assess all the property of the railroads and railroad corporations in the State of Kansas: Provided, that nothing in this section contained shall be construed to include within the meaning of this act any real estate in this State owned by any railroad company, and not used, or necessary to be used, for the convenient and daily operation of its railroads; nor shall it include any buildings that are not in whole or in part situated upon the right of way of such road, but such real estate shall be assessed and taxed in the same manner as other real estate, anything in this section to the contrary notwithstanding.

Sec. 27. The board, when properly organized as herein provided for, shall proceed to ascertain all the personal property of any railroad com-

A demurrer filed by the county treasurers was sustained, and a final decree entered dismissing the bill; and the plaintiff appealed to this court.

---

pany owning, operating or constructing a railway in this State, which, for the purposes of assessment and taxation, shall be held to include the track, road-bed, right of way, water and fuel stations, buildings and land on which they are situated, adjacent to or connected with the right of way, machinery, rolling stock, telegraph lines and all instruments connected therewith, material on hand and supplies provided for operating and carrying on the business of such railroad, together with the moneys, credits and all other property of such railway company, used or held for the purpose of operating its railroad by such railway company, and appraise and assess such property at its actual value in money.

SEC. 28. Every person, company or corporation, owning, operating or constructing a railroad in this State, shall return sworn lists or schedules of the taxable property of such railroad company or corporation, as hereinafter provided. Such property shall be listed with reference to the amount, kind and value on the first day of March in the year in which it is listed.

SEC. 29. On or before the twentieth day of March, eighteen hundred and seventy-six, and at the same time in each year thereafter, the person, company or corporation owning, operating or constructing any railroad in this State shall, by its president, secretary or principal accounting officer, return to the auditor of state a sworn statement or schedule, as follows: . . . Fifth, a full list of the rolling stock belonging to or operated by the person, company or corporation, which shall distinctly set forth the number, class and value of all locomotives, passenger cars, sleeping cars, dining cars, express cars, mail cars, baggage cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars and all other kind of cars owned or leased by said company.

SEC. 30. All sleeping, dining, palace or other cars that make regular trips over any railroad in this State, and not owned by such railroad company, shall be listed by the manager, agent or conductor, or other person having such cars in charge, and return made to state auditor, the same as is required of railroad companies, and the company operating or using said cars shall be held liable for the taxes due thereon.

SEC. 33. The board of railroad assessors, after having valued and assessed all the railroad property in this State in accordance with the provisions of this article, shall through the auditor of state make returns to the county clerks of each and every county in which any portion of said railroad property, as designated in this article, may be located.

SEC. 34. Such returns shall be as follows: First, number of miles of main track located in each city and township in the county, and the total length in the county. Second, the average valuation per mile; such valuation to include the following items: Track, right of way, franchises, road-bed, rolling stock, telegraph lines and instruments connected therewith,

This case presents substantially the same questions as the case of *Pullman's Palace Car Co.* v. *Pennsylvania*, argued with it, and just decided, and is disposed of by the opinion in that case. *Decree affirmed.*

MR. JUSTICE FIELD, MR. JUSTICE BRADLEY and MR. JUSTICE HARLAN dissented, for the reasons stated in their opinion in *Pullman's Palace Car Co.* v. *Pennsylvania*, *ante*, 18.

MR. JUSTICE BROWN, not having been a member of the court when this case was argued, took no part in its decision.

---

material on hand, supplies and tools, and all other property used in the operation of the road, and all moneys and credits. Third, the average valuation per mile of all personal property enumerated in this article. Fourth, the amount of valuation that shall be placed to the credit of each city and township in the county, as heretofore provided for in this section.

SEC. 38. The county clerk, as soon as he shall have received the return of railroad assessment from the auditor of state, shall certify to the proper officer of the different school districts, cities and townships in his county, in or through which any portion of the railroad is located, the amount of such assessment that is to be placed upon the tax roll for the benefit of such school district, city or township, and he shall at the proper time place such assessment on the proper tax roll of his county, subject to the same per cent of levy for different purposes as in other property.

MASSACHUSETTS *v.* WESTERN UNION TELEGRAPH COMPANY.—WESTERN UNION TELEGRAPH COMPANY *v.* MASSACHUSETTS.[1]

MASSACHUSETTS *v.* WESTERN UNION TELEGRAPH COMPANY.—WESTERN UNION TELEGRAPH COMPANY *v.* MASSACHUSETTS.

MASSACHUSETTS *v.* WESTERN UNION TELEGRAPH COMPANY.—WESTERN UNION TELEGRAPH COMPANY *v.* MASSACHUSETTS.

APPEALS AND CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 1126, 1127, 1128, 1129, 1130, 1131. Argued January 19, 20, 1891.—Decided May 25, 1891.

The tax imposed by the statutes of Massachusetts, (Pub. Stat. c. 13, §§ 40, 42,) requiring every telegraph company owning a line of telegraph within the State to pay to the state treasurer "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," deducting such portion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State, is in effect a tax upon the corporation on account of property owned and used by it within the State; and is constitutional and valid, as applied to a telegraph company incorporated by another State, and which has accepted the rights conferred by Congress by § 5263 of the Revised Statutes.

Western Union Telegraph Company v. *Attorney General of Massachusetts*, 125 U. S. 530, followed.

Upon rendering a decree for the plaintiff in a suit in equity, brought in behalf of a State, pursuant to statute, to recover the amount of a tax with interest thereon at the rate of twelve per cent until paid, a sum tendered and paid into court by the defendant, for part of that amount and interest thereon at that rate, is to be applied to the payment of both principal and interest of the sum so admitted to be due; interest at the rate of twelve per cent is to be computed on the rest of the principal until the date of the decree; and from that date interest on the lawful amount of the decree is to be computed at the ordinary rate of six per cent only, notwithstanding the final disposition of the case is delayed by appeal.

---

[1] In these cases the docket title was in all the cases "The Attorney General of the State of Massachusetts" instead of "Massachusetts."

THE case is stated in the opinion.

Mr. Henry C. Bliss for the State of Massachusetts.

Mr. Wager Swayne for the Western Union Telegraph Company.

MR. JUSTICE GRAY delivered the opinion of the court.

Three informations in equity were filed in the Supreme Judicial Court of Massachusetts, by the Attorney General at the relation of the Treasurer of the Commonwealth, against the Western Union Telegraph Company, a corporation of New York, under section 54 of chapter 13 of the Public Statutes of Massachusetts, for the recovery of taxes assessed to the defendant for the years 1886, 1887 and 1888, under other sections of that chapter, and interest thereon at the rate of twelve per cent a year until paid, and for an injunction against the defendant's prosecution of its business until payment of such taxes and interest.

Upon petition of the defendant, alleging that the matter in dispute arose under the Constitution and laws of the United States, the three suits were removed into the Circuit Court of the United States, and were there heard upon pleadings and proofs, and decrees entered for the amounts of the taxes and interest, deducting certain sums paid into court by the defendant, and granting no injunction. Both parties appealed to this court.

These cases cannot be distinguished from that of *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, in which the validity of similar taxes was upheld in a judgment delivered by Mr. Justice Miller with no dissent.

The Constitution of Massachusetts, c. 1, sec. 1, art. 4, empowers the legislature "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within, the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchan-

dise and commodities whatsoever, brought into, produced, manufactured or being within the same." 1 Charters and Constitutions, 961.

The statutes, pursuant to which the taxes now in question were assessed and sought to be collected, are set forth in full in 125 U. S. 531–534, note, and the material provisions of them are as follows:

By § 38, "every corporation chartered by the Commonwealth, or organized under the general laws, for purposes of business or profit, having a capital stock divided into shares," (with certain exceptions,) shall annually return to the tax commissioner a list of its shareholders and the number of shares belonging to each, the amount of its capital stock, the par value and market value of the shares, and the locality and value of its real estate and machinery subject to local taxation within the Commonwealth; and "railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the Commonwealth."

By § 39, the tax commissioner shall ascertain the true market value of the shares of each corporation, and estimate the fair cash valuation of all the shares constituting its capital stock, and shall also ascertain and determine the value of its real estate and machinery subject to local taxation, and of the deductions provided in § 40.

By § 40, "every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year," "upon the aggregate valuation of all the cities and towns for the preceding year." "From the valuation, ascertained and determined as aforesaid, there shall be deducted: First, in case of railroad and telegraph companies, whose lines extend beyond the limits of the Commonwealth, such portion of the whole

valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the Commonwealth, and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the Commonwealth. Second, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery subject to local taxation, wherever situated."

By § 42, "every corporation or association, chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this Commonwealth," shall make all the returns prescribed by § 38, excepting the list of shareholders, "and shall annually pay a tax, at the same rate, and to be ascertained and determined in the same manner," as is provided in § 40.

By § 54, taxes assessed under §§ 40 and 42 may be recovered, "with interest at the rate of twelve per cent per annum until the same are paid," by action in the name of the treasurer of the Commonwealth, or by information at his relation in the Supreme Judicial Court.

It is to be remembered that by the tax act of Massachusetts "taxes on real estate shall be assessed in the city or town where the estate lies;" and "all machinery employed in any branch of manufacture shall be assessed where such machinery is situated or employed; and, in assessing the stockholders for their shares in any manufacturing corporation, there shall first be deducted from the value thereof the value of the machinery and real estate belonging to such corporation." Mass. Pub. Stat. c. 11, §§ 13, 20. Although it is hard to see how telegraph companies can have "machinery employed in any branch of manufacture," unless they make their own machines, yet railroad corporations, which are coupled with telegraph companies in the statutes in question, as well as other corporations embraced in those statutes, might have such machinery.

The effect of the statutes complained of is that every tele-

graph company, whether incorporated in Massachusetts or elsewhere, owning a line of telegraph in Massachusetts, is to be there taxed on such proportion only of the whole value of its capital stock as the length of its line in Massachusetts bears to the whole length of its lines everywhere; and to prevent its whole tax in Massachusetts from amounting in any event to more than that, it is provided that from the taxable portion of the value of its capital, so ascertained, shall be deducted the value of any property owned by it in Massachusetts which is subject to local taxation in the cities and towns.

Such being the real state of the case, all the objections to the validity of the tax are met and disposed of by the decision of this court in the former case between these parties.

In that case, as in this, the telegraph company, while admitting that its property in the State of Massachusetts was subject to taxation there like other property, argued that, by reason of its having accepted the provisions of the act of July 24, 1866, c. 230, (14 Stat. 221,) now embodied in §§ 5263–5269 of the Revised Statutes, and having thus acquired under § 5263 "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 railway or post roads of the United States, and over, under or across the navigable streams or waters of the United States," it had a franchise from the United States which could not be taxed by any State through which its lines ran; that the statutes of Massachusetts, in terms and effect, undertook to tax the franchises of the corporation; and that the tax was unconstitutional and void, both as interfering with interstate commerce and as being unequal and excessive.

But this court, in answering that argument and upholding the validity of the tax, affirmed the following propositions:

The franchise of the company to be a corporation, and to carry on the business of telegraphing, was derived not from the act of Congress, but from the laws of the State of New York, under which it was organized; and it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter

the territory of any other State, and to erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to the support of the government of that State. 125 U. S. 547, 548.

By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. 125 U. S. 547.

The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution. 125 U. S. 552.

The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State; and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not an unfair or unjust one; and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. 125 U. S. 553.

That decision was cited by the court in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 426, 427, and in *Leloup* v. *Mobile*, 127 U. S. 640, 649.

The other questions argued relate to the amounts for which decrees were entered. In each case, the defendant admitted its liability to pay a tax on the actual value, as stated in its

answer, of its real and personal property within the State; and tendered, and paid into court, the sum so admitted to be due, with interest thereon at the rate of twelve per cent, and costs. The sum so paid in was greater than like interest then accrued on the whole amount of the tax assessed and sued for. The court added, to the whole amount of the tax sued for, interest thereon at the rate of twelve per cent to the date of the payment into court; deducted from the sum so ascertained the sum paid in; and entered a decree for the balance, with interest thereon at the rate of twelve per cent from the date of such payment to the date of the decree, and, thereafter until payment, interest on the amount of the decree at the rate of six per cent, that being the usual rate of interest in Massachusetts.

It is contended, in behalf of the State, that the tender and payment into court could have no effect in a suit of this kind to recover a tax, with interest thereon at the rate of twelve per cent in the nature of a penalty; and that such interest must be computed at that rate, not merely to the time of the decree below, but to the time of payment, or at least to the time of the final decree in this court. On the other hand, it is contended that the sum paid into court should have been applied, according to the evident intention of the defendant in paying it, to both principal and interest of the sum admitted to be due; instead of applying it to interest on the whole claim sued for, and thereby increasing the sum on which to compute subsequent interest.

We are of opinion that in this matter the defendant is right. In equity, at least, the defendant was entitled to the benefit of the sum paid into court. That sum should have been applied to that part of the principal sum and interest which was admitted to be due. After the payment into court, as before, interest at the rate of twelve per cent was to be computed on the rest of the principal. The penal rate of twelve per cent interest ran only until the amount to be recovered was judicially ascertained. Since the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of six per cent only.

Statement of the Case.

In each of the three cases, therefore, the entry must be

Decree reversed, and case remanded with directions to enter a decree for the amount of the tax found due by the Circuit Court, but applying the sum paid into court, and computing interest on the balance, in accordance with the opinion of this court; the costs in this court to be equally divided between the parties.

Mr. Justice Field and Mr. Justice Harlan dissented.

CRUTCHER *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 828. Argued March 19, 1890. — Decided May 25, 1891.

The act of the legislature of Kentucky of March 2, 1860, "to regulate agencies of foreign express companies," which provides that the agent of an express company not incorporated by the laws of that State shall not carry on business there without first obtaining a license from the State, and that, preliminary thereto, he shall satisfy the auditor of the State that the company he represents is possessed of an actual capital of at least $150,000, and that if he engages in such business without license he shall be subject to fine, is a regulation of interstate commerce so far as applied to a corporation of another State engaged in that business, and is, to that extent, repugnant to the Constitution of the United States.

The case was stated by the court as follows:

This case arose at Frankfort, Franklin County, Kentucky, upon an indictment found against Crutcher, the plaintiff in error, in the Franklin Circuit Court, for acting and doing business as agent for the United States Express Company, alleged to be an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier, by express, of goods, merchandise, money and other things of value in and through the county and State aforesaid, without having any license so to do either for himself or the

company. Crutcher, being arrested and brought before the court, tendered a special plea setting forth the facts with regard to his employment and the business of the company, and amongst other things, that said company was a joint stock company, incorporated and having its principal office in the city of New York, in the State of New York, which plea was refused. He then pleaded "not guilty," and the parties filed an agreed statement of facts; and, by consent, the matters of law and fact were submitted to the court, and the defendant was found guilty and sentenced to pay a fine of one hundred dollars and the costs of prosecution.

The agreed statement of facts was as follows:

"It is agreed that defendant is agent of the United States Express Co., a foreign corporation doing the business ordinarily done by express companies in this country, of carrying goods and freight for hire not only from points in this State to other points in this State, but also of carrying same character of freight from points within this State to points without State, in divers parts of the United States, and *vice versa*.

"And defendant, agent at Frankfort, Ky., never obtained any license to do such business, nor did said express company obtain any license from the State of Kentucky. The proportion of business done by the said company within and without this State for the month of November, 1888, is shown by a statement herewith filed, marked 'X,' and the same proportion of business within and without this State, approximately, is generally done by said company."

The detailed statement referred to, marked X, showed the total amount of business done by the company at the Frankfort office in November, 1888, to have been $226.71, of which $56.14, or not quite one-fourth of the whole, was business done entirely within the State; and the remainder, $170.57, was done partly within and partly without the State; that is, the goods were brought into the State from places without the State, or were carried from the State to places without the State. Of course the latter, or largest portion, was comprised within the category of interstate commerce.

The defendant upon these facts moved for a new trial,

which was refused, and also for an arrest of judgment, which was denied, and a bill of exceptions was taken. The case was then appealed to the Court of Appeals of Kentucky, and the judgment was affirmed. The ground taken for reversing the judgment was that the statute of Kentucky, under which the indictment was found was repugnant to the power given to Congress by the Constitution of the United States to regulate commerce among the several States.

The law in question was passed March 2, 1860, and is as follows:

"An Act to Regulate Agencies of Foreign Express Companies:

"SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That it shall not be lawful, after the first day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth, to set up, establish or carry on the business of transportation in this State, without first obtaining a license from the auditor of public accounts to carry on such business.

"SEC. 2. Before the auditor shall issue such license to any agent of any company incorporated by any State of the United States, there shall be filed in his office a copy of the charter of such company, and a statement, made under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock, and how the same has been paid, and of what the assets of the company consist, the amount of losses due and unpaid by said company, if any, and all other claims against said company or other indebtedness, due or not due; and such statement shall show that the company is possessed of an actual capital of at least $150,000, either in cash or in safe investments, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it shall be his duty to issue license to such agent or agents as the company may direct to carry on the business of expressing or transportation in this State.

"SEC. 3. Before the auditor shall issue license to any agent of any express or transportation company incorporated by any

foreign government, or any association or partnership acting under the laws of any foreign government, there shall be filed in his office a statement setting forth the act of incorporation or charter, or the articles of association, or by-laws under which they act, and setting forth the matters required by the preceding section of this act to be specified; and satisfactory evidence shall be furnished to the auditor that such company has on deposit in the United States, or has invested in the stock of some one or more of the United States, or in some safe dividend-paying stocks in the United States, the sum of $150,000, which statement shall be verified by the oath of the president of such company, its general agent in the United States, or the agent applying for such license; and upon the due filing of such statement, and furnishing the auditor with satisfactory evidence of such deposit or investment, it shall be his duty to issue such license to the agent or agents applying for the same.

"SEC. 4. The statements required by the foregoing sections shall be renewed in each year thereafter, either in the months of January or July; and the auditor, on being satisfied that the capital or deposit, consisting of cash securities or investments as provided in this act, remain secure to the amount of $150,000, shall renew such license."

"SEC. 8. Any person who shall set up, establish, carry on, or transact any business for any transportation or express company not incorporated by the law of this State, without having obtained license as by this act required, or who shall in any way violate the provisions of this act, shall be fined for every such offence not less than one hundred nor more than five hundred dollars, at the discretion of a jury, to be recovered as like fines in other cases. . . ."

"SEC. 9. For any license issued by the auditor under this act, and for each renewal thereof, he shall be allowed the sum of $2.50, to be paid by the agent or company taking out such license." Myer's Supplement, 228.

An amendatory act passed in 1866 raised the license fee to five dollars, and imposed a fee of five dollars for filing copy of charter, and ten dollars for filing an original or annual

statement. The Supreme Court of Kentucky in disposing of the case gave the following opinion (*Crutcher* v. *Commonwealth*, 40 Amer. & Eng. Railroad Cases, 29; 12 So. West. Reporter, 141):

"It seems to us that the case of *Woodward* against *The Commonwealth*,[1] in which the statute appears in full, (decided by this court at its last term,) determines the question now presented. Counsel for the appellant now claims that the statute of this State is invalid, as its effect is to regulate commerce among the several States. The agent of the express company was fined for not paying to the auditor a fee of five dollars, or rather, for failing to take out a license required by the act regulating the agencies of foreign express companies, passed in March, 1860, and amended by the act of 1866. That the company of which the appellant is agent is a corporation created by the laws of New York, doing business in this State as a carrier of goods, wares and merchandise is conceded, and that it transports goods, etc., out of the State into other States, and all other species of property usually incident to such transportation is admitted. It appears that at least fifty per cent of the business done by this agent consists in the carrying of goods from the place of his agency, Frankfort, to other States. That the carrying and transportation of goods from one State to another is a branch of interstate commerce is not controverted, but it is claimed that there is nothing in the legislation imposing on those who desire to act as the agents of this foreign corporation the burden of paying to the auditor the fee of five dollars for recording his agency, or rather, for issuing him his license to act as such.

"The statute was enacted for the benefit of the citizens of the State, under which the auditor is required to have satisfactory evidence of the ability and solvency of the corporation to do that which it has undertaken to do by virtue of its act of incorporation. Those who intrust to its custody the transportation of their property are entitled to some security that its undertaking will be performed, and we find no law of

[1] 35 Amer. and Eng. Railroad Cases, 498; 9 Ky. Law Reporter, 670.

Congress, or any constitutional provision, that would deny to the State the right to impose such a burden upon those who undertake the discharge of such responsible duties. There is no discrimination made between corporations doing a like business; and the State, although the appellant's company is a foreign corporation, has the right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the State alone."

The court then referred to the cases of *Smith* v. *Alabama*, 124 U. S. 465, and to *Nashville, Chattanooga &c. Railway* v. *Alabama*, 128 U. S. 96, and concluded as follows: "We cannot perceive how any burden has been placed by the State upon interstate commerce by the provisions of the enactment in question, and must therefore affirm the judgment."

Mr. W. W. Macfarland for plaintiff in error.

Mr. James P. Helm (with whom was *Mr. Helm Bruce* on the brief) for defendant in error.

We suppose that the only serious question involved in the case is, as to whether or not the State has the power to require that all express companies doing business in the State shall have an actual capital of at least $150,000. If it has the power to require this, then it unquestionably has the power to require that some officer of the State shall be satisfied of this fact by the filing with him of a sworn statement showing the fact. And we suppose there cannot be any question but that the State has the right to require that the charter of the corporation doing business in the State, and which charter fixes the rights and powers, and often the liabilities of the corporation, shall be made known to the people of this State who are to deal with the corporation, by filing a copy of said charter in a public office of the State.

And we understand it to be the settled law that where a State has the right to make such requirements as these, which call for the performance of duties on the part of state officers, it has also the right to require that reasonable fees shall be paid by the party seeking the performance of these offices, to

cover the cost and to make reasonable compensation to the officers for the services performed. *Smith* v. *Alabama*, 124 U. S. 465.

We do not deny that the business done by an express company is commerce; nor that it is well settled that a State cannot charge a person engaged in interstate commerce, for the privilege of coming into the State to do business. And we are familiar with the line of decisions holding that a State cannot tax the occupation of carrying on interstate commerce. But the great majority of these cases have been cases involving the validity of tax laws, which are manifestly not laws enacted by virtue of the State's police power.

As these cases involving the validity of tax laws could not, in the very nature of the case, involve a consideration of the nature and extent of the State's police power, except by way of illustration, therefore, inasmuch as the present case is not a tax case, but is a case in which the statute of the State is claimed to be valid under the police power of the State, we derive more assistance and instruction from the decisions of this court, wherein the court has been called upon to decide expressly whether or not a given act by a State was a valid exercise of the police power of the State, than we do from the class of cases above referred to, where the question of police power was not and could not have been directly involved.

For these reasons it seems to us that the cases of *Brown* v. *Maryland*, 12 Wheat. 419; *The Passenger Cases*, 7 How. 283; *State Freight Tax Case*, 15 Wall. 232; *Railroad Gross Receipts Case*, 15 Wall. 284; *Florida Telegraph Case*, 96 U. S. 1; *Texas Telegraph Case*, 105 U. S. 460; *Massachusetts Telegraph Case*, 125 U. S. 530; *Leloup* v. *Mobile*, 127 U. S. 640; *Moran* v. *New Orleans*, 112 U. S. 69; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; and *Picard* v. *Pullman Car Co.*, 117 U. S. 34, are not nearly so instructive in the consideration of the case at bar as are such cases as *New York* v. *Miln*, 8 Pet. 119; *The License Cases*, 5 How. 504; *Smith* v. *Alabama*, 124 U. S. 465; *Patterson* v. *Kentucky*, 97 U. S. 501; *Railroad Company* v. *Alabama*, 128 U. S. 96, and others of that character.

However courts and text-writers may differ as to the definition of the police power of a State, all agree that such a power does exist in the States; that it was never surrendered to Congress; that it is absolutely essential to the existence of the States, and that it embraces the power to make all needful regulations for the protection of its citizens. It is well that no constitution, or fixed law of any kind, ever attempted to define this power. It must always be sufficient to meet the exigencies of the times, whatever they may be, or the government must perish; and, as no human mind can comprehend the future, none can tell what may or may not become necessary to meet its requirements. The habits and customs of people, their pursuits, their manner of conducting business, their means of communication, differ so widely at different times that it is absolutely necessary that governments should have a power to meet the exigencies of the times. And in a government like ours, unique in history, where in every State there are two coexistent governments, where every citizen is at one and the same time the citizen of two governments, the subject of two sovereignties; and when we recollect that there is no isolated fact, no solitary event, but that every occurrence is connected directly or collaterally with countless others, we say, that when these considerations are remembered, one cannot fail to recognize the danger of testing by *extreme cases* these independent powers of distinct sovereignties governing the same people at the same time; the danger in insisting that the exercise in a certain manner of a given power by one of these governments is necessarily invalid, because it may be seen that by the application of the same power in an extreme case of kindred nature some object might be effected which is more legitimately the subject of a different power in the other government.

Whatever may be the correct statement of the view now taken by this court on the question of the *exclusiveness* of the power of Congress over interstate commerce, it is, of course, remembered that at one time the majority of this court held that the grant of power to Congress to regulate interstate commerce did not exclude the power of the States in that

respect so long as Congress remained silent; but that, whenever Congress spoke, its dictum was supreme. This was the principle on which the majority of the court decided the case of *Pierce* v. *New Hampshire*, one of the "*License Cases*," 5 Howard, 564, where this view was most ably presented by Chief Justice Taney, (pp. 578, etc.,) and where he and Justice Catron (p. 603) seem to us to show very clearly that such was the view of Chief Justice Marshall, as shown by his opinions in *Gibbons* v. *Ogden*, 9 Wheat. 1, and *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 241.

The court seems now, however, to have settled that Congress alone has the power to "regulate commerce" in matters susceptible of general and uniform regulation; but that in matters which are affected by local considerations the power to "regulate commerce" is possessed by both the Federal and State legislatures, subject, however, to the modification that whenever Congress speaks on the subject that is the supreme law. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 492, 493. In other words, in matters best susceptible of local regulation the States have concurrent power with Congress to pass laws that are directly and unquestionably regulations of interstate commerce, and are intended as such; but, as to matters susceptible of uniform regulation, the power to pass laws, the object of which is to regulate interstate commerce, is in Congress alone.

But even upon a matter which might be said to be susceptible of uniform regulation, under a law the object of which was to "regulate commerce," the State may make a *police* regulation which may affect it, but which, if it appears to be a *bona fide* police regulation and not a mere covered attempt to regulate commerce, will still be valid unless a conflict arises between this regulation and some regulation by Congress under its commercial power. *New York* v. *Miln*, 11 Pet. 102; *Smith* v. *Alabama*, 124 U. S. 465; *Railroad Co.* v. *Alabama*, 128 U. S. 96.

No question can be made of the good faith of the State in requiring evidence that the foreign corporation doing business

within it is solvent. Such a law is not in conflict with any law of Congress. Does Congress by its silence mean to say that it will not make any regulation on this subject, and that no State shall have the right to do so; but that any corporation may go into a foreign State where it is not known, either as to the extent of its legal or financial powers or as to the agents that are accredited by it, and may then refuse to make known any of these facts, and insist on carrying on this important business and making important contracts with, and securing valuable property of the citizens of this State, though it (the corporation) may be utterly irresponsible? Surely this cannot have been the intention of Congress. On the contrary, it must be presumed that Congress understood the propriety and necessity of such regulations, and left them to the States to make, according to the character of the corporations concerned and the necessities of the case.

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

We regret that we are unable to concur with the learned Court of Appeals of Kentucky in its views on this subject. The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the state law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it

would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the state legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation, — an English or a French transportation company, for example, — from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co.*

v. *Tinker*, 94 U. S. 238. The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several States; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 205, 211; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 342; *McCall* v. *California*, 136 U. S. 104, 110; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114, 118. As was said by Mr. Justice Lamar, in the case last cited, "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."

We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Leloup* v. *Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *McCall* v. *California*, 136, U. S. 104; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114.

As a summation of the whole matter it was aptly said by the present Chief Justice in *Lyng* v. *Michigan*, 135 U. S. 161, 166: "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 rea-

son that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection.

The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State. The cases to this effect are numerous. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall. 566; *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727; *Phila. Fire Association* v. *New York*, 119 U. S. 110.

But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order

of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy* v. *Hardin*, 135 U. S. 100, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the States shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the State. Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: "The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State." Chief Justice Taney in the *License Cases*, 5 How. 504, 576, took the same distinction when he said: "It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence and pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter

and traffic, like any other commodity in which a right of property exists."

But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the Federal government, is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the legislature may deem opposed to the public welfare. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Stone* v. *Mississippi*, 101 U. S. 814; *Foster* v. *Kansas*, 112 U. S. 201; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Kidd* v. *Pearson*, 128 U. S. 1; *Kimmish* v. *Ball*, 129 U. S. 217.

It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.

In view of the foregoing considerations, and of the well-considered distinctions that have been drawn between those things that are and those things that are not, within the scope of commercial regulation and protection, it is not difficult to arrive at a satisfactory conclusion on the question now presented to us. The character of police regulation, claimed for the requirements of the statute in question, is certainly not

such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void. And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the Court of Appeals must be reversed.

The judgment is reversed accordingly, and the cause remanded for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE GRAY dissented.

MR. JUSTICE BROWN, not having been a member of the court when the case was argued, took no part in the decision.

VOIGHT *v.* WRIGHT.

ERROR TO THE CORPORATION COURT OF THE CITY OF NORFOLK, STATE OF VIRGINIA.

No. 92. Submitted November 26, 1890. — Decided May 25, 1891.

The act of Virginia of March, 1867, (now repealed,) as set forth in c. 86, Code of Virginia, ed. 1873, providing that all flour brought into the State and offered for sale therein shall be reviewed, and have the Virginia inspection marked thereon, and imposing a penalty for offering such flour for sale without such review or inspection, is repugnant to the commerce clause of the Constitution, because it is a discriminating law, requiring the inspection of flour brought from other States when it is not required for flour manufactured in Virginia.

Opinion of the Court.

THE case is stated in the opinion.

Mr. James E. Heath for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought in 1886, in a justice's court in Norfolk, State of Virginia, by Wright, the defendant in error, against the plaintiffs in error, R. P. Voight & Co., to recover fifteen dollars for fees alleged to be due to the plaintiff for inspection of flour. Judgment was rendered for the plaintiff, and an appeal taken to the corporation court of the city of Norfolk, by which court the judgment was affirmed. This being the highest court of the State in which a decision in the suit could be had, a writ of error to the same was sued out of this court, and the case is now here for review. The question in the case has respect to the constitutionality of a law of Virginia, passed in March, 1867, by which it was declared as follows: (1) "All flour brought into this State and offered for sale therein shall be reviewed, and have the Virginia inspection marked thereon. (2) Any person or persons selling or offering to sell such flour without review or inspection, as provided in the preceding section, shall be fined the sum of five dollars, for the use of the commonwealth, for each barrel so sold or offered for sale." This law was afterwards carried into the code of 1873, constituting the 10th and 11th sections of the 86th chapter of the said code. The laws also gave to the inspector a fee of two cents for each barrel inspected. There was no law requiring flour manufactured in Virginia to be thus inspected as a condition of selling it or offering it for sale, though by the inspection laws of the State manufacturers of flour might have their flour so inspected if they saw fit. It may be proper to add that the law in question is now repealed.

On the trial of the cause in the corporation court the following bill of exceptions was taken, to wit:

"Be it remembered that upon the trial of this cause the following statement of facts was agreed between the parties, to

wit: The following facts are agreed in this case to have the same force and effect as if regularly proved by competent proof:

"1st. The plaintiff is the flour inspector for the city of Norfolk, duly appointed and commissioned as such.

"2d. The defendants are wholesale grocery merchants, conducting their business in the said city.

"3d. The bill of the plaintiff is for the inspection of 750 barrels of flour belonging to the defendants, and brought into this State from other States, and inspected as required by c. 86 of the Code of Virginia, edition 1873, before the same was sold or offered for sale and after the same was placed in his storehouse.

"And, to maintain the issue on his part, the plaintiff and appellee, E. T. Wright, read the sections of the statute of Virginia, as set forth in chapter 86 of the Code of Virginia, edition of 1873, in relation to the inspection of flour brought into this State from sister States, and, to maintain the issue on their part, the appellants and defendants, R. P. Voight & Co., read from the commercial clause of the Constitution of the United States, viz., art. I, sec. 8th, clauses 1 and 3, and section 10, clause 2, and art. IV, sec. 2, clause 1, and insisted that the said sections of said statute of the State of Virginia are in conflict with the Constitution of the United States; but the court overruled the objections of the said R. P. Voight & Co., and expressed the opinion that the said statute of the State of Virginia is not in conflict with the said Constitution of the United States, and thereupon gave judgment for the plaintiff; and to this opinion of the court the defendants, R. P. Voight & Co., by their counsel, except and pray that this bill of exceptions may be signed, sealed and made a part of the record in this case, which is accordingly done.

"D. Tucker Brooke, [seal]

"*Judge Corporation Court of the City of Norfolk, Va.*"

The State of Virginia has had a system of inspection laws from an early period; but they have related to articles produced in the State, and the main purpose of the inspection

required has been to prepare the articles for exportation, in order to preserve the credit of the exports of the State in foreign markets, as well as to certify their genuineness and purity for the benefit of purchasers generally. Chief Justice Marshall, in *Gibbons* v. *Ogden*, said: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be, for domestic use." 9 Wheat. 1, 203. In *Brown* v. *Maryland*, speaking of the time when inspection is made, he adds: "Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land." 12 Wheat. 419, 438. Whilst, from the remark of the Chief Justice, last cited, it would appear that inspection may be made of imported goods, as well as goods intended for export, yet in what manner and to what extent this may be done without coming in collision with the power of Congress to regulate foreign and interstate commerce, may be somewhat difficult to explain with precision. In the case of *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59, it was held by this court that a law of the State of New York imposing a tax upon alien passengers coming by vessel from a foreign country to the port of New York is a regulation of foreign commerce, and void, although it was declared by the title of the law to be "An act to raise money for the execution of the inspection laws of the State;" which laws authorized passengers to be inspected in order to determine who were criminals, paupers, lunatics, orphans or infirm persons, without means or capacity to support themselves, and subject to become a public charge. It is true that the law was held not to be an inspection law, because such laws have reference only to personal property, and not to persons. But the question is still open as to the mode and extent in which state inspection laws can constitutionally be applied to personal property imported from abroad, or from another State, — whether such laws can go beyond the identi-

fication and regulation of such things as are directly injurious to the health and lives of the people, and therefore not entitled to the protection of the commercial power of the government, as explained and distinguished in the case of *Crutcher* v. *Kentucky*, *ante*, 47, just decided.

It may be remarked, in passing, that in the notes to *Turner* v. *Maryland*, 107 U. S. 38, 51, 53, prepared by Mr. Justice Blatchford, in which is contained a list of the various inspection laws of the different States, we do not observe any laws which seem to provide for the inspection of articles other than those which are the produce of the State, and this generally with a view to preparing them for exportation.

But, be this as it may, and without attempting to lay down any specific proposition on this somewhat difficult subject, there is enough in the case before us to decide it on satisfactory grounds, without passing upon the general right of the State to inspect imports or the qualifications to which it must necessarily be subject. The law in question is a discriminating law, and requires the inspection of flour brought from other States, when such inspection is not required for flour manufactured in Virginia. This aspect of the case brings it directly within the principle of *Brimmer* v. *Rebman*, 138 U. S. 78, decided at the present term. The law in question in that case was another statute of Virginia, making it unlawful to sell within the State any fresh meats (beef, veal or mutton) slaughtered one hundred miles, or over, from the place at which it might be offered for sale, until it had been inspected and approved as provided in the act. Mr. Justice Harlan, delivering the opinion of the court in that case, said: "Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here

in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Welton* v. *Missouri*, 91 U. S. 275, 281; *Railroad Co.* v. *Husen*, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313, 319." The case of *Brimmer* v. *Rebman* was decided in accordance with these views, the law in question being held to be unconstitutional and void. The decision in that case is so directly apposite to the present that it is unnecessary to prolong the discussion, or to cite further authorities.

The judgment of the Corporation Court of the city of Norfolk is

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in the decision.

STEIN v. BIENVILLE WATER SUPPLY COMPANY.

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

No. 344. Argued April 28, 1891. — Decided May 11, 1891.

A contract with a municipal corporation, whereby the corporation grants to the contractor the sole privilege of supplying the municipality with water from a designated source for a term of years, is not impaired, within the meaning of the contract clause of the Constitution, by a grant to another party of a privilege to supply it with water from a different source.

Where a contract with a municipal corporation is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.

THE case is stated in the opinion.

Mr. W. Hallett Phillips for appellant.

Mr. T. A. Hamilton and *Mr. D. P. Bestor* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case presents a question under the clause of the Constitution of the United States relating to the impairment by state legislation of the obligation of contracts.

The appellant, who was the plaintiff below, claims that his testator, Albert Stein, deceased, acquired by valid contract, and to the exclusion of all other persons or corporations, the right and privilege, by a system of public works, of supplying the city of Mobile and its inhabitants with water, *from whatever stream or river drawn*, until that city should redeem and purchase the water works constructed and maintained by the testator in accordance with the terms of that contract; and that the obligation of such contract was impaired by an act of the legislature of Alabama, approved February 19th, 1883, incorporating the Bienville Water Supply Company. Acts of Alabama, 1882–1883, p. 451. In this view the court below did not concur, and it dismissed the bill for want of equity. 34 Fed. Rep. 145.

It will conduce to a clear understanding of the issue between the present parties if we trace the history of the question of water supply for Mobile and its inhabitants, as disclosed in the legislation of Alabama and in the action upon that subject, from time to time, of the constituted authorities of that city. This being done, the inquiry as to whether the above act of 1883 impairs the obligation of the contract that Stein had with the city can be solved without extended discussion.

The first act, to which attention is called, is that of December 20th, 1820, incorporating the Mobile Aqueduct Company.

Its preamble recites that "it has been represented, that it would be of singular advantage to the health and commerce of the city of Mobile, to be supplied with water from some of the running streams in its vicinity, which would be attended with too much labor and expense to be effected by laying a tax for the purpose," and that "it has also been represented, that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called Three-Mile Creek, otherwise Bayou Chatogue, for the use of the citizens and other persons residing in the city of Mobile." In consequence of these representations certain named persons were constituted a corporation under the name of the Mobile Aqueduct Company, with authority to establish a channel or canal large enough to contain and conduct water in quantities sufficient to supply the citizens and other persons of Mobile. The act provided "that the said corporation and their successors shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years: *Provided*, The said corporation or their successors shall, before the expiration of three years, from the passage of this act, cause to be conducted the water *from the said bayou or creek*, to the said city of Mobile, in the manner hereinbefore proposed: And *provided also*, That, after the expiration of the said term of years, the said water works shall become the property of the said city, and shall be for the free use of the inhabitants thereof forever." Acts of Alabama, 1820, p. 72.

Nothing was done by this company. And by an act approved December 24th, 1824, amendatory of the charter of Mobile, the act of December 20th, 1820, was declared null and void, and all the rights, privileges and powers granted by it were transferred to and vested in that city for the use and benefit of its inhabitants. Acts of Alabama, 1824–5, p. 68.

On the 1st day of December, 1836, an agreement in writing was entered into between the city and one Hitchcock, whereby the former granted and leased to the latter, his executors and assigns, for the term of twenty years, the entire use, control, management, rents, profits and issues of the "Mobile City

Water Works," embracing the ground at Spring Hill, where the fountain was situated, and the ground along which the pipes passed from the fountain to the city, together with the use of all the wooden and iron pipes and logs then laid down, as well as all the advantages that had accrued to the city, from, by or under the above act of December 20th, 1820, and from all ordinances or resolutions passed by the city relating to said city water works. This grant and lease were in consideration of the payment of certain sums, evidenced by Hitchcock's notes, and upon the condition, among others, that he would, within the space of two years from the date of the agreement, "put the said water works in good and sufficient repair, so as to continue during the time hereby granted, and will also keep up the said water works in good order as they now are until they shall be so placed in good order and repair, so that the city of Mobile, and the inhabitants thereof, may at all times be supplied with such quantity of good, wholesome water as may be procured through the said aqueduct;" such water works to be surrendered to the city in good order and condition at the end of the twenty years, Hitchcock being paid what they actually cost him during that time. That contract also provided that Hitchcock, his executors, administrators and assigns, should, during said term of twenty years, "have the exclusive privilege of furnishing to the citizens and inhabitants of the city of Mobile water *from the aqueduct or water works aforesaid*, at a sum or price which shall at no time be less" than certain named rates; and that he shall have "the power and authority to make such alterations and repairs upon the said works, and to erect such new work, and in such manner as he may deem necessary and proper, and may at will change the fountain head, and conduct the water *from any part of Three-Mile Creek*, so called, so that the same be good and wholesome, he, the said Henry Hitchcock, procuring, at his cost, the necessary ground for the reservoir or reservoirs and that through which the pipes shall pass. And the said mayor and aldermen of Mobile, for themselves and their successors in office, hereby further covenant and agree, that they will, at the expiration of the said term of twenty years, (he, the

said Henry Hitchcock, his executors, administrators or assigns, delivering up the said 'water works' and appurtenances in good order and repair,) pay to him or them the actual cost and expenses which he or they shall have laid out and expended, and which may be put upon the said works by him or them, or any of them, either by reason of repairs, or addition to the present works, as by alterations or improvements made upon the said water works during the said term of twenty years above stated."

Subsequently, December 25th, 1837, an act was passed incorporating the Mobile Aqueduct Company, to continue until December 1st, 1856, and until it should have been "purchased out" by the city of Mobile, during which period it was to have and enjoy all the rights, privileges and immunities conferred by the above act of December 20th, 1820, except as modified by the act of December 25th, 1837, the former act being revived and declared to be in force during the continuance of the latter one. The 5th section of the act of December 25th, 1837, recognized and confirmed the contract between the city and Hitchcock, and provided that upon its assignment to the new company, (which he was authorized to make,) the same was to enure to its benefit, and should be subject to all the covenants therein contained to be performed by Hitchcock. That act further provided that the new company "shall be permitted the use of the streets in the city of Mobile, free of charge, for the purpose of laying down pipes for the conveyance of the water;" also, "that so soon after the first day of December, 1856, as the said corporation of Mobile shall pay to the said company, the cost of the said work, in conformity with their contract, before referred to, with the said Henry Hitchcock, then this act shall cease to operate and not before: *Provided*, That the said company shall have power to collect its debts and wind up its affairs." Acts of Alabama, 1837, p. 76.

Shortly after the passage of the act of December 25th, 1837, the water works property again passed into the possession of the city of Mobile, and the building of the system contemplated by that act was abandoned.

On the 26th day of December, 1840, the city of Mobile and Albert Stein, the testator of the plaintiff, entered into a written agreement, whereby the city granted to him, his heirs, executors, administrators and assigns, the "sole privilege of supplying the city of Mobile with water *from the Three-Mile Creek* for twenty years from the date of this agreement, as well as all the advantages and benefits which accrue to the said mayor, aldermen and common council from, by or under an act of the legislature of the State of Alabama entitled an act to incorporate an aqueduct company in the city of Mobile, passed December 20th, 1820, and all ordinances and resolutions passed by the said mayor and aldermen of the city of Mobile, under and by virtue of the said act, or by the act of incorporation of the said city of Mobile, and the several acts amendatory thereto, which in any way or manner relate to the said 'City Water Works,' or the right to supply said city with water, as well as all the benefits and advantages which accrue to the said mayor, aldermen and common council, or the mayor and aldermen of the city of Mobile, from, by or under an act of the legislature of the State of Alabama, entitled an act to incorporate the Mobile Aqueduct Company, passed December 25th, 1837; to have and to hold the *above-mentioned and described privileges* together with all and singular the appurtenances unto the same belonging, or in anywise appertaining, unto the said Albert Stein, his executors, administrators and assigns, from the date hereof, for during and until the full end and term of twenty years thence next ensuing."

The city covenanted and agreed that it would, at the expiration of the said term, (Stein delivering up the water works and appurtenances in good order and condition,) pay him, his executors, administrators or assigns, their actual value, as determined by six arbitrators, three to be chosen by each side, whose award should be binding; but in case of disagreement, the value to be left to the determination of the water committee of Philadelphia, and their decision, communicated to the city, to be conclusive; and the amount so awarded to be paid on the day it should be reported, when the water works and

all appurtenances should be delivered over to the corporation of Mobile. The city also covenanted that Stein, his executors, administrators and assigns, "shall have quiet possession of the said works, during their erection and after they shall be completed, for the term of twenty years, and for any further time, until the said parties of the first part [the city authorities], or their successors in office, shall redeem the said works from the said party of the second part [Stein], his heirs, executors, administrators or assigns, according to the aforesaid stipulation;" that Stein, his executors, administrators and assigns — he and they performing the stipulations of the contract upon their part to be performed — "shall and may retain quiet possession of the said water works for the said term of twenty years without let, molestation or hindrance of the said mayor, alderman and common council, or their successors in office, or any person or persons claiming by, through or under them; and that the said Stein, his executors, administrators and assigns, shall, during the said term of twenty years, or any further time, until said works are redeemed as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the city of Mobile water from the water works aforesaid, at the sum or price which shall at no time exceed" certain named rates to be paid by the person receiving the water. This contract specified the maximum rates to be charged to persons receiving water. Stein, his executors, administrators and assigns were given power to collect and receive these rates, and "power and authority to conduct the water *from any part of the 'Three-Mile Creek,'* so-called, so that the same may be good and wholesome, he, the said Albert Stein, his executors, administrators or assigns, procuring at his or their expense the necessary ground for the reservoir, engine and pump-house, and that through which the pipes shall pass."

By an act of the legislature, approved January 7th, 1841, entitled "An act for the promotion of the health and convenience of the city of Mobile by the introduction of a supply of wholesome water into said city, to be used for domestic purposes and the extinguishment of fires," this last agreement was fully

confirmed, and all the rights, powers, privileges and immunities granted by the acts of December 20th, 1820, and December 25th, 1837, not inconsistent with the terms of such agreement, were granted and confirmed to Stein and his assigns, with full authority to use such of the public roads of the county "as may be in the direct route between the reservoir and fountain head of the water works hereby to be erected, and the city of Mobile, for the purpose of laying the pipes for conducting the water into the city, free from all charge or claim for damage therefor," and with power to dispose of or mortgage any of said privileges, rights and immunities.

The bill alleges, and the demurrer admits, that Stein, in good faith, set about, and out of his own private fortune and by borrowing money from others, raised the means to build, and did construct, at an outlay and expense of more than two hundred thousand dollars, a system of public water works to supply said city of Mobile and the inhabitants thereof with water, in strict conformity to and compliance with the aforesaid contract and agreement; that he and his executor have ever since maintained and kept the same in good order and condition and in all respects observed the aforesaid contract and agreement; that the said city of Mobile has not redeemed or purchased, or offered to redeem or purchase, said water works property, as by said contract it agreed to do, although said period of twenty years has long since expired; that in the year 1879 the legislature of the State of Alabama repealed the charter of the city of Mobile and immediately thereafter, and at the same session of the legislature, passed an act incorporating the municipal corporation known as the "Port of Mobile," embracing, however, substantially the same territory and people and public property as that included in the city of Mobile; and that said municipal corporation called the "Port of Mobile" succeeded to all the rights, powers and authority possessed by the said city of Mobile, and said port of Mobile recognized the validity, efficacy and continuance of the above contract of December 26th, 1840.

The Bienville Water Supply Company was incorporated by an act approved February 19th, 1883, which was amended by

an act approved February 14th, 1885. The preamble recites that "whereas the inhabitants of the municipality known as the Port of Mobile, and the inhabitants of the village of Whistler, in the county of Mobile, are not provided with an adequate supply of water for domestic and municipal purposes; and whereas, it is essential to the public health of the citizens of those towns, and to the protection of their property and the public property therein, against conflagration, that an abundant supply of water should be introduced and furnished to said citizens; and whereas, a company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit." By the 6th section of the act that company was charged with the duty of introducing into the Port of Mobile and the village of Whistler, in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof might require; and for this purpose it was authorized to construct all needed canals and ditches, and, by pipes and aqueducts as might be found best suited for the purpose, to carry into said towns, by such lines or route as might be found best, such water as was needed, from any point in that county within twenty miles of the port or city of Mobile.

The same act provides, among other things: "§ 9. That the said corporation hereby created is hereby invested with all the rights and powers, which by law or contract was vested in the late municipal corporation, known as 'the mayor, aldermen and common council of the city of Mobile,' by redemption, purchase or otherwise, to acquire from any and all other persons, corporations or associations whatever, any and all property and rights by such person or persons, corporations or associations, held under any former contract or law whatever for the introduction and supply of water into the city of Mobile, or the inhabitants thereof, and for such purpose said Bienville Water Supply Company shall be held and taken to be the assignee of the said 'mayor, aldermen and common council of the city of Mobile,' and may proceed to assert said rights, and exercise said powers thus assigned, the same as could have been done by the municipal corporation aforesaid,

and for this purpose the commissioners of Mobile, appointed under and by virtue of 'An act to vacate and annul the charter and dissolve the corporation of the city of Mobile,' approved February 11th, 1879, are hereby authorized, on the demand of said corporation, to release to said corporation all the rights of said late city of Mobile in and to such right of redemption, purchase or other acquisitions of such property or rights.

"§ 10. That said Bienville Water Supply Company be, and is hereby, authorized to acquire by contract with any person or persons, corporation, company or association, claiming any right to supply the port or city of Mobile or the inhabitants thereof with water, such right or rights as he or they may have in the premises, and the property owned and used in connection therewith, and pay therefor such amount of money as may be agreed upon, or such amount as may be agreed upon in stock of the said supply company; and in case of failure by contract to obtain such right and property, then said corporation hereby created, may proceed as directed by law, for the condemnation and the taking of private property for public use, to obtain the same for the purpose of the public use and benefit herein declared of furnishing the port of Mobile and the village of Whistler, and the inhabitants thereof, with an adequate supply of water for domestic, sanitary and municipal purposes.

"§ 11. That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, *other than Three-Mile Creek* in the county of Mobile, for the supply of said port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of the port of Mobile, and be ready for distribution and supply to the inhabitants of the port of Mobile, and the houses and dwellings within the limits of said port. And till the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation as hereinafter provided, but said corporation within four years from the passage of this act, must begin its works, and within six years from the date of the passage of this act, must cause

water to be conducted into the port of Mobile from some stream, point or place as hereinbefore named, and if and when any existing claim to conduct water into Mobile from Three-Mile Creek, or any other point without the limits of said port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said Port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. . ."

The plaintiff, alleging in his bill that the Bienville Water Supply Company were engaged in laying down pipes and mains for the avowed purpose of conducting water into Mobile to supply that city and its inhabitants, prays that the defendant may be enjoined from laying pipes in, along or through the streets and alleys of the city for such a purpose, and that it be perpetually enjoined from interfering with the exclusive right and privilege which the plaintiff, representing the estate of Albert Stein, claims of supplying Mobile and its inhabitants with water under the contract of December 26th, 1840, until that city shall redeem and purchase, at their actual value, the water works constructed and maintained by the testator under that contract.

The present case is not controlled by *New Orleans Water Works Company* v. *Rivers*, 115 U. S. 674, and *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64, to which counsel have referred. The first case involved the validity and effect of a contract between the city of New Orleans and the New Orleans Water Company, whereby the former, acting under legislative authority, granted to the latter, for the term of fifty years, the exclusive privilege of supplying that city and its inhabitants "with water from the Mississippi, *or any other stream or river*, by mains or conduits, and for erecting and constructing any necessary works or engines or machines for that purpose." Subsequently, under the sanction of a new state constitution, adopted after that

contract was made, the city passed an ordinance allowing Rivers or the lessee of the St. Charles Hotel, the right of way and privilege to lay a water pipe from the Mississippi River at any point opposite the head of Common or Gravier streets, through either of those streets, to convey water to that hotel. This court held the grant to Rivers to be inconsistent with the previous one to the Water Works Company, and that the provision in the new constitution of Louisiana and the ordinance under which Rivers proceeded, impaired the obligation of the city's contract with the Water Works Company. It was said: "The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the State, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests. And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which, not being at the time prohibited by the constitution of the State, was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law;" the constitutional prohibition upon state laws impairing the obligation of contracts not, however, restricting "the power of the State to protect the public health, the public morals or the public safety, as the one or the other may be involved in the execution of such contract," because "rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations."

In *St. Tammany Water Works* v. *New Orleans Water Works*, we maintained the contract which the New Orleans Water Works Company had with the city against another corpora-

tion that claimed the right, under the general laws of Louisiana — and was about to take active steps in its enforcement — of bringing water into New Orleans by means of pipes, laid in the streets of that city parallel with those constructed by the New Orleans Water Works Company, to convey water from Bogue Falaya River, in the parish of St. Tammany. As the exclusive right of the New Orleans Water Works Company to supply the city of New Orleans and its inhabitants with water was not restricted to water drawn from the Mississippi, but embraced water from "any other stream or river," the case was held to be controlled by the decision in *New Orleans Water Works Company* v. *Rivers*.

The present case is materially different. The exclusive right acquired by Stein, under his contract of 1840, with the city of Mobile, and confirmed by the act of January 7, 1841, of supplying that city and its people with water, by means of a system of public works, did not, in terms or by necessary implication, embrace all streams, or rivers or bodies of water, from which he could supply water for public use in Mobile. While the obtaining of water for that city was undoubtedly contemplated by the legislature when it passed the first act, that of 1820, the thing done to that end was to incorporate certain persons proposing to bring water to the city from Three-Mile Creek or Bayou Chatogue. And this idea was apparent in the agreement of 1836 with Hitchcock. So, by the agreement with Stein, he, and his heirs, executors, administrators and assigns, acquired the "sole privilege of supplying the city of Mobile with water *from the Three-Mile Creek*" for a designated term of years, as well as after the expiration of that term and until he or they should receive from the city the actual value of his water works, determined in the mode prescribed by the contract. The specific power and authority given to Stein and his executors, administrators and assigns, by the city and the State, was "to conduct the water from any part of the Three-Mile Creek, so called, so that the same be good and wholesome." Why the parties, in making their agreement, specified a particular stream from which Stein was to conduct water into the city of Mobile for public use does

not distinctly appear. And it is not necessary to inquire; for the question before us depends upon the fair and reasonable interpretation of the agreement actually made. The court has no right to enlarge it, even if it believed that the parties themselves would have done so, if the matter had, at the time the agreement was signed, been called to their attention. The exclusive privilege granted, and the power and authority conferred in connection therewith, were to conduct water into the city from Three-Mile Creek. The parties, by the agreement, fixed upon that stream as the source of the water to be brought into the city; and the exclusive privilege granted to Stein had reference only to that stream.

The case then is this: The State incorporated the Bienville Water Supply Company, and conferred upon it the exclusive right, for a term of years, to supply the port of Mobile with water conducted and brought *from any other point than* Three-Mile Creek. The plaintiff seeks a perpetual injunction against the exercise of that right, and in support of his claim of an exclusive privilege of supplying water for Mobile and its people, from whatever source drawn, exhibits the contract which granted to Stein the exclusive right to supply that city and people with water brought from Three-Mile Creek for a fixed term of years, and until his works were redeemed by the city. The exercise by the defendant of the exclusive right granted to it will not interfere with the only exclusive privilege acquired by the plaintiff under the contract of 1840, confirmed by legislative enactment in 1841, namely, to conduct water for the use of Mobile and its people from Three-Mile Creek. If the contract under which the plaintiff claims was doubtful in its meaning, the result would not be different; for, while it is the duty of the courts not to defeat the intention of parties to a contract by a strained interpretation of the words employed by them, it is a settled rule of construction, that, "in grants by the public nothing passes by implication;" and, "if, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the

powers of the corporation, that construction is to be adopted which works the least harm to the State." *The Binghamton Bridge*, 3 Wall. 51, 75. Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river.

The relief asked was, in effect, an injunction perpetually restraining the defendant from supplying the port and people of Mobile with water drawn from rivers or streams other than Three-Mile Creek. That was the object of the suit, and the decree below must be restricted to a denial simply of that relief. Thus restricted, and without deciding any other question, the decree dismissing the bill must be

Affirmed.

Mr. Justice Bradley did not participate in the decision of this case.

PARKER *v.* ORMSBY.

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

No. 1658. Submitted April 27, 1891. — Decided May 25, 1891.

In a suit by the assignee of a promissory note payable to the order of the payee, where the jurisdiction of the Circuit Court depends upon the citizenship of the parties, it must appear affirmatively in the record that the payee could have maintained the action on the same ground.

A party cannot, by proceedings in the Circuit Court, waive a question of the jurisdiction of that court, so as to prevent its being raised and passed upon here.

THE case is stated in the opinion.

Mr. Lionel C. Burr for appellants.

Mr. Walter J. Lamb for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act of Congress approved February 25th, 1889, it was provided that in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of that court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review the judgment or decree without reference to its amount; but in cases where the decree or judgment does not exceed the sum of five thousand dollars, this court is not to review any question raised upon the record except such question of jurisdiction. 25 Stat. 693, c. 236.

This case comes here under that act. The question of the jurisdiction of the Circuit Court, in which this suit was brought, arises out of the following facts: C. M. Parker executed at Lincoln, Nebraska, September 7th, 1886, his promissory note for $2000, payable on the 7th day of September, 1891, with semi-annual interest from date at the rate of eight per cent per annum, the interest coupons and the note being payable to Walter J. Lamb or order, at the Lancaster County Bank, in Lincoln, Nebraska. It was provided in the note that any interest coupon not paid when due should bear interest at the rate of eight per cent per annum from maturity; and if any interest remained unpaid for thirty days after it matured the holder could elect to consider the whole debt due and collectible at once; also, that in case an action was brought for the collection of the note, the maker was to pay, as attorney's fees, a sum equal to ten per cent of the amount due. The note and interest coupons were secured by a mortgage given by Parker and wife upon real estate in the city of Lincoln.

Opinion of the Court.

Upon the back of the note and coupons were the following endorsements: "Pay L. L. Ormsby or order. Lancaster County Bank, Lincoln, Neb. F. O. Metcalf, cashier. Pay Lancaster County Bank or order. I waive demand, notice, protest and notice of protest, and guarantee the payment of the within note. W. J. Lamb."

The whole debt having become due by reason of default in meeting the interest, this suit was brought, December 13th, 1889, by Lucinda L. Ormsby against the appellants, Charles M. Parker and Emma Parker, his wife, and Martha L. Courtney, the relief sought being a decree for the sale of the mortgaged premises to pay the amount due, and for a personal judgment against Charles M. Parker for any deficiency remaining after the sale.

The bill avers that the plaintiff is a citizen of Illinois, and that the defendants are citizens of Nebraska. It contains, however, no averment as to the citizenship of Lamb, the original payee in the note and coupons as well as the mortgagee.

A decree was rendered finding due the plaintiff the sum of $2520.80, the aggregate of the principal and interest of the note and coupons and costs, including attorney's fees. The mortgaged premises were ordered to be sold to raise that sum.

Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear, upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power, this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act. *Mansfield &c. Railway Co.* v. *Swan*, 111 U. S. 379, 382; *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226; *Cameron* v. *Hodges*, 127 U. S. 322, 325.

The judiciary act of 1789 provided that the District and Circuit Courts of the United States should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a

suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 78, c. 20, § 11. The act of March 3, 1875, provided that no Circuit or District Court should "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. 470, c. 137, § 1. The provision in the act of March 3, 1887, determining the jurisdiction of the Circuit Courts of the United States and for other purposes, as amended by that of August 13, 1888, is in these words: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 Stat. 433, 434, c. 866, § 1.

It thus appears that the act of 1887, in respect to suits to recover the contents of promissory notes or other choses in action, differs from the act of 1789 only in the particular that the act of 1887 excludes, under certain circumstances, from the cognizance of the Circuit and District Courts of the United States suits in favor "of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation." It is not necessary now to consider the meaning of the words just quoted; for the present suit is by an assignee of a promissory note payable, not to bearer, but to the order of the payee. And we have only to inquire as to the circumstances under which the court below could take cognizance of a suit of that character. That inquiry is not difficult of solution.

It was settled by many decisions, under the act of 1789, that a Circuit Court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order, unless it appeared, affirmatively, that it could have been maintained in that court in the name

of the original payee. *Turner* v. *Bank of North America*, 4 Dall. 8, 11; *Montalet* v. *Murray*, 4 Cranch, 46; *Gibson* v. *Chew*, 16 Pet. 315, 316; *Coffee* v. *Planters' Bank of Tennessee*, 13 How. 183, 187; *Morgan's Executor* v. *Gay*, 19 Wall. 81, 82. There were these recognized exceptions to that general rule in its application to promissory notes: 1. That an endorsee could sue the endorser in the Circuit Court, if they were citizens of different States, whether a suit could have been brought or not by the payee against the maker; for the endorsee would not claim through an assignment, but by virtue of a new contract between himself and the endorser. *Young* v. *Bryan*, 6 Wheat. 146, 151; *Mullen* v. *Torrance*, 9 Wheat. 537, 538. 2. The holder of a negotiable instrument payable to bearer or to a named person or bearer could sue the maker in a court of the United States, without reference to the citizenship of the original payee or original holder, because his title did not come to him by assignment, but by delivery merely. *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 326; *Thompson* v. *Perrine*, 106 U. S. 589, 592, and authorities there cited. There can be no claim that the present case is within either of those exceptions.

The authorities we have cited are conclusive against the right of the plaintiff to maintain this suit in the court below, unless it appeared that the original payee, Lamb, could have maintained a suit in that court upon the note and coupons. Consequently, it was necessary that the record should, as it does not, disclose his citizenship. *Metcalf* v. *Watertown*, 128 U. S. 586; *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240, 243; *Rollins* v. *Chaffee County*, 34 Fed. Rep. 91. If it be true, as stated in an affidavit filed below, that Lamb was, at the commencement of the suit, a citizen of Nebraska, clearly the court below was without jurisdiction; for all the defendants are alleged to be citizens of that State.

There is another point in the case that requires notice. By an act of the legislature of Nebraska, approved February 23, 1875, it was provided: "1. Hereafter no stay of execution or order of sale upon any judgment or decree shall be granted for a longer time than nine months from and after the rendition

of such judgment or decree. 2. The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same; *Provided*, That if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof." "5. No proceedings in error or appeal shall be allowed after such stay has been taken, nor shall a stay be taken on a judgment entered as herein contemplated, against one who is surety in the stay of execution." Laws of Nebraska, 1875, p. 49; Compiled Stats. of Neb. 1885, p. 688, § 477.

The appellee moved to dismiss the appeal upon the ground that the above statute constitutes a rule of property in Nebraska, and that, as the appellants, within twenty days after the rendition of the decree, filed with the clerk below a written request that the sale be stayed for nine months from and after the decree, he is precluded from prosecuting this appeal, without reference to any question of the jurisdiction of the Circuit Court. This motion has been met with one by the appellants that they be permitted to execute a supersedeas bond, or that the action be dismissed for want of jurisdiction in the Circuit Court.

The motion to dismiss the appeal necessarily assumes that it was competent for the appellants by their acts, or by failing to act, to waive the question of the jurisdiction of the Circuit Court. This is an error. We said in *Metcalf* v. *Watertown*, above cited, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here, upon error or appeal, is a question that this court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits.

As to the effect of the statute of Nebraska, it is only necessary to say that it cannot be permitted, by its operation, to confer jurisdiction upon a Circuit Court of the United States, in contravention of the statutes defining and limiting its jurisdiction. Such would be the result in this case if, without

determining the question of jurisdiction, the appeal be dismissed upon the ground that appellants, by accepting the provisions of the statute of Nebraska in respect to a stay of the sale, are estopped to appeal from the decree rendered against them. What would be the effect of that statute in its application to a case of which the Circuit Court of the United States, sitting in Nebraska, could properly take cognizance, we need not inquire.

The motion to dismiss the appeal is denied, and the decree is reversed, with costs against the appellee, and remanded with instructions to dismiss the bill for want of jurisdiction in the court below, unless the plaintiff, by leave of the court below, and within such time as it may prescribe, amends her bill so as to present a case within its jurisdiction.

CARPENTER *v.* STRANGE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 267. Argued March 26, 1891. — Decided May 25, 1891.

The objection that the record of proceedings in a court of record offered in evidence should not be received in evidence, on the ground that the transcript was incomplete, or was improperly authenticated, should be raised in the court below; and if not raised there cannot be taken here for the first time.

In an action in the Supreme Court of New York (the court having jurisdiction of the parties) between two sisters, the defendant being sued in her representative capacity as testatrix of her father's will, the matters in controversy were: (1) whether the plaintiff had accepted or rejected a provision made for her by her father's will; (2) whether she was entitled to recover from her father's estate an amount claimed to be due on account of a fund which came to him as trustee for her, and which he had never accounted for; and (3) whether a certain conveyance of real estate in Tennessee made by the father in his life-time to the defendant should be adjudged to be fraudulent, and be vacated. That court, after hearing the parties, adjudged (1) that the plaintiff had not accepted the provision so made for her; (2) that the plaintiff was entitled to recover the full amount so claimed; and (3) that the deed was "absolutely null and void, from the beginning," so far as it affected the testator's said indebted-

Statement of the Case.

ness. A litigation in equity then took place in Tennessee, in which the plaintiff and defendant in New York were, respectively, plaintiff and defendant. There were other parties, whose presence was not material to the points here decided. This litigation resulted in the Supreme Court of Tennessee deciding: (1) That the plaintiff had elected to take the share so devised to her; (2) that having so elected she was not entitled to recover on her claim; (3) that the Supreme Court of New York was without power to adjudge the conveyance by the testator to the defendant of lands in Tennessee fraudulent and void, or to annul the same. *Held:*

(1) That this decree did not give to the judgment of the Supreme Court of the State of New York the full faith and credit to which it was entitled under the Constitution as to the 1st and 2d points so decided;

(2) That, as to the third point, the courts of New York had no power to decree that a deed of land in Tennessee was null and void.

In 1857, William Newton Mercer conveyed certain lands in Illinois to Ayres P. Merrill, in trust for the latter's daughter, Anna M., to the sole and separate use of said Anna M., and the heirs of her body, free from the control, debts, liabilities or contracts of any husband she might have, with power in the trustee to sell and dispose of the same, in whole or in part, and reinvest the proceeds in either real or personal property, to be held for the same uses and purposes and upon the same trusts, and providing that in the event of the death of Anna M., leaving no surviving issue, the property so conveyed in trust or the proceeds thereof, should descend to her brother, William Newton Mercer Merrill, and be held by the trustee or his successor for the use and benefit of the said William upon the same conditions and trusts, with power of appointment.

A. P. Merrill sold and conveyed the lands described in the deed in 1861 and 1864, for an aggregate of $6200, but never accounted to said Anna M., or any one for her, for the amounts received and interest.

Anna M. subsequently intermarried with one Carpenter, now deceased.

A. P. Merrill had resided in Memphis, Tennessee, and subsequently became a citizen of the State of New York, where he died in November, 1873, leaving there some personalty and holding title at the time to a considerable amount of real

estate in Memphis. In December, 1867, Merrill executed a deed to another daughter, Mrs. Strange, dated December 3, and acknowledged December 27, of lot 59, Madison Street, Memphis, without valuable consideration, and which was not recorded until December 27, 1873, after Merrill's decease.

In 1871 Merrill made his last will and testament.

By the first item, he bequeathed to Mrs. Carpenter a life estate in lot No. 98, Madison Street, Memphis "upon condition that she renounce all claim upon my estate for moneys accruing from the sale of a tract of land in Illinois conveyed to me in trust for her benefit by Dr. W. N. Mercer," and upon her decease or declining the condition, it was provided that the property be sold "for the benefit of the daughters then surviving of my several daughters."

By the second item he devised to Mrs. Strange lot No. 59, Madison Street, being the same lot described in the deed of December, 1867; and also all his personal property.

By the third item he bequeathed to Mrs. Strange certain moneys in trust for his grandchildren.

The fourth item was: "All other property may be sold for the benefit of my own children, equally, who may survive me."

By the fifth item he appointed Mrs. Strange sole executrix, without bond, and requested her to give to his son and three grandchildren certain specified articles.

Mrs. Strange was a citizen of New York, and there proved the will and qualified as executrix in February, 1874.

Shortly after the letters testamentary issued, Mrs. Carpenter, also a citizen of New York, brought suit in the Supreme Court of that State against Mrs. Strange, as executrix, for the recovery of the trust moneys.

The amended complaint alleged the decease of A. P. Merrill in December, 1873, testate; that Mrs. Strange was sole executrix; that the will was admitted to probate in February, 1874, a copy being annexed; set up the trust created in 1857 by Mercer; the sale by Merrill of the lands and the receipt of the money; charged that Merrill converted the money to his own use, and that it became absorbed in his business and

materially enhanced the value of his estate; that he had rendered no account to her of the trust estate; and that he left real estate of large value in Memphis, and large sums of money and personal property in New York.

She then set forth the clause of the will in relation to No. 98 Madison Street, and stated "that she has not renounced said claim, so as aforesaid required to do, nor has she refused to renounce said claim, for the reason that plaintiff claims that by virtue of the deed of trust it is impossible for plaintiff to release said trust funds, and for the further reason that such a condition as aforesaid required is against conscience and justice." She further alleged that Mrs. Strange was unfit for the position of trustee, and that her interests were opposed to plaintiff's interests; that at the time of Merrill's death plaintiff was informed and believed he was free from debt, except plaintiff's claim for the trust moneys and other money she had put into his hands in trust, and a balance due her brother William for money held upon a similar trust created by Mercer simultaneously with that in plaintiff's favor, and that if any debts had existed they had been paid except as aforesaid. She charged that the executrix refused to account for these sums of money, and denied the liability of the estate for the same, and in proving the will claimed and declared that she owned as devisee the real estate specifically devised to her, but suppressed mention of the fact that a deed of the same property had been made to her. Complainant further alleged that if the deed of December, 1867, was obtained at all from the testator, it was so obtained by collusion with him and for the "fraudulent purpose of defeating the collection of the plaintiff's just and legal claim against the estate of the said testator, and to take so much of his estate as said property represents from liability to said claim," and plaintiff alleged and charged that said "conveyance was made without any valuable consideration in law;" that said deed, if made at all, was made while the trust existed and was a just claim and lien against testator's estate; and that Mrs. Strange had notice and knowledge thereof.

Plaintiff prayed that the court might adjudge and decree

that the bequest of the life estate "be taken and held free from all and every condition thereunto attached in said will; that the said condition be decreed as void, and that the title to the life estate be absolutely vested in this plaintiff, and that she be relieved from renouncing any claim for said trust money, and that the trust estate be declared unaffected by said condition in said will and a charge upon the estate of the said testator;" that Mrs. Strange, executrix, be compelled to account; that the deed from Merrill to Mrs. Strange be set aside and be declared inoperative and void and of no effect, as against the claims of plaintiff against testator's estate; and that the sums of money found due plaintiff be made a lien on the property described in the deed to Mrs. Strange and in the will, and the decree be enforced against the same; that the cause be referred, and Mrs. Strange compelled to account as the representative of A. P. Merrill as trustee, and a suitable trustee be appointed to carry out the trust; that on the rendition of the account, the sums reported due be paid over to the trustee or to the *cestui que trust*, as the court should direct; and for general relief.

Mrs. Strange was personally served and answered fully. She denied the trust; alleged that the trust moneys had been paid over to plaintiff; averred that testator's personalty was insignificant; set up a counter-claim; alleged the validity of the deed of Merrill to herself; and as to the devise to plaintiff, insisted that it ought to be taken and accepted by plaintiff as a complete satisfaction of all her claims against Merrill's estate, and that there was no obstacle to plaintiff's renunciation of such claims; and further alleged that decedent was solvent and had sufficient property to pay his debts aside from the real estate conveyed to her; and also set up the statute of limitation. She prayed that the complaint be dismissed as to her individually as well as executrix, and for judgment on her counter-claim as executrix; "and that it may be adjudged and declared by this court herein that the devise to, and the provisions made for, the plaintiff by said last will and testament was and is, as it was intended by said testator to be, in full satisfaction of any and all claims and demands which the

plaintiff had against him at the time of the death of the testator or now has against his estate, or against this defendant in her capacity of executrix of his last will and testament; that in the event that the plaintiff shall elect to take, or in the event that it shall be adjudged that plaintiff take and accept, the devise contained in said last will and testament so intended to be in satisfaction of all her claims and demands against the estate of said testator, the plaintiff in that case be required and directed by the judgment of this court to execute and deliver to this defendant, in her representative capacity, as the executrix of said last will and testament, and also to this defendant in her individual capacity, a release in due form of law of this defendant and the estate of said testator from all her claims and demands, as in said last will and testament provided, as to the testator's estate; and that in the event that plaintiff shall not elect to take or accept, nor be required to take or accept, the devise to and provisions for her contained in said last will and testament, and it be found that the plaintiff is entitled to an accounting as to said alleged trust estate as found, and to recover any amount for or on account thereof, this defendant prays that in such case" her counter-claim be set off against such recovery.

To this answer a special replication was filed.

The cause was referred on January 29, 1880, to a referee, who made his report July 1, 1880, whereupon it was ordered and adjudged:

"1st. That Anna M. Carpenter, the plaintiff in this action, do recover of or against the estate of the said Ayres P. Merrill, deceased, and of the executrix as such, or of any person or persons having the possession, custody or control of said estate or part thereof, the sum of sixteen thousand four hundred and thirty-six dollars and seventy cents, hereby adjudged to be due to plaintiff, or so much thereof as said estate or any part thereof will pay.

"2d. That all of the above-mentioned sum of $16,436.70 be paid to the said plaintiff or her said attorney, except sixty-two hundred dollars thereof, which last-mentioned sum shall be paid to a suitable person to be appointed by said court as

trustee for the purposes above referred to, and that such appointment be made on notice by plaintiff to defendant, William N. M. Merrill, or his attorney herein.

"3d. That the above-mentioned deed of conveyance by Ayres P. Merrill to Maria E. Strange is hereby adjudged to be absolutely null and void from the beginning, so far as the same in anywise affects the above-mentioned indebtedness of said estate to said plaintiff.

"4th. That any bequest or devise in said last will and testament of said Ayres P. Merrill contained in favor of any person or persons whatever is subject to the payment of the whole amount above-mentioned as due from said estate to plaintiff, and to interest thereon at the rate of six per cent per annum until paid.

"5th. That plaintiff have execution against the property which was of said Ayres P. Merrill at the time of his death for the amount last above-mentioned, and interest thereon until paid, besides sheriff's fees and expenses as provided by law."

On January 15, 1875, Mrs. Carpenter filed a bill in the Chancery Court of Shelby County, Tennessee, No. 1805, against Mrs. Strange as executrix, setting forth in substance the same matters as alleged in her suit in New York, and praying, among other things, that the real estate be attached and held "to secure the recovery that complainant may recover on account of this suit or any other one complainant has brought or may bring on account of the premises set forth."

The writ of attachment was issued as prayed for and levied upon the real estate described.

The bill was taken *pro confesso* April 30, 1875, and a receiver appointed. In October this decree was set aside upon the motion of Mrs. Strange and she filed a full answer. On the 14th of February, 1876, the receiver was, on her motion, discharged from exercising custody and control over lot No. 59, and directed to deliver possession thereof to her, but it was ordered that the discharge should in no way affect the attachment of the property.

In January, 1881, Mrs. Strange caused the will of her father

to be probated in Tennessee, where she had then taken up her residence, and letters were issued to her there.

On February 2, 1881, Mrs. Carpenter filed her bill in the Chancery Court of Shelby County, Tennessee, No. 3912, against Mrs. Strange as executrix and individually, and the heirs, distributees and legatees under Merrill's will. This bill set forth the death of Merrill in New York in November, 1873, testate; the probate of the will in February, 1874, by Mrs. Strange; and its probate in Tennessee in January, 1881; and that complainant had "never renounced her claim upon the testator's estate and has never claimed anything under said will or received anything." She averred that she was a creditor of said estate on account of trust funds received by Merrill in his lifetime, and that the claim had been reduced to judgment in a suit brought against Mrs. Strange, as executrix, in the Supreme Court of the county and State of New York, which judgment was for the sum of $16,436.70. A certified copy of the record in the New York case was made an exhibit to the bill and prayed to be taken as a part thereof.

It was then stated that Mrs. Strange became possessed of Merrill's property soon after his death; that complainant, being informed that Mrs. Strange had qualified as executrix in Tennessee, filed her bill, No. 1805, against her as such executrix to recover the amount due from Merrill, and among other things sought to attach the real estate of the testator, and that it was attached and a receiver appointed; that by the said proceedings she sought to impound the real estate and hold it subject to the judgment sought to be recovered in New York against the estate and Mrs. Strange, who was a non-resident of Tennessee, and said suit No. 1805 was ancillary and auxiliary to the suit in New York; that judgment was recovered in the latter; and that there was no need of proceedings to recover judgment in No. 1805.

Complainant further alleged that Mrs. Strange had been collecting rents of all the real estate in Tennessee, and as to lot No. 59, the New York court, in the suit referred to, had declared the deed to her of that lot fraudulent and void. Complainant reiterated that she was a creditor of the estate

of Merrill in the sum of over $16,000 by judgment recovered, to the record of which she again referred, and said that "she seeks to recover on said judgment just as if specially sued on in a law court. Said judgment is still owned by complainant and is unsatisfied and unpaid, together with cost and interest. Complainant believes there are other creditors of said estate, the names of whom and the amounts due same she has not been able to learn."

Complainant charged that the insolvency of the estate had been duly suggested in the county court of Shelby County; that the personalty had been exhausted in the payment of debts, and that there remained nothing but the real estate to pay such debts; and averred that she "files this bill in behalf of herself and all other creditors and persons interested in the estate who may wish to come in and be parties herein." Complainant further represented that lot No. 59 had become, by virtue of the judgment of the New York court, assets of Merrill's estate, and liable for the payment of debts, together with the other real estate, and prayed that the administration and settlement of the estate be transferred from the county court to the Shelby chancery court; that an account of the assets and liabilities be begun, and a settlement had with Mrs. Strange as executrix, and that she pass her accounts and settlement in the latter court; that Mrs. Strange be made to account for the money left her in trust; that the legatees under the will account for legacies turned over to them and be postponed until the debts were paid; that the creditors and others interested be permitted to become parties to the proceedings; that the clerk and master make publication for all creditors to file their claims on or before the 15th of May, 1881; that the judgment recovered by the complainant in New York be allowed and a decree rendered thereon against the estate; and that the realty be sold to pay complainant's claim, and also any other *bona fide* debts and claims. Complainant further prayed that the receiver in charge of part of the property be put in charge of lot No. 59, and that the receiver in No. 1805 be made and continued receiver in this case; that a new trustee be appointed to manage the trust

fund recovered for complainant in the suit in New York, under the control and supervision of the court; and for general relief.

Publication of notice to creditors to prove their claims was thereupon ordered. All parties defendant appeared, and the minor heirs, by their guardian *ad litem*, moved to dismiss so much of the bill "as seeks to enforce the alleged rights of complainant as a devisee of A. P. Merrill, deceased, for the reason that it appears by the bill that the devise to complainant was conditioned upon the renunciation by her of all claim against the estate of said testator for the fund held by him in trust for complainant. The bill not only fails to show a compliance with this condition, but affirmatively shows the contrary, to wit, that complainant has elected to claim and sue for said trust fund. The bill shows no sufficient reason for non-compliance with the said condition, nor for setting it aside as null and void." This motion was heard by the court and overruled, the order reciting that the "solicitors for Mrs. Carpenter insisted that no such claim was asserted, and that for their client they disclaimed any right or purpose to hold or claim a devise under the will." A motion by Mrs. Strange to dismiss the bill in No. 3912, because of the pendency of the other bill, was overruled as premature.

Mrs. Strange answered as executrix and in her own right, admitted that she had made no settlement as executrix in New York, and that the personalty was disposed of, and among other things pleaded and relied upon, as executrix and individually, the statutes of limitation of the State of Tennessee, and as executrix that no personal assets whatever had come to her hands to be administered in Tennessee; and she further averred that the bequests in item No. 3 of the will had not been paid, either in whole or in part; claimed lot No. 59 as her own under the deed made to her in 1867, and stated that the will left no realty belonging to Merrill except Nos. 98 and 100 Madison Street. Answers were filed for the other defendants, adopting Mrs. Strange's answer, and pleading all of the statutes of limitation of the State of New York and of the State of Tennessee applicable in any way to the case. The answer of the minors submitted their case to the

court, and also relied on the statutes of limitation. W. N. M. Merrill filed a claim in the suit, setting forth a trust created by Mercer in 1857, by conveyance to A. P. Merrill for the benefit of claimant, and that the lands described in the conveyance were sold in 1860 for $6000 or thereabouts. And he insisted that any surplus remaining after the payment of the judgment in favor of his sister Anna M. should be paid into court in trust for him and the heirs of his body, or for his sister Anna M. in default of such heirs.

By consent of the parties the two cases, Nos. 1805 and 3912, were consolidated and ordered to be heard together, and upon the hearing an authenticated copy of the record, proceedings and judgment in the Supreme Court of New York in the case of *Carpenter* v. *Strange, Executrix, et al.*, which has been hereinbefore referred to, and was filed as an exhibit to the bill in No. 3912, was put in evidence. This transcript, although the record in this court shows that the suit in New York was brought shortly after February, 1874, commences with an amended summons, dated March 19, 1878, and an amended complaint, which was sworn to on that day. The caption runs in the name of the people of the State of New York and recites that they "having examined the records and files in the office of the clerk of the county of New York and clerk of the Supreme Court of said State for said county, do find a certain judgment roll there remaining in the words and figures following, the same being a full and perfect record, to wit," (and then follows the record) and the conclusion is: "All of which we have caused by these presents to be exemplified and the seal of our said Supreme Court to be hereunto affixed." This is tested in the name of the presiding justice of the Supreme Court for the city and county of New York and subscribed by the clerk and the seal of the court affixed, and accompanied by the certificate of said justice to the effect that the clerk whose name was subscribed to the exemplification was the clerk of the county of New York and of the Supreme Court, duly appointed and sworn, and that full faith and credit were due to his official acts, and that the seal affixed to the exemplification was the seal of the Supreme Court and the attestation

was in due form of law; and a further certificate of the clerk was attached under the seal of the court, that the judge who certified was presiding justice of the Supreme Court.

When the record of the New York court was offered in evidence in No. 3912, counsel for the defendants objected to its admission "upon the ground that neither the executrix in Tennessee nor the heirs or legatees were bound by it, and that it was incompetent and inadmissible as evidence in this cause for the reason that it was not in any way binding upon said respondents in this proceeding, and for the further reason that the said record shows upon its face that the judgment was erroneous and ought not to have been rendered." The chancellor, however, admitted the record, and, being of opinion that Mrs. Carpenter was entitled to recover from Mrs. Strange, executrix, according to the tenor and effect of said proceedings and judgment, decreed that she recover the sum of $16,436.70 with interest. The chancery court further held that the statutes of limitation constituted no valid defences against the recovery; and further held and decreed "that the filing of this bill was an election by complainant to renounce all benefit under the will of said Merrill, and she is barred and precluded from ever claiming anything under its provisions." It was further ordered that a trustee be appointed to receive and control $6200 of the recovery when realized, according to the terms of Mercer's deed of settlement for the benefit of complainant, and that the balance of the recovery belonged to Mrs. Carpenter as her own individual property; and that this branch of the cause be referred to a master to take proof and report: (1) What assets have come or should have come to the hands of said executrix in this State. (2) What debts are due and owing to the creditors of said Merrill, deceased. (3) What realty belongs to said estate, and upon what terms should a sale be made. (4) What debts of said Merrill have been paid in this State.

The chancellor further ordered that upon the third inquiry either party might submit proofs as to the ownership of lot No. 59, the court refusing to set aside the deed to Mrs. Strange by force of the judgment or decree in the New York court,

holding that the order of that court declaring the deed void was inoperative in this case, and reserving the question as to its validity as to complainant and other creditors of Merrill, and also all other questions not adjudged, including costs.

The record in No. 1805 was read by defendants upon the hearing.

An appeal to the Supreme Court of the State was taken by the defendants from so much of the decree in No. 3912 as awarded a recovery to complainant against Merrill's estate, and ordered the settlement of the accounts of his personal representative; and by complainant from so much of that decree as refused to declare the deed of Merrill to Mrs. Strange void by force of the New York judgment.

In No. 1805 the court ordered complainant's bill to be dismissed, and an appeal was prayed therefrom. The appeals having been duly prosecuted, the cases were referred to commissioners under the Tennessee practice, who made an elaborate report, holding that the chancellor erred in not decreeing that the deed to Mrs. Strange was void as to Mrs. Carpenter's debt, and that he should have held the land therein conveyed liable and subjected it to the payment of her debt; and also that the bill in No. 1805 should not have been dismissed except without prejudice, and, with these modifications, that the decree should be affirmed and the cause remanded for further proceedings, the estate wound up and administered as an insolvent estate, and, upon exhaustion of the personalty, that the lands should be sold to pay the debts.

Exceptions were filed to the report of the commission, and the Supreme Court of Tennessee heard the cause upon the chancery court record and the report and exceptions, and April 16, 1887, set aside the report and reversed the decree of the court below, but on the 20th of April, on motion of the defendants, vacated that decree and entered another in lieu and stead thereof, which stated that the court was of opinion (1) That the record of the proceedings in New York was fatally incomplete and defective in that the transcript commenced with an amended complaint, and because the certificate was insufficient; (2) That the New York court had no power or jurisdiction to

adjudge the conveyance by Merrill to Mrs. Strange fraudulent and void as to creditors, and did not have power, by force or virtue of its judgment or decree alone, to annul Mrs. Strange's claim of title under said conveyance.

"III. That upon the pleadings, proceedings and evidence as the same appear in the transcript of this cause the complainant has elected to claim, assert and sue for a life estate, under the devise of the same to her in the first item of the will of said A. P. Merrill, in and to the property described in said will as 'the western portion of the double tenement purchased of Adlai O. Harris, being the house and lot No. 98, on Madison Street, Memphis, Tennessee;' and that by the terms of said will said devise to complainant was made upon condition that said complainant should renounce and surrender the claim against the estate of said testator for which she sues in these proceedings, and that complainant, having thus elected to claim and assert title as devisee under said will, must give effect to and perform the condition upon which said devise to her was made, and must renounce and surrender her said claim against the testator's estate.

"Complainant, therefore, is entitled to recover a life estate in the premises as aforesaid, but is not entitled to recover upon her alleged money demand against the testator's estate, as shown in the record.

"IV. The several questions arising upon the record touching the alleged bar of the statute of limitations, the force and effect of the money judgment rendered in the court of New York in favor of complainant and against defendant, Maria E. Strange, as executrix of said will, and whether said judgment, if duly authenticated and admitted in evidence, would be conclusive or of *prima facie* force only against the executrix of the same will in Tennessee, and the further question whether said judgment in New York against the executrix there qualified would be of any force, either *prima facie* or conclusive, as against the heirs or devisees of the realty in Tennessee, or whether the said proceedings in New York would, as against said heirs or devisees, operate to arrest the running of the statutes of limitation of this State, the court does not deem it necessary here to pronounce any opinion."

A final order and decree was then rendered in accordance with these propositions and the cause remanded to the Chancery Court of Shelby County with directions. A petition for rehearing was made and overruled, and a writ of error allowed to this court.

Mr. Henry Wise Garnett for plaintiff in error. *Mr. James M. Baldwin* was on the brief.

Mr. W. Hallett Phillips for defendant in error.

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

No objection was made in the Chancery Court of Shelby County to the record of the proceedings in the Supreme Court of New York upon the ground that the transcript was incomplete or not properly authenticated. If the objections were well taken, they were removable, and they should have been raised in the court below. The record was, however, in our opinion duly exemplified, Rev. Stat. § 905; *Maxwell* v. *Stewart*, 22 Wall. 77; and was in itself complete.

The judgment or decree of the New York court was entitled to the same credit and effect in the State of Tennessee that it had in the State of New York where it was rendered. Did it receive it?

Mrs. Carpenter, Mrs. Strange and A. P. Merrill were all citizens of New York at the time of the death of the latter and the probate of his will. The action was commenced against Mrs. Strange as executrix, upon personal service, and she appeared and answered the complaint. That complaint alleged that A. P. Merrill was indebted to the plaintiff for certain trust moneys belonging to her which he had converted to his own use, and that he had conveyed to Mrs. Strange certain real state in Tennessee under such circumstances as caused the deed to be inoperative and void as against plaintiff's claim. And it was further averred that A. P. Merrill had devised a life estate to plaintiff in certain real estate, upon

condition that she would renounce her claim for the trust moneys; and that she had not renounced, nor had she refused to renounce, because others were interested in the trust fund, and for the further reason that the condition was against conscience and justice. She therefore prayed for a decree against the defendant as executrix for the trust moneys; that the condition annexed to the devise be declared void, and the title to the real estate named be vested in her freed therefrom; and that the deed of Merrill to Mrs. Strange be declared void as against plaintiff's claim.

Mrs. Strange answered the complaint fully, and among other things denied the existence of the claim, alleged the validity of the deed of Merrill to herself, and as to the devise to plaintiff of the life estate, insisted that that devise ought to be taken and accepted by plaintiff as a full satisfaction of her claims against Merrill's estate, and prayed that it be so adjudged and decreed, and that plaintiff be compelled to release. The parties being thus at issue before a court of competent jurisdiction, the decree of that court put an end to the controversies properly litigated between them. There was no question but that the Supreme Court of New York had complete jurisdiction over the person and over the subject matter, unless in reference to the deed made by Merrill to Mrs. Strange, which involves questions requiring separate consideration. The judgment or decree was that Mrs. Carpenter recover against the estate of the decedent, and of the executrix as such, the sum of $16,436.70; that the conveyance by A. P. Merrill to Mrs. Strange was void so far as it affected the indebtedness of the estate to Mrs. Carpenter; and that any bequest or devise in A. P. Merrill's will in favor of any person or persons whatever was subject to the payment of the judgment. In the New York suit and in the bills of complaint in the Chancery Court of Shelby County, Mrs. Carpenter made substantially the same allegations in regard to the devise and its condition, and Mrs. Strange the same defence, insisting not that Mrs. Carpenter had elected, but that she ought to be compelled to accept the devise in full satisfaction of all claims and demands that Mrs. Carpenter had against Merrill at the time

of his death, or now had against his estate, or against Mrs. Strange in her capacity as executrix.

By the New York judgment Mrs. Carpenter's prayer that the devise should be freed from the condition, and Mrs. Strange's that Mrs. Carpenter should be required to accept the devise with the condition, were both in legal effect denied. And by the terms of the judgment the plaintiff recovered the amount of the trust money. This she could not have done if she had elected to take under the will, which would have subjected her to the operation of the condition. That judgment was a judgment *de bonis testatoris*, and it became Mrs. Strange's duty as executrix to apply the property of the testator wherever situated to the payment of the judgment.

There is no doubt whatever that a Federal question is presented by the record, but it is said that, conceding this, yet the Supreme Court of Tennessee also decided the case upon a question of general law sufficiently broad to support the judgment even if the Federal question was decided erroneously. And the ground thus referred to is that that court held that Mrs. Carpenter could not recover as a creditor of the estate of her father because she had elected to claim under his will as devisee. But that question was not open to the Supreme Court to decide, if it gave full faith and credit to the judicial proceedings of a sister State, since it had already been passed upon and determined by the New York court, whose judgment was put in evidence. That court, as we have already stated, not only refused to sustain Mrs. Carpenter's contention as to the invalidity of the condition, and Mrs. Strange's, that the devise must be accepted, but rendered judgment for the money and thereby determined that Mrs. Carpenter had forfeited her right to the devise. In that suit the parties were the same, the subject matter was the same, the issues were the same, as in this, and the judgment not only bound the estate, but bound Mrs. Carpenter in respect of the devise as well.

The decision before us is exactly to the contrary. It obliterates the judgment, and turns Mrs. Carpenter from a judgment creditor into a devisee. We perceive no ground upon which it was competent for the court to do this. No action

of Mrs. Carpenter appears upon the pleadings, proceedings and evidence, which operated to open up the New York judgment and allow that question to be again passed upon. On the contrary, she asserted her claim as creditor throughout all the proceedings, and her counsel in this case, before the hearing and on the motion that so much of the bill as referred to her alleged rights as devisee be dismissed, disclaimed any right or purpose to hold or claim a devise under the will, and insisted that no such claim was set up.

No question of election proper, where something is given by will to one who is entitled to some other thing disposed of to another, arose in any stage of this litigation. This was a case of an express condition annexed to the devise, upon compliance with which the devisee might take, and not otherwise, and the institution of the suit in New York would appear in itself to have disposed of any right to the devise. *Rogers* v. *Law*, 1 Black, 253. The position that because Mrs. Carpenter may have entertained the idea that the trust money was probably invested in the lot devised, and that the condition was so unjust that it ought not to be enforced, and gave expression to those views in the pleadings on her part in the three suits brought essentially to enforce her money claim, she should, therefore, be subjected to an estoppel, operating as a forfeiture of that claim, certain in every material particular, both as regarded the obligation to elect and the act by which the election was held to have been made, is one to which we cannot give our assent; but it is enough that the New York judgment was to the contrary, and that that judgment ought to have been respected.

In *Hill* v. *Tucker*, 13 How. 458, it was held that as the interest of an executor in the testator's estate is what the testator gives him, while that of an administrator is only that which the law of his appointment enjoins, executors in different States are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibility as if there was only one executor. And that although a judgment obtained against one executor in one State is not conclusive upon an executor in another, yet it is admissible in

evidence to show that a demand has been carried into judgment, and the other executors are precluded by it from pleading prescription or the statute of limitations upon the original cause of action.

But there the testator appointed different executors in two different States. In the case at bar there was but one executrix, and she was a citizen of the domicil of the testator and of the creditor, and the judgment rendered in that jurisdiction was conclusive against her as executrix when she took out the letters testamentary in Tennessee, because it was a judgment by a court of competent jurisdiction upon the same subject matter, between the same parties and for the same purpose. *Aspden* v. *Nixon*, 4 How. 467.

She was in privity with the decedent as to his property by the terms of the will, and the judgment against her as executrix in New York bound her in Tennessee upon the probate of the will and her qualification there. It is unnecessary to consider whether the legatees or heirs could have made any defence to the judgment upon the merits, for there was no attempt to do so.

But the adjudication of the Supreme Court of New York, that the deed of Merrill to Mrs. Strange was void so far as affecting the indebtedness of the estate to Mrs. Carpenter, rests upon far different grounds. That suit was instituted against Mrs. Strange solely as executrix, and did not purport to implead her individually. The attack upon the deed seems to have been predicated upon the theory that the realty therein described belonged to the *corpus* of the estate, and could only be claimed by Mrs. Strange as devisee, and to have been thrown in as ancillary to the main object of the suit, which was the recovery of judgment for the indebtedness against Mrs. Strange as executrix. But Mrs. Strange claimed title as an individual, and, under the pleadings as they stood, it might well be held that dealing in any way with the real estate was not legitimately within the issues. The objection, however, goes deeper than this.

The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the

person of a party a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The court "has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title." *Hart* v. *Sansom*, 110 U. S. 151, 155.

Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, (*Massie* v. *Watts*, 6 Cranch, 148,) yet it does not follow that such a decree is in itself necessarily binding upon the courts of the State where the land is situated. To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*.

By its terms no provision whatever was made for its enforcement as against Mrs. Strange in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the court announced. Direct action upon the real estate was certainly not within the power of the court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts. Story Confl. Laws, § 543; Whart. Confl. Laws, §§ 288, 289; *Watkins* v. *Holman*, 16 Pet. 25; *Northern Indiana Railroad* v. *Mich. Cent. Railroad*, 15 How. 233; *Davis* v. *Headley*, 22 N. J. Eq. (7 C. E. Green) 115; *Miller* v. *Birdsong*, 7 Baxter, 531; *Cooley* v. *Scarlett*, 38 Illinois, 316; *Gardner* v. *Ogden*, 22 N. Y. 327.

The judgment of the Supreme Court of Tennessee is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

EVANS *v.* STATE BANK

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

No. 347. Argued April 29, 30, 1891. — Decided May 25, 1891.

This case is affirmed on the facts.

Mr. A. H. Garland and *Mr. H. J. May* for appellants. *Mr. W. W. Dudley* and *Mr. L. T. Michenor* were with them on the brief.

Mr. J. McConnell for appellee.

FULLER, C. J.: This case was decided by the Circuit Court in favor of the State National Bank, upon the facts, and after a patient investigation of the record, with the aid afforded by the arguments and briefs of counsel, we are unable to hold that the Circuit Court erred in the conclusions at which it arrived.

The decree will, therefore, be

Affirmed.

In re MAYFIELD, Petitioner.

ORIGINAL.

No. 15. Original. Submitted April 27, 1891. — Decided May 25, 1891.

A member of the Cherokee Nation, committing adultery with an unmarried woman within the limits of its Territory, is amenable only to the courts of the Nation.

THIS was a petition for a writ of *habeas corpus*. Petitioner averred that on the 19th day of October, 1890, he was indicted in the District Court of the United States for the Western District of Arkansas, and subsequently tried, convicted and

Counsel for Parties.

sentenced to the Detroit House of Correction for three years, for the crime of adultery in the Indian country. He further stated that he was "a Cherokee Indian by blood, and a recognized member of the Cherokee tribe of Indians, and resided at the time of his arrest for the crime aforesaid, in the said Cherokee Nation, where the said crime is alleged to have been committed; that he has resided in the said Cherokee Nation all his life; . . . that he verily believes that the said District Court had no jurisdiction of his person, he being a Cherokee Indian by blood and a resident of the Cherokee Nation and subject to the exclusive jurisdiction of the laws of said nation for the crime aforesaid." The indictment, a copy of which was annexed to the petition, charged that "John Mayfield, on the first day of January, A.D. 1890, at the Cherokee Nation, in the Indian country, within the Western District of Arkansas aforesaid, did commit the crime of adultery with one Mollie Phillips, a white woman, and not an Indian, and a single woman, by him, the said John Mayfield, having then and there carnal knowledge of the body of the said Mollie Phillips, the said John Mayfield being then and there a married man, and then and there having a lawful wife alive other than the said Mollie Phillips, and the said John Mayfield and the said Mollie Phillips not being then and there lawfully married to each other." Upon the hearing it was admitted by the district attorney who tried the case, which admission also had the approval of the District Judge, that upon the trial of the case "the evidence showed defendant to be one-fourth Indian by blood, and a citizen of the Cherokee tribe of Indians, and that he was lawfully married to a white woman by blood; and that Mollie Phillips, with whom the crime of adultery was charged to have been committed, was a white woman by blood; and that they both resided in the Illinois District of the Cherokee Nation, Indian Territory, at the time of the commission of the adultery of which Mayfield was convicted."

Mr. Van H. Manning and *Mr. Duane E. Fox* for the petitioner.

Mr. Assistant Attorney General Maury opposing.

Argument for Defendant in Error.

The answer to the allegation of the want of sufficient cause for the petitioner's detention, is that he is held by virtue of a judgment of the District Court of the United States for the Western District of Arkansas.

If that court had jurisdiction of the crime of adultery of which the petitioner was convicted, it would seem that the return to the rule shows a complete justification for his detention.

By section 533 of the Revised Statutes, the jurisdiction of the District Court of the United States for the Western District of Arkansas was extended to "the country lying west of Missouri and Arkansas, known as the Indian Territory."

But the jurisdiction of this court over the Indian Territory was considerably abridged by the act of Congress of March 1, 1889, 25 Stat. 786, c. 333, § 17, annexing a part of that Territory to the Eastern District of Texas, and the act of January 6, 1883, 22 Stat. 400, c. 13, § 2, annexing another part to the District of Kansas.

It suffices to say that the residue of the Territory left to the jurisdiction of the District Court for the Western District of Arkansas embraces the venue of the crime as laid in the indictment.

The jurisdiction of the court established for the Indian Territory by the act of March 1, 1889, 25 Stat. 783, c. 333, does not interfere with the jurisdiction of the District Court, because the jurisdiction of the former is limited to offences "not punishable by death or by imprisonment at hard labor." See also section 33 of the act of May 2, 1890, 26 Stat. c. 182, pp. 96, 97.

It is true the offence of adultery is punishable "by imprisonment in the penitentiary not exceeding three years," but, inasmuch as a prisoner convicted of this offence may, under the provisions of chapter 9, title 70, of the Revised Statutes, be imprisoned in a penitentiary where hard labor is exacted of all prisoners, it may be said with entire propriety that hard labor is a possible punishment for the crime of adultery. In *Ex parte Karstendick*, 93 U. S. 396, 399, the court used the following language on this subject: "Where the statute re-

quires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place *where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever varying circumstances of the cases which come before them.*" To the same effect is the case of *In re Mills*, 135 U. S. 263.

It cannot be doubted that the Cherokee Nation is within the western district of Arkansas.

It cannot be doubted that the offence of adultery was cognizable by the District Court of the said district.

The court having jurisdiction of the offence, it cannot be doubted that it must be conclusively taken to have had jurisdiction of the prisoner in the absence of any plea filed by him showing that the court had not, for some reason, jurisdiction over him, in accordance with the long established principle laid down in *Peacock* v. *Bell*, 1 Saund. 74, that "nothing shall be intended to be out of the jurisdiction of a Superior Court *but that which specially appears to be so;* and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."

In *Ex parte Watkins*, 3 Pet. 193, 207, Chief Justice Marshall said: "The cases are numerous which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the Circuit Court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power

by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied." This would seem to be decisive of the case at bar.

The jurisdiction of the court over the offence is clear. The petitioner appeared before the court, and no doubt pleaded to the indictment, although that does not appear directly, but is clearly inferable. Is it not clear, also, that it must be conclusively presumed that the court had jurisdiction over the person of the petitioner? *Galpin* v. *Page*, 18 Wall. 350, 366.

The District Court is a court of general criminal jurisdiction over that part of the Indian Territory where the offence was committed, and all presumptions are to be indulged for the purpose of supporting its judgments. *Rhode Island* v. *Massachusetts*, 12 Pet. 667, 718, 719.

Mr. Justice Brown delivered the opinion of the court.

Petitioner was indicted for a violation of the third section of the act of March 3, 1887, 24 Stat. 635, c. 397, entitled "An act to amend an act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two." The section reads as follows: "That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery." Rev. Stat. sec. 5352, to which this is an amendment, provided for the punishment of bigamy when committed "in a Territory, or other place over which the United States have exclusive jurisdiction." But the applicability of the act of March, 1887, to this case is apparent from sec. 2145, title 28, chapter 4, entitled "Government of Indian country," which reads as follows: "Except as to crimes the punishment of

which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

It was held by this court in *United States* v. *Rogers*, 4 How. 567, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, Congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian. The doctrine of this case was subsequently reaffirmed in the cases of the *Cherokee Tobacco*, 11 Wall. 616; *United States* v. *Kagama*, 118 U. S. 375, and *Ex parte Crow Dog*, 109 U. S. 556.

Did the case rest here there could be no doubt of the propriety of this conviction, but the very next section, 2146, as amended by the act of February 18, 1875, 18 Stat. 316, 318, c. 80, contains an important qualification to the general language of section 2145, as follows: "The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively." The crime charged in this case was evidently not one committed by one Indian against the person or property of another Indian, nor is there any evidence that Mayfield had been punished by the local law of the tribe; indeed, it is admitted that there is no Indian law punishing the crime of adultery. It only remains to consider whether, by treaty stipulation, exclusive jurisdiction over the offence has been secured to the Indian tribes.

On July 19, 1866, a treaty was concluded between the United States and the Cherokee Nation, 14 Stat. 799, the seventh and the thirteenth articles of which are pertinent to this case. The seventh article reads as follows: "The United

States court to be created in the Indian Territory; and until such court is created therein, the United States District Court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, etc." The district of the Cherokee Nation referred to in this article, is described in the fourth article, and is known as the Canadian District. It is admitted that the District Court for the Western District of Arkansas is the nearest to the Cherokee Nation; but in order to give it jurisdiction it is not only necessary, under this article, that an inhabitant of the district shall be a party, (in this case he is a party defendant,) but that the other party (in this case the prosecutor) shall be "an inhabitant outside of said district, in the Cherokee Nation." It does not appear, however, who was the prosecutor, or in fact that there was any one who could properly be so termed. The party with whom the adultery is claimed to have been committed is not an adverse, but a consenting party. Nor is there any evidence before us that the prosecution was instituted by the wife of Mayfield, if the crime of adultery could be considered as committed against her. *Bassett* v. *United States*, 137 U. S. 496, 506.

The thirteenth article of the same treaty provides as follows: "The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Though the stipulation does not show that Mayfield was a native of the Cherokee Nation, it does show that he was one-fourth Indian by blood, and a citizen of the Cherokee

tribe, and his petition alleges that he has resided there all his life, an allegation which, taken literally, would indicate that he was born there. If this section be operative, we see no reason to doubt that this is a criminal case arising within the Cherokee Nation, in which an adopted member of the nation is the only party; and that it also falls within the other clause of the section, as a case where the cause of action has arisen in the Cherokee Nation. The District Court held that the proviso of this section above quoted was not effective until a court had been established in the Indian country, "with jurisdiction over offences generally;" and that, as this had not been done, the thirteenth article did not become operative "as a means of defining the jurisdiction of the Indian courts." We are unable to give our assent to this conclusion. On March 1, 1889, Congress passed an act entitled "An act to establish a United States court in the Indian Territory, and for other purposes," 25 Stat. 783, c. 333, with criminal jurisdiction extending over the Indian Territory, but limited to cases "not punishable by death or by imprisonment at hard labor." While the crime of adultery is punishable simply in the penitentiary for a term not exceeding three years, such imprisonment may, under chapter 9, title 70, of the Revised Statutes, be executed in a penitentiary where hard labor is exacted of all convicts, and it follows that it is, in effect, imprisonment at hard labor, and therefore not within the jurisdiction of this newly established court. *Ex parte Karstendick*, 93 U. S. 396; *In re Mills*, 135 U. S. 263.

Now if the establishment of any court at all were necessary to give validity to the proviso of the thirteenth article, upon which we express no opinion, we think the establishment of any court sitting in such territory under the direct authority of the United States, and having a general jurisdiction, is adequate for that purpose. Indeed, the object of the proviso seems to be, not so much the establishment of a new jurisdiction dependent upon the happening of a certain event, as a recognition of a jurisdiction already existing. As the seventh article of the treaty limited the power of the court proposed to be created, and of the district courts already existing, to cases

of which this was not one, it would seem to follow that offences not there described were intended to be cognizable in the Indian courts, and that the thirteenth article was inserted as a further declaration or recognition of that fact.

There is, however, another act not alluded to in the opinion of the District Court, passed after the offence is alleged to have been committed, but before the indictment was filed, which contains a further recognition of the native courts, and is pertinent in this connection. We refer to the act of May 2, 1890, 26 Stat. 81, c. 182, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes." The thirtieth section of this act contains the following proviso: "That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties." The thirty-first section of said act also contains the following as its concluding paragraph: "The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves

to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith. The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.

It is needless to say that the fact, if it be a fact, that the laws of the Cherokees make no provision for the punishment of the crime of adultery, would not extend to the courts of the United States a power to punish this crime that did not otherwise exist. As Mayfield was a member of the Cherokee Nation by adoption, if not by nativity, and was the sole party to these proceedings, we think it is clear that under the treaties and acts of Congress he is amenable only to the courts of the nation, and that his petition should be granted.

The point is taken in the brief submitted by the Attorney General that the Supreme Court has no power to consider this question upon an application for a writ of *habeas corpus*. This court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record. *Ex parte Yerger*, 8 Wall. 85; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Carll*, 106 U. S. 521; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Bigelow*, 113 U. S. 328; *Re Nielsen*, 131 U. S. 176; *Re Savin*, 131 U. S. 267. In *Re Cuddy*, 131 U. S. 280, it was held directly, that where the petitioner had been committed for a contempt, he was at liberty, upon application for a writ of *habeas corpus*, to allege and prove facts not contradictory to the record, which went to show that the court was without jurisdiction.

Upon the facts of this case, which are fully discussed in the briefs of counsel, the petitioner is entitled to his discharge. His petition for a writ of *habeas corpus* is therefore

Granted.

REYNOLDS *v.* BURNS.

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

No. 364. Submitted April 30, 1891. — Decided May 25, 1891.

This case is dismissed by the court because the amount involved is not sufficient to give it jurisdiction.

THIS was a bill originally filed by the appellants to enjoin the execution and enforcement of a judgment in ejectment, wherein Thomas Burns and Martha B. Burns were plaintiffs, and Daniel Reynolds, Levi H. Springer, Samuel F. Halley, Hiliary H. Halley, Watt C. Halley and Richard Hurt were defendants.

It appeared from the bill and exhibits that on June 22, 1859, one John J. Bowie, of Chicot County, Arkansas, died, leaving a will, in which, after bequeathing $1000 to his daughter, Martha B. Leatherman (subsequently Martha B. Burns), in full of her share of the estate, he left the rest to be equally divided between his wife, America, and their two sons, John R. and James W. Bowie, appointing his wife sole executrix, with a further provision that upon the death of the wife her estate should be equally divided between the three children, Martha, John and James. Both sons died after the death of the father and before the estate had been administered or divided. The widow took out letters testamentary upon the estate, and proceeded to administer the same to a final settlement in the probate court, upon which settlement there was adjudged to be a balance due her of $6234.41. It further appeared that on the 19th of November, 1866, the said America A. Bowie, executrix, executed to Zachariah and Martha B. Leatherman, his wife, a deed in which, after stating the above facts and her wish "to retire from the management and control of said estate, and to provide for her comfort and quiet in her declining years," she conveyed all her right

in the estate, both by virtue of the will and by virtue of her being the mother and heir of her sons, John and James, as well as all her claim upon such estate for the balance found to be due her by the probate court in the final settlement of such estate, in consideration of certain live stock belonging to such estate, and a covenant on the part of Zachariah Leatherman to pay her an annuity of $400 per year during her life, the grantor retaining a lien upon all the estate for the payment of such annuity, with an express reservation that if the grantee should fail to make payment of any instalment of such annuity the grantor should have power and authority, upon giving thirty days' notice, to sell enough of such real estate to satisfy such of said instalments as should be due and unpaid; Leatherman further covenanting that the grantor was to have a home at his house during her life, or that he should pay her $200 in addition to the annuity in case he should sell his present home and the grantor should not wish to remove with him, and to take care of and provide for her during her life; with a further covenant that the grantees should take immediate possession of all of such estate and have full and complete control of the same.

The bill further averred that at the time of the execution of said deed the only assets remaining unadministered consisted of the interest of such estate in certain lands; that all persons interested in the estate were dead except Mrs. Bowie and her daughter Martha; that besides her life interest in the property, Mrs. Bowie had said judgment in the probate court for $6234.41, "for which all the said property, then not worth $6000, was under the law primarily liable and subject to be sold," to pay such balance; that she was then in possession of such property and entitled to retain possession thereof until the estate was finally closed and her judgment paid, so far as the assets of the estate extended; that she also had an interest as heir of her sons in certain of the lands; that the said Martha had no real or equitable interest of value in such lands, as the same were not worth enough to pay the amount then due her mother, and she could have no interest, under the will or otherwise, except her legacy, which she had re-

Statement of the Case.

ceived; that she was the owner of a mere naked legal title, subject to a life interest in one-third part; that possession was delivered under the aforesaid deed to Martha and her husband, who acquired the possession and thus acquired a good title to what she had before held a mere naked legal title, that could have been extinguished by a sale to pay such judgment in favor of her mother; that after the said Martha and her husband entered into possession of said property under their purchase, they or she alone, thereafter, and prior to May 1, 1876, the date of the sale to these plaintiffs, sold and transferred to various parties parts of the land so acquired; that the said Martha and her husband failed to pay the annuity and provide a home for Mrs. Bowie as arranged for in said deed, and in March, 1876, there then being due and unpaid on such annuity over $1300, Mrs. Bowie, under the authority contained in said deed, advertised that she would sell such lands, or so much thereof as would be necessary to pay said annuity, and at such sale the plaintiffs "each purchased certain tracts or parts of said lands, and paid for the same the full value thereof for a good title thereto, under the impression and belief that by such purchase they acquired a good title to so much of said lands," the said Reynolds purchasing 385 acres for $1180; Springer purchasing 60 acres for $40.50; and the defendant Halley 58 acres for $71; each of the plaintiffs receiving a deed for the parts purchased by them from Mrs. Bowie under the power contained in the said deed to the Leathermans, and each entered into possession; that the proceeds of such sale paid by the plaintiffs went to the support of Mrs. Bowie; that after this money had been expended to pay the annuity contracted to be paid by the said Martha, she sought, by ejectment, to recover back the lands to which she could in no event be equitably entitled except upon payment of the money due her mother, bringing suit upon her naked legal title, when in fact she had no equitable or just title to the same, and could have none except after the payment of the debts and expenses of administration; and that to enforce such judgment would in effect make these plaintiffs support Mrs. Bowie and give to Martha the property which was originally in the

hands of Mrs. Bowie for her support, and only conveyed by her upon the promise of support, as the consideration for such conveyance. Wherefore plaintiffs prayed an injunction against the execution and enforcement of such judgment in ejectment.

Defendants interposed a general demurrer to the bill, which was sustained and the bill dismissed. Plaintiffs appealed to this court.

Mr. F. W. Compton for appellants.

Mr. U. M. Rose and *Mr. G. B. Rose* for appellees.

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

The object of this bill is to enjoin the enforcement of a judgment in ejectment upon the ground that, while the plaintiffs in such judgment held the legal title to the lands in dispute, the equitable title was in the defendants, the plaintiffs in this bill. Curtly stated, the facts are, that America A. Bowie, the widow and executrix of her husband, John W. Bowie, who was also heir-at-law to her two sons, and a creditor of the estate of her husband to the amount of $6234.41, executed a deed of her interest in his estate to her daughter, Martha B. Leatherman, (now Burns,) upon condition that the grantee should pay her an annuity of $400 per year, and provide her with a home during her life, and with a reservation of power to sell, upon thirty days' notice, in case of failure to perform the condition. The grantee did not pay the annuity or perform her covenants, and Mrs. Bowie, without taking any steps to obtain the annulment of the deed, or the reconveyance of the property, assumed to sell under the power contained in the deed, and did sell at public auction to the plaintiff Reynolds one parcel, for $1180; to the plaintiff Springer, another, for $40.50; to the plaintiff Halley, another, for $71, all of whom received their deeds and entered into possession. Mrs. Burns and her husband thereupon brought ejectment and obtained judgment, to enjoin which this bill was filed.

Statement of the Case.

From this brief statement of facts it is entirely clear that this court has no jurisdiction of the appeal. There is no allegation or proof of the value of the property recovered in the ejectment suit, the only showing being that the aggregate amount paid by the three plaintiffs for their parcels was $1291.50. The only allegation of value is that the whole estate was "not worth $6000," though how much less it was worth is not stated. It further appears that plaintiffs' deeds did not cover the whole of such estate, and that the amount due and unpaid upon the annuity at the time these sales were made was about $1300.

Under no possible theory can the case be said to involve the amount exceeding $5000 requisite to give this court jurisdiction, and the appeal must therefore be

Dismissed.

DENNY v. PIRONI.

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

No. 1661. Submitted April 27, 1891. — Decided May 25, 1891.

When the pleadings in an action in a Circuit Court of the United States fail to show averments of diverse citizenship necessary to give the court jurisdiction, the fault cannot be cured by making such an averment in a remittitur by the plaintiff of a portion of the judgment.

While it is not necessary that the essential facts, necessary to give a Circuit Court jurisdiction on the ground of diverse citizenship should be averred in the pleadings, they must appear in such papers as properly constitute the record on which judgment is entered, and not in averments which are improperly and surreptitiously introduced into the record for the purpose of healing a defect in this particular.

The cases on this subject reviewed.

This was a writ of error sued out under the act of February 25, 1889, 25 Stat. 693, c. 236, allowing a writ of error in all cases involving the jurisdiction of the Circuit Court.

The action was brought by the defendants in error against

Denny, one of the plaintiffs in error, to recover certain wines purchased of the plaintiffs by one Momand through the alleged fraudulent device of Denny, who subsequently seized such wines upon an attachment of his own against Momand. The only averment of citizenship, requisite to give jurisdiction, was contained in the following allegation:

"1. That petitioners, who are hereinafter styled plaintiffs, are and were at the times of the accrual of the causes of action hereinafter stated, a mercantile firm, composed as aforesaid, engaged in the wholesale wine and liquor business in the city and county of Los Angeles, California, where both of said plaintiffs also reside; that defendant is a resident citizen of Dallas County, Texas, within the Northern Judicial District of Texas."

The case went to trial upon this allegation, and a judgment was recovered against Denny and the sureties upon his replevin bond for $2224.70, the value of the property, besides $238.29 damages, with interest and costs. Motion was made for a new trial February 23, 1891, upon alleged errors in the instruction of the court and in the verdict of the jury, and was denied. Upon the same day a motion was made in arrest of the judgment, which had already been entered, upon the ground that there was no allegation in the petition showing that plaintiffs and defendant were citizens of different States, and no allegation to show that the court had jurisdiction. Upon the next day the plaintiffs filed the following remittitur:

"Now at this time come Pironi & Slatri, a firm and copartnership, composed of C. B. Pironi and F. Slatri, the plaintiffs in the above-numbered and entitled cause, each of whom is now and was at the date of the institution of this suit, a citizen of the State of California, and a resident of the city and county of Los Angeles, in said State of California, and show to the court that they, on the 21st day of February, 1891, recovered a judgment against the defendant, J. C. Denny, who was at the date of the institution of this suit a citizen of the State of Texas, and a resident of the city of Dallas, in said State of Texas, within the Northern Judicial District of Texas, for certain personal property of the value of $2224.70, and also

damages for its detention in the sum of $238.29, besides interest and costs; and said plaintiffs now in open court remit the sum of five dollars to and from the said sum of $238.29, the damages awarded in said judgment aforesaid; and plaintiffs pray that this remittitur may be noted on the docket and entered in the minutes, and that execution may issue in due course for the balance of said judgment after deducting said sum of five dollars now here remitted from the damages adjudged as aforesaid."

Upon the filing of this document an order was made that "said remittitur be noted on the docket and filed herein as a part of the record of this cause, and that the said sum of five dollars be, and the same is hereby, remitted from the judgment of $238.29, assessed and adjudged as damages in said original judgment herein entered on February 21, 1891; and it is further ordered that execution issue for the balance only of said original judgment after deducting the said amount of five dollars so here remitted." An order was also made denying the motion in arrest of judgment, and a bill of exceptions was settled setting forth the above facts.

Mr. John Johns for plaintiffs in error.

Mr. W. Hallett Phillips for defendants in error.

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

The only averment of the plaintiffs' citizenship appearing in the record prior to the remittitur is contained in the first allegation of the petition, that "the petitioners, who are hereinafter styled plaintiffs, are and were at the times of the accrual of the causes of action hereinafter stated, a mercantile firm, composed as aforesaid, engaged in the wholesale wine and liquor business in the city and county of Los Angeles, California, where both of said plaintiffs also reside." That an averment of residence is not the equivalent of an averment of citizenship, and is insufficient to give the Circuit Court jurisdiction, has been settled in a multitude of cases in this court:

Parker v. *Overman*, 18 How. 137; *Robertson* v. *Cease*, 97 U. S. 646; *Everhart* v. *Huntsville College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253; and in case of a defective averment in this particular the judgment will be reversed by this court upon its own motion, and the case remanded; *Peper* v. *Fordyce*, 119 U. S. 469; *Everhart* v. *Huntsville College*, 120 U. S. 223; *Menard* v. *Goggan*, 121 U. S. 253. A case cannot be amended here so as to show jurisdiction, but the court below, in its discretion, may allow it to be done where the suit was instituted in the Circuit Court; *Continental Insurance Company* v. *Rhoads*, 119 U. S. 237; *Halsted* v. *Buster*, 119 U. S. 341.

This judgment then depends for its validity wholly upon the question whether the mere recital of the citizenship of the parties in the remittitur is such an incorporation of the same into the record as obviates the objection to the original petition and supports the judgment. It has been repeatedly held that it was not necessary for the averment to appear in the pleadings, but that the statute was complied with if it appeared in any part of the record. Thus in *Railway Company* v. *Ramsey*, 22 Wall. 322, 328, which was a case removed from a state court, the averment of citizenship did not appear in the pleadings, but the parties, by stipulation and agreement placed on file, and made part of the record, admitted that the cause was brought into the Circuit Court by transfer from the state court in accordance with the statutes in such case provided. By the same stipulation it was made to appear that all the original files in the cause had been destroyed by fire. The court held that, while consent of parties cannot give the courts of the United States jurisdiction, they may admit facts which show jurisdiction, and the courts may act judicially upon such admission, and that it would be presumed that the petition for removal stated facts sufficient to entitle the party to have the transfer made. Said the Chief Justice, speaking for the court: "As both the court and the parties accepted the transfer, it cannot for a moment be doubted that the files did then contain conclusive evidence of the existence of the jurisdictional facts." In *Briges* v. *Sperry*, 95 U. S. 401, the bill showed no

jurisdiction in the Circuit Court; but as the proceedings in the state court, which were held to be properly part of the record, showed that the case was removed from the state court to the Federal court on account of the citizenship of the parties, the jurisdiction was sustained. The same ruling was made in *Steamship Company* v. *Tugman*, 106 U. S. 118. In *Bondurant* v. *Watson*, 103 U. S. 281, the record showed that the husband of the original defendant, of whose will she was the executrix, was at the time of his death, and for many years before had been, a citizen of Mississippi, and the court held that it necessarily followed that the defendant was a citizen of such State at the time of her husband's death, which took place before the filing of the petition in the case, and that as it also appeared that she was a citizen of the same State at the time of the commencement of the suit against her, the jurisdiction should be sustained.

While these cases settle the principle that it is not necessary that the essential facts shall be averred in the pleadings, they show that they must appear in such papers as properly constitute the record upon which judgment is entered, and not in averments which are improperly and surreptitiously introduced into the record for the purpose of healing a defect in this particular. Thus in *Robertson* v. *Cease*, 97 U. S. 646, it was claimed by counsel to be apparent, or to be fairly inferred from certain documents or papers copied into the transcript, that the plaintiff was at the time of the commencement of the action, a citizen of Illinois. Among these documents was a notice of an application for a commission to examine witnesses, among whom was the plaintiff, described as residing in the county of Mason, State of Illinois; and there was a deposition of his, which began as follows: "My name is Henry Cease; residence, Mason County, Illinois." Under the doctrine of the cases before cited it was contended that the citizenship of Cease was satisfactorily shown by these documents, which it was insisted were a part of the record. "But," said the court, "this position cannot be maintained. It involves a misapprehension of our former decisions. When we declared that the record, other than the pleadings, may be referred to in this court, to

ascertain the citizenship of the parties, we alluded only to such portions of the transcript as properly constituted the record upon which we must base our final judgment, and not to papers which have been improperly inserted in the transcript. Those relied upon here to supply the absence of distinct averments in the pleadings as to the citizenship of Cease, clearly do not constitute any legitimate part of the record."

In the case under consideration, the remittitur formed no proper part of the judgment record, and the recital of citizenship formed no proper part of the remittitur. Undoubtedly proceedings subsequent to the judgment are admissible to show what action has been taken upon such judgment, as for instance, that it has been vacated, stayed, amended, modified or paid, that execution has been issued upon it, or that a part of it has been remitted, but such proceedings cannot be introduced to validate a judgment void for the want of jurisdiction. Not only is the remittitur in this case open to this objection, but it appears upon its face not to have been filed in good faith, but for the sole purpose of introducing the averment of citizenship; in other words this averment is the object, and the remittitur the incident. Remittiturs are used where the judgment has been accidentally entered for a larger amount than was due, or occasionally to forestall an appeal: *Pacific Express Company* v. *Malin*, 132 U. S. 531, but never to give jurisdiction where it is not otherwise shown. As well might it be contended that the difficulty could be surmounted by filing an affidavit subsequent to judgment. In either case it would be impossible for the defendant to take issue upon it, or to submit it to the court or jury as upon a plea in abatement.

The judgment of the court below must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* McBRIDE.

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

No. 1712. Submitted May 11, 1891. — Decided May 25, 1891.

The only question open in a case brought up under the act of February 25, 1889, 25 Stat. 693, c. 236, where the judgment does not exceed $5000, is the question of jurisdiction of the court below.

In the Indian Territory a right of action survives against a railroad company inflicting injuries upon a passenger which result in death.

When a defendant sued in a Circuit Court of the United States appears and pleads to the merits, he waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district.

THE case is stated in the opinion.

Mr. George R. Peck, *Mr. E. D. Kenna*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiff in error.

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

MR. JUSTICE BREWER delivered the opinion of the court.

This was an action commenced by the filing of a complaint on September 19, 1890, in the Circuit Court of the United States for the Western District of Arkansas. The defendants in error were plaintiffs below. They alleged that they were respectively the widow and children of James A. McBride, deceased, and his next of kin and heirs at law, and that there were no personal representatives of the said deceased. They further alleged that they were citizens and residents of the Western District of Arkansas; that the railway defendant was a corporation and citizen of the State of Missouri, doing business in the State of Arkansas and the Indian Territory, owning, maintaining and operating a line of railway through said States and Territory; that on the 20th day of July, 1890,

the deceased, James A. McBride, was in the employ of defendant; and that on that day, and in the Indian Territory, while at work as a brakeman on a freight train, he was, through the negligence of said defendant, so injured that on the 22d day of July he died. The complaint further disclosed the circumstances under which the accident occurred; alleged the dependence of the plaintiffs upon the deceased for support: and prayed judgment for twenty thousand dollars damages.

The record contains no process, or service thereof. On the 4th day of November, 1890, the defendant filed a demurrer, on three grounds, as follows: "1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court has no jurisdiction of the subject matter of the action. 3d. Because the complaint does not state facts sufficient to constitute a cause of action." This demurrer was overruled; and in January, 1891, a trial was had, resulting in a verdict for plaintiffs in the sum of four thousand dollars. No answer appears in the record, though it is proper to say that counsel for defendants in error, in their brief, state that service of process was made upon the defendant by delivering a copy to its station agent at Fort Smith, Arkansas; and that an answer was filed denying the defendant's negligence, and setting up also contributory negligence on the part of the deceased, but not denying any of the allegations in respect to the citizenship and residence of the parties. The fact of an answer seems also to be implied from the record of the trial, which recites that "after all the evidence had been introduced by both parties to maintain their respective issues, etc." Judgment was entered on the verdict for the sum of four thousand dollars, and of this judgment plaintiff in error complains.

As the judgment did not exceed five thousand dollars, the case can only come to this court on the question of the jurisdiction of the Circuit Court. 25 Stat. 693, c. 236; *McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41.

The action was one to recover money, the sum claimed being in excess of two thousand dollars, and was between citizens of different States, and was brought in the district and State of the residence of the plaintiffs. It was a case, therefore,

within the general jurisdiction of the Circuit Courts of the United States, under section 1 of chapter 866, 25 Stat. 433; and if the jurisdiction was founded only on the fact that the action was between citizens of different States it was brought in the Circuit Court of a proper district.

The contention of plaintiff in error is, that the jurisdiction is not founded only on the matter of diverse citizenship, but that it is an action based upon a statute of the United States, and to enforce a right given solely by such statute, and is therefore one which must be brought in the district of which the defendant was an inhabitant. Its contention goes further than this. It insists that under a proper construction of the United States statutes there was no cause of action existing in favor of the plaintiffs. It will be observed that the action is one to recover damages for the wrongful acts of defendant, in causing the death of the husband and father of the respective plaintiffs. Such an action did not survive at common law. The wrongful acts of defendant were done in the Indian Territory. On May 2, 1890, an act was passed by Congress with respect to the Territory of Oklahoma and the Indian Territory. Act of May 2, 1890, 26 Stat. 81, c. 182. The 31st section extended over the Indian Territory the provisions of certain specified statutes of Arkansas, among them one chapter relating to "pleadings and practice, chapter 119;" and in that chapter, by sections 5225 and 5226, it is provided that in case of injuries causing death, a right of action survives, the statute being substantially like that now in force in most States of the Union. The plaintiff in error contends that the effect of the act of Congress extending this chapter over the Indian Territory was not to put in force therein all its sections, but only those relating to pleadings and practice; and that, therefore, there being no other law than the common law in force in the Indian Territory, the complaint stated no cause of action. And further, as heretofore stated, that, if those sections in respect to the surviving of actions were extended to the Territory, the action was founded on the statute of the United States alone, and such an action must be brought in the district of which the defendant is an inhabitant.

The first of these questions is not open to inquiry in this case. The complaint making no reference to the Federal statute, alleges wrongful acts on the part of the defendant, and prays to recover damages therefor. Whether upon those facts the plaintiffs are entitled to recover is not a matter of jurisdiction, but one of the merits of the controversy. Suppose in a State where there is no statute providing for the surviving of such an action a suit is brought by the widow and children of a deceased person, alleging that his death was caused by the wrongful act of the defendant, and the defendant having been served with process enters its appearance and denies all liability, and the trial court improperly holds that there was liability and renders judgment for damages, is there anything other than a matter of erroneous ruling upon the merits? Could it be held that the court had no jurisdiction, no right to hear and determine the controversy between the parties? So, here, whether there was or was not a statute in force in the Indian Territory, providing that an action should survive in case of death, and whether upon the facts stated in the complaint the plaintiffs had a cause of action against the defendant, were questions entering into the merits of the controversy, and not matters affecting the jurisdiction of the court. If it had jurisdiction of the parties, it had the right to inquire and determine whether upon those facts the plaintiffs were entitled to judgment.

Neither can the other contention of plaintiff in error be sustained. Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was, not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought.

The first part of section 1 of the act of 1887, as amended in 1888, gives, generally, to the Circuit Courts of the United States jurisdiction of controversies between citizens of different States where the matter in dispute exceeds the sum of two thousand dollars exclusive of interest and costs. Such a controversy was presented in this complaint. It was, therefore, a controversy of which the Circuit Courts of the United States have jurisdiction. Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but that it comes within the scope of that other clause, which provides that "no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant," still the right to insist upon suit only in the one district is a personal privilege which he may waive, and he does waive it by pleading to the merits. In *Ex parte Schollenberger*, 96 U. S. 369, 378, Chief Justice Waite said: "The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive." The judiciary act of 1789, § 11, 1 Stat. 79, besides giving general jurisdiction to Circuit Courts over suits between citizens of different States, further provided, generally, that no civil suit should be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that of which he was an inhabitant, or in which he should be found. In the case of *Toland* v. *Sprague*, 12 Pet. 300, 330, it appeared that the defendant was not an inhabitant of the State in which the suit was brought, nor found therein. In that case the court observed: "It appears that the party appeared and pleaded to issue. Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties by any acts of theirs to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was that the party defendant,

not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him. . . . Now, this was a personal privilege or exemption, which it was competent for the party to waive. The cases of *Pollard* v. *Dwight*, 4 Cranch, 421, and *Barry* v. *Foyles*, 1 Pet. 311, are decisive to show that, after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege, which may be waived, and that appearing and pleading will produce that waiver." In *Lexington* v. *Butler*, 14 Wall. 282, the jurisdiction of the Circuit Court over a controversy between citizens of different States was sustained in a case removed from the state court, although it was conceded that the suit could not have been commenced in the first instance in the Circuit Court. See also *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81.

Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district. *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141; *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98.

It follows from these considerations that the Circuit Court had jurisdiction; and, as that is the only question before us, the judgment must be

Affirmed.

BRIGGS *v.* SPAULDING.

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

No. 185. Argued March 3, 4, 1891. — Decided May 25, 1891.

The degree of care required of directors of corporations depends upon the subject to which it is to be applied, and each case is to be determined in view of all the circumstances.

Statement of the Case.

Directors of a corporation are not insurers of the fidelity of the agents whom they appoint, who become by such appointment agents of the corporation; nor can they be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty.

A director of a national bank is not precluded from resignation within the year by the provision in Rev. Stat. § 5145 that when elected he shall hold office for one year, and until his successor is elected.

Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in ninety days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination.

Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figure-heads: they are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention.

If a director of a national bank is seriously ill, it is within the power of the other directors to give him leave of absence for a term of one year, instead of requiring him to resign, and if frauds are committed during his absence and without his knowledge, whereby the bank suffers loss, he is not responsible for them.

Applying these principles to this case, *Held*, (1) That the defendant Cushing, having in good faith sold his bank stock and taken proper steps for its transfer, and orally tendered his resignation as a director to the president of the bank, and ceased to act as such, cannot be held liable for the consequences of breaches of trust alleged to have been subsequently thereafterwards committed: (2) That Charles T. Coit was guilty of no want of ordinary care in acting upon the leave of absence given him; and, having died while absent on that leave, his estate is not liable for losses alleged to have been incurred during such absence, and with which he had no affirmative connection: (3) That the defendant Francis T. Coit, having accepted the office of director, when in infirm health, there being at the time others of the board of directors capable of attending to the concerns of the bank, and by reason of physical infirmity having failed to give the attention to the bank's affairs he otherwise would, his estate is held not liable for passive negligence on his part under all the circumstances disclosed in evidence: (4) That as no negligence is shown whereby the alleged losses can be said to have been affirmatively caused by the defendants Johnson and Spaulding, or either of them, they are not to be held responsible simply because during the short period they were directors, they did not discover such losses and prevent them.

THE case was stated by the court as follows :

Statement of the Case.

Smith (subsequently succeeded by Hadley, Hadley by Movius, and Movius by Briggs) exhibited his bill, as receiver of the First National Bank of Buffalo, in the Circuit Court of the United States for the Northern District of New York, on the 4th of May, 1883, against Reuben Porter Lee, Francis E. Coit, Elbridge G. Spaulding, William H. Johnson and Thomas W. Cushing, as directors of that bank, and Anne Vought as executrix of John H. Vought, and Frank S. Coit and Joseph C. Barnes, as administrators of Charles C. Coit, former directors. Francis E. Coit died pending the suit, and Caroline E. Coit, executrix, was made a party defendant.

The bill alleged the organization of the bank as a national banking association under the acts of Congress in that behalf; that it carried on the business of banking from February 5, 1864, to April 13, 1882; that on the 14th of April, 1882, being then insolvent, it suspended business under and by direction of a bank examiner; and that on the 22d of April complainant was appointed receiver by the comptroller of the currency, qualified April 26, and took possession of the bank's books, records and assets of every description.

That on December 7, 1863, at a preliminary meeting of the subscribers to the stock of the bank, certain articles of association were duly adopted and executed, a copy of which was annexed; that these articles remained unchanged, except that the number of directors was reduced from nine to five; that by-laws were adopted by the board of directors December 13, 1863, a copy of which was annexed, and continued unaltered from thence forward; and that on January 7, 1879, at a meeting of the directors, a resolution was adopted requiring the directors to meet regularly at the bank once in each month to look after the affairs of the bank and transact such business as might come before them. It was further alleged that defendant Lee was a director from January 12, 1877, to April 14, 1882; that defendants Spaulding and Johnson were directors from January 10 until April 14, 1882, "except as the defendant Spaulding was disqualified by the sale of his stock on April 11, 1882;" that defendant Francis E. Coit was a director from May 20, 1881, and so remained, except as disqualified

Statement of the Case.

by the sale of his stock April 11, 1882; that defendant Cushing was a director from June 7, 1879, to January 10, 1882, on which day his successor was elected; that John H. Vought was a director from January, 1865, and remained such, except as he was disqualified by the sale of his stock January 18, 1882; and that Charles T. Coit was elected a director January 11, 1870, and continued to act as such until about December 11, 1881, when he died intestate, and letters of administration were issued to Frank S. Coit and Joseph C. Barnes as administrators. It was further averred that from June 7, 1879, to December 11, 1881, Charles T. Coit was president of the bank and defendant Lee its cashier; that down to about October 3, 1881, Charles T. Coit continued in the active discharge of his duties as president, and on that day was given a leave of absence for one year from those duties, and the defendant Lee was made vice-president and placed in charge of the bank; that Lee also continued to be cashier and one McKnight was assistant cashier thereof; and that on January 10, 1882, a new board of directors was elected consisting of the defendants Spaulding, Johnson, Francis E. Coit, Lee and Vought, who elected officers for the ensuing year, Lee as president, Francis E. Coit as vice-president, McKnight as cashier and one Bogert as assistant cashier. The bill then charged that down to about October 3, 1881, being the date when the defendant Lee was made vice-president and placed in charge of the bank, "the said bank was solvent and engaged in a prosperous business; that the capital stock of said bank was one hundred thousand dollars, which was entirely paid up, and was divided into shares of the par value of one hundred dollars each, and that said shares were then saleable at not less than one hundred and fifty dollars each, and were actually worth about that sum; that from the time of its organization down to said last-mentioned date the said bank had declared and paid dividends on its said capital stock, amounting in the aggregate to upwards of 285 per cent thereon; that said bank then had a surplus or reserve fund representing undivided profits of said bank amounting nominally to seventy-four thousand two hundred and seventy-seven dollars and

three cents ($74,277.03), and had actually a large surplus;" that on April 14, 1882, the bank was largely insolvent; that its surplus and capital stock had been exhausted; that its total liabilities to its creditors, not including the amount of its capital stock, or other liability to its stockholders as such, amounted to $1,160,763.77; that its assets were nominally not less than $1,351,199.69, not including the liability of the stockholders on their stock; that a large portion of such assets were utterly worthless, and that the deficiency then existing in the good assets as compared with its liabilities was not less than $535,163.42, or about 46 per cent of the liabilities; that statements of the nominal financial condition of the bank, as shown by its own books, as of the dates October 3, 1881, January 9, 1882, and April 14, 1882, are annexed; but those of January 9 and April 14 fail to show that "any of the bills discounted or cash items, as therein stated, were worthless or uncollectible, or that the said bank had suffered any considerable loss by reason of bad debts or wasteful management, contrary to the facts as hereinbefore and hereinafter stated." The bill further averred that the greater part of the losses of the bank during the period between October 3, 1881, and April 14, 1882, and the consequent failure of the bank, were due to the misconduct of the officers and directors of the bank, and to the failure of the directors to perform faithfully and diligently the duties of their office, and it was particularly alleged that it was the duty of the directors, "by reason of the nature of their office and of the principles of the common law applicable thereto, and under and by virtue of the provisions of the Revised Statutes of the United States, and of the acts of Congress relating to national banks, and of the articles of association and by-laws of the said bank, hereinbefore referred to, diligently, carefully and honestly to administer the affairs of the said bank; to employ none but honest and competent persons to serve as officers of the said bank; to take from all persons so employed sufficient security for the faithful performance of their duties; to keep correct books of account of all the affairs, business and transactions of the said bank; to see that the business of the said bank was prudently con-

ducted, and that the property and effects of the said bank were not wasted, stolen or squandered;" etc., etc.

It was then charged that the directors utterly failed to perform each and every of their official duties, and during all the period from October 3, 1881, to April 14, 1882, paid no attention to the affairs of the bank; failed to hold or call meetings; or to appoint any committee of examination; or to require bonds; or to make personal examinations into the conduct and management of its affairs and into the condition of its accounts, but allowed the executive officers to manage it without supervision.

The bill further charged that the defendants permitted the reserve of the bank to remain below the amount required by Rev. Stat. § 5191, and that a large part of the losses of the bank arose from the unlawful extension of its line of discounts, and would have been prevented if the directors had performed their duty and prevented the increase; that on or about November 7, 1881, the surplus and undivided profits had been exhausted and the capital stock impaired, and this should have been reported to the Comptroller, whereby the capital would have been made good, or the said bank would have necessarily been put into liquidation and further losses thereafter incurred by continuance of its business would have been stopped.

It was also asserted that, independently of the provisions of the acts of Congress, the directors were trustees for the bank, and its stockholders and creditors, and it was their duty to have ascertained whether the bank had sustained losses and made known the facts and the general condition of the bank and the methods of its management, which duties they neglected and failed to perform, and by reason thereof the bank sustained great losses, amounting in the aggregate to at least $685,163.42.

It was further alleged that it was unlawful for the bank to allow any one person, company, corporation or firm to become indebted to an amount exceeding one-tenth of the capital stock, excepting by a discount of bills of exchange drawn in good faith and of business or commercial paper actually owned by the person negotiating it; but that the directors

from October 3, 1881, to April 14, 1882, permitted this to be done, and thereby a loss of at least $556,215.62 was occasioned; that it was the duty of the directors and officers of the bank to make accurate reports to the comptroller, and they did October 1, 1881, submit a report, and on December 31, 1881, and March 11, 1882, further reports, but the reports dated December 31, 1881, and March 11, 1882, were false and misleading, and particularly in representing that the bank had a surplus fund and undivided profits amounting to large sums and an unimpaired capital, and failing in any way to show that the bank had sustained heavy losses; whereas the bank had not at either of the dates any surplus or undivided profits, and its capital stock was exhausted or largely impaired on December 31, 1881, and on March 11, 1882, entirely exhausted, by reason of improvident and careless management, etc.; that by reason of the false and misleading character of the reports the comptroller and stockholders and creditors of the bank were not informed of its actual condition, and failed to take steps to repair the losses or put the bank in liquidation, by reason of which the bank incurred further losses. And further, that it was the duty of the directors who were such from October 3, 1881, to April 14, 1882, to appoint only honest, faithful, trustworthy, experienced and competent persons as officers of the bank, and to require bond or other security, and remove them if they were incompetent or untrustworthy in the performance of their duties; that during all that period of time the directors then in office elected and appointed to the positions of president, vice-president, and cashier, persons who were unfit, untrustworthy, incompetent and unfaithful, and more particularly in the appointment of Lee as vice-president and president, McKnight and Bogert being mere clerks of the bank and subject absolutely to the control and direction of Lee; that Francis E. Coit never actually assumed or performed any of the duties properly appertaining to the office of vice-president, and was of no value to the bank as one of its executive officers; that by reason of the foregoing Lee was during all the period from October 3, 1881, down to the stoppage of the bank, in absolute control thereof, without any

check, oversight or supervision whatever, which fact was at all times known to the directors of the bank; that Lee was a person of inconsiderable financial responsibility and of insufficient age and experience to qualify him for the position, and it was an act of gross negligence on the part of the directors to trust the entire management of the bank, or even the proper performance of the duties of president, to Lee; that under Lee's management the line of discounts was increased by lending large sums of money on accommodation paper to Lee personally and to members of his family and his personal friends, and to other persons with whom the said Lee was engaged in speculations, all of whom were of little or no financial responsibility, many of the loans being in excess of the amount allowed by the acts of Congress; that Lee failed to take sufficient security for the loans, and in many cases none at all; that Lee himself borrowed large sums of money upon his own notes and by overdrawing his account, and an examination of the books would have disclosed the fact, and that Lee was lending the funds of the bank to individuals of insufficient responsibility, and otherwise improperly managing the affairs of the bank and demonstrating his unfitness for the position; and transactions with one Hall were set forth at length, and other improvident transactions; and it was charged that by reason of Lee's reckless, improvident and criminal conduct, the bank "which had been solvent and in a fair financial condition on the said 3d day of October, 1881, became insolvent and was compelled to go into liquidation on the 14th day of April, 1882, as hereinbefore alleged;" that all of his acts in effecting the loans appeared on the books and might have been discovered by the directors by a proper examination, and it was owing to their negligence and inattention to duty that Lee was permitted to continue in office and to continue his mismanagement of the bank's affairs until it had become insolvent; therefore, the complainant insisted that the directors were responsible for all losses sustained by the bank through the negligence and wrongful conduct of Lee.

It was further alleged that on January 18, 1882, Vought sold his stock in the bank, and that Spaulding and Francis E.

Coit sold their stock on April 11, 1882, and that thereby each of them became disqualified to act as a director, but none of them resigned; that on April 14, 1882, the stock was held as follows: Lee, 170 shares; Hall, 578 shares, purchased April 11, 1882; Prosser, 50 shares; Barnum, 30 shares; Marshall, 10 shares; Mr. Rochester, 10 shares, and Mrs. Rochester, 12 shares, all purchased in January, 1882; Gluck, 20 shares, purchased in December, 1881, and 10 purchased in January, 1882; Mrs. Stagg, 100 shares, held since 1864; and defendant Johnson, 10 shares, purchased January 9, 1882; that all the stockholders, except Lee, Hall and Johnson, were ignorant of the bank's condition and innocent of all participation in the negligent and wasteful management of the bank, and have been subjected by reason of the negligence, inattention to duty and wrongful acts of the directors to a loss equal to double the amount of the par value of their shares of stock together with the amount of their proportionate interest in the surplus and undivided profits, which their respective interests in the stock of the bank would have brought them if the bank "had continued in the condition in which it was on the said 3d day of October, 1881."

And complainant claimed to be entitled to sue for and recover all the losses and damages which the bank, its stockholders and creditors had sustained in the premises.

The bill prayed for answers, the oath not being waived, and for general relief; and was taken as confessed against the defendants R. P. Lee and Anne M. Vought, as executrix of John H. Vought.

Spaulding, Johnson, Cushing, the executrix of Francis E. Coit and the administrators of Charles T. Coit answered severally.

These answers denied the jurisdiction of the court; and denied that the receiver could maintain the action as one for equitable relief, and insisted that the remedy, if any, was at law.

The answers of the executrix and the administrators denied that the cause of action survived. Cushing claimed that his responsibility, if any, terminated upon the sale of his stock September 24, 1881.

Statement of the Case.

The defence was set up on behalf of Charles T. Coit that he could not be held responsible from October 3 to December 11, 1881, when he died, because of his ill health and absence on the leave granted to him on October 3; and it was insisted on behalf of Francis E. Coit that he should be excused for failure to attend to the business of the bank by reason of his ill health, so far as he did not attend to it, if responsible at all.

The same defence was made on behalf of Johnson, with the added fact of serious illness in his family; and the age and practical retirement from business of Mr. Spaulding were also set forth.

All denied any intentional wrong-doing, or omission of duty, or legal responsibility for the losses. All asserted their confidence in Lee's capacity and integrity and their belief in the sound financial condition of the bank. All denied any neglect of duty in the premises, and it was denied that any special losses occurred from January 10, 1882, to the stoppage of the bank; and asserted on behalf of Spaulding and Francis E. Coit that if any loss happened between the 11th of April and the 14th they could not be held responsible under the bill as framed, as they had parted with their stock and thereby ceased to be directors.

Voluminous evidence was taken and upon the hearing of the cause the bill was dismissed as to defendants Spaulding, Johnson and Caroline E. Coit, executrix, without costs, and as to defendants Cushing and the administrators of Charles T. Coit, with costs.

From this decree an appeal was prosecuted to this court. The opinion of the Circuit Court will be found in *Movius* v. *Lee*, 30 Fed. Rep. 298.

The Circuit Court held that defendant Cushing ceased to be a director of the bank prior to the occurrence of the losses as alleged and owed no duty in that behalf, and that Charles T. Coit's absence on leave from October 3, 1881, to his death, December 11, 1881, exonerated him, and that defendants Spaulding, Johnson and Francis E. Coit were not liable under the statute, because they did not come within its provisions, nor by the common law, for by that each was liable only for his own miscarriages and none were shown.

Mr. Ansley Wilcox and *Mr. W. Hallett Phillips* for appellant. *Mr. John G. Milburn* was on their brief.

Mr. E. C. Sprague for appellee Spaulding.

Mr. Benjamin H. Williams for appellee Johnson.

Mr. David F. Day for appellee Cushing.

Mr. Daniel N. Lockwood for appellee Coit's administrator.

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

In the language of appellant's counsel, the bill was framed upon the theory of a breach by the defendants as directors "of their common law duties as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act."

And it is claimed that the defendants should have been held liable for the losses which occurred through loans of the bank's funds and moneys during their term of office as directors, to Lee, his father, his wife and certain designated persons, which were the principal losses, though there were others smaller in amount for which they were responsible.

This liability is alleged to have been incurred by Lee for all loans from October 3, 1881, until April 14, 1882; by F. E. Coit for all losses through the mismanagement of the bank from October 3, 1881, until April 14, 1882, which could have been prevented by reasonable diligence and care on the part of the directors; by John H. Vought on the same basis and for the same time; by Charles T. Coit from October 3 to December 11, 1881; by Cushing from October 3, 1881, to January 10, 1882, unless his liability terminated with the transfer of his stock on the books of the bank; by Spaulding and Johnson from January 10 to April 14, 1882.

It is contended, as an independent proposition, that each of the defendants should have been held liable for all loans made during the periods before mentioned when the loans exceeded ten per cent of the capital of the bank, in violation of Rev.

Stat. § 5200, and also for all loans made while the bank's reserve was below fifteen per cent of its deposits, in violation of Rev. Stat. § 5191, where such loans resulted in losses.

And finally, that each of the defendants should have been held absolutely liable for all losses of the bank incurred by carrying on its business after its capital became impaired or exhausted and the bank insolvent.

Under Rev. Stat. § 5136, national banking associations were empowered "Fifth. To elect or appoint directors, and by its board of directors, to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted and the privileges granted to it by law exercised and enjoyed. Seventh. To exercise by its board of directors, or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

By section 5145, the affairs of each association were to be managed by not less than five directors, to be elected at meetings to be held in January, and to hold office for one year and until their successors were elected and had qualified; and by section 5146, every director was obliged to own in his own right at least ten shares of the capital stock, and if he ceased to own the required number of shares or became in any other manner disqualified, he thereby vacated his place. By section 5148, any vacancy in the board was to be filled by an appointment by the remaining directors, and any director so appointed held his place until the next election.

Section 5147 provided that: "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title," etc.

By section 5211, every bank was required to make not less than five reports during each year, under the oath of the president or cashier, and attested by at least three of the directors, exhibiting in detail the resources and liabilities of the bank, and the comptroller could call for special reports.

Under section 5240, the appointment of bank examiners was provided for, with power to make thorough examination into the affairs of any bank, and in doing so to examine any of the officers and agents on oath, and make a full and detailed report to the comptroller.

Section 5239 is in these words: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

When the banking act was originally passed and this bank was organized that which is now subdivision seven of section 5136 did not contain the words "or duly authorized officers or agents, subject to law;" that is, the original act provided that the board of directors might exercise all such incidental powers as should be necessary to carry on the business of banking, as

there specified, but said nothing about the exercise of those powers by the bank officers or agents. The words were inserted in the Revised Statutes, 1873, 1874.

The articles of association of the First National Bank of Buffalo were framed under Rev. Stat. § 5133, and provided for an annual meeting of the stockholders; that the board of directors should appoint a president, cashier and such other officers and clerks as might be required to transact the business of the association and define their respective duties, and by their by-laws specify by what officers of the association or committee of the board the regular banking business of the association should be conducted; and empowered the board of directors to require bonds of the officers. The by-laws of the institution were adopted December 13, 1863, and had relation to the then powers of the board of directors. By section 13 a standing committee was provided for, to be known as the exchange committee, consisting of the president and three directors, appointed by the board every six months, which had power to discount bills, notes, etc., and was required to report at the regular board meetings. Under section 19 a committee was to be appointed every three months to examine into the affairs of the bank and report to the board. Regular meetings were required to be held monthly. It is alleged that on the 7th of January, 1879, the board requested itself to meet thereafter regularly on the first of every month, "to look after the affairs of the bank," etc.

It appears that the provisions of the by-laws were not observed, at least after the amendment in sub-section 7, § 5136, and that the management of the bank was left almost entirely to the officers. No exchange committee nor examination committee was appointed, and the meetings of the board were infrequent and perfunctory. For years prior to the failure, fourteen at least, the business of the bank had been conducted by the president.

It is not contended that the defendants knowingly violated, or permitted the violation of, any of the provisions of the banking act, or that they were guilty of any dishonesty in administering the affairs of the bank, but it is charged that

they did not diligently perform duties devolved upon them by the act.

Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although if any director participated in or assented to any violation of the law by the board he would be individually liable. The corporation after the amendment of 1874 had power to carry on its business through its officers. And although no formal resolution authorized the president to transact the business, yet in view of the practice of fourteen years or more, we think it must be held that he was duly authorized to do so. It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part, is another question. Indeed, it is frankly stated by counsel that "although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong-doing;" and section 556 of Morawetz on Corporations is cited, which is to the effect that "the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed."

Opinion of the Court.

It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. Morawetz, §§ 551 *et seq.*, and cases.

Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to *cestui que trust.*

In *Percy* v. *Millaudon*, 8 Martin, (N. S.) 68, 74, 75, which has been cited as a leading case for more than sixty years, the Supreme Court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault "is by inquiring whether he neglected the exercise of that diligence and care, which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction, renders himself responsible for the slightest neglect. There are others, where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It

is not contemplated by any of the charters, which have come under our observation, and it was not by that of the Planter's Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge, to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Spering's Appeal, 71 Penn. St. 11, 20, was the case of a bill filed by Spering, as assignee of a trust company, against its directors and others, to compel them to make good losses sustained by the depositors on the ground of fraudulent mismanagement of the affairs of the company. And Judge Sharswood, speaking for the court, said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee entrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries — persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. . . . We are dealing now with their responsibility to stockholders, not to outside parties — creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found

no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means, that their responsibility is limited to these cases, and that there might not exist such a case of negligence or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places." And see *Citizens' Building Association* v. *Coriell*, 34 N. J. Eq. 383; *Hodges* v. *New England Screw Company*, 1 R. I. 312; *Wakeman* v. *Dalley*, 51 N. Y. 27.

It was in this aspect that Lord Hatherley remarked in *Land Credit Company* v. *Fermoy*, L. R. 5 Ch. 763, 772: "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable." And the same view is expressed by Sir George Jessel, M. R., in his opinion in *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450, 451, where he says: "One must be very careful in administering the law of joint-stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account, and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Wilful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund — in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

The theory of this bill is that the defendants are liable, not

to stockholder nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention.

If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations.

In *Preston* v. *Prather*, 137 U. S. 604, 608, it was ruled that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping; and whether that negligence existed or not is a question of fact for a jury to determine, or to be determined by the court where a jury is waived. And, further, that the reasonable care which the bailee of another's property entrusted to him for safe-keeping without reward must take, varies with the nature, value and situation of the property, and the bearing of surrounding circumstances on its security. That was a case of persons, engaged in the business of banking, receiving for safe-keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of scant means, was engaged in speculations in stocks. They made no examination of the securities deposited with them, and did not remove the cashier. He stole the bonds so deposited; and it was held that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen. And Mr. Justice Field, delivering the opinion said: "Undoubtedly if the bonds were received for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions."

No one of the defendants is charged with the misappropriation

or misapplication of, or interference with, any property of the bank, nor with carelessness in respect to any particular property: but with the omission of duty, which, if performed, would have prevented certain specified losses, in respect of which complainant seeks to charge them.

The doctrine that one trustee is not liable for the acts or defaults of his cotrustees, and while, if he remains merely passive and does not obstruct the collection by a cotrustee of moneys, is not liable for waste, is conceded, but it is argued that if he himself receives the funds, and either delivers them over to his associate, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste; *Bruen* v. *Gillet*, 115 N. Y. 10; Pomeroy Eq. Jur. §§ 1069, 1081; and that this case comes within the rule as thus qualified.

Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part.

And in this connection the remarks of Mr. Justice Bradley in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 382, may well be quoted: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is fail-

ure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed."

In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances.

The alleged liability of the defendants is such that the facts must be examined as to each of them.

As to the defendant Cushing, the evidence establishes that on the 24th of September, 1881, he resigned his office as a director of the bank verbally to Charles T. Coit, the then president, and on that day sold to Mr. Coit the ten shares of the capital stock of which he was the owner. The books of the bank show the sale and transfer as of September 24, 1881, but the certificate and power of attorney authorizing the transfer were apparently not delivered until October 7, when the money was paid, being $125 per share. According to the recollection of Lee, the entry in the transfer book was not made until November, when he thinks the stock was sent up to him by Mr. Coit from New York city, but he was informed of Mr. Cushing's resignation of his position as director on October 3, 1881, by Mr. Coit, who was then president of the bank. This was brought out upon cross-examination, after complainant had examined Lee in chief in relation to Cushing's resignation and the vacancy created by the transfer of his stock. Cushing testified that the transfer was made on

September 24, 1881, and we cannot hold that the Circuit Court erred in concluding that that testimony, coupled with the evidence of the record, outweighed the testimony of Lee, which was, indeed, of minor importance if the resignation had taken effect as stated. It is objected that the evidence of Cushing was incompetent, but we do not find that this objection was made when Cushing was examined and cross-examined as a witness. Nor do we think the evidence incompetent as against complainant. Rev. Stat. § 853; N. Y. Code Civ. Proc. § 829; *Monongahela Bank* v. *Jacobus*, 109 U. S. 275; *Snyder* v. *Fiedler*, 139 U. S. 478.

In *Whitney* v. *Butler*, 118 U. S. 655, 662, it was held that where stock had been sold, and the certificate, with power of attorney for transfer duly executed in blank, delivered to the president of the bank, the responsibility of the original stockholder terminated. And Mr. Justice Harlan said for the court: "It was suggested in argument that the defendants should have seen that the transfer was made. But we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was under all the circumstances, that of careful, prudent, business men, and it would be a harsh interpretation of their acts to hold (in the language in some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a shareholder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the

bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock, on the books of the association, to the purchaser." Tested by this rule the conclusion of the Circuit Court on the matter was correct.

The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more orderly and proper mode of procedure, but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case. We do not understand that because Section 5145 of the Revised Statutes provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the banking law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective. *Rex* v. *Mayor, &c. of Ripon*, 1 Ld. Raym. 563; *Olmsted* v. *Dennis*, 77 N. Y. 378; *Chandler* v. *Hoag*, 2 Hun, 613; *S. C.* 63 N. Y. 624; *Bruce* v. *Platt*, 80 N. Y. 379; *Port Jervis* v. *Bank of Port Jervis*, 96 N. Y. 550.

Having sold his stock September 24 and resigned his position, Mr. Cushing did not thereafter act as a director, and was not present at the meetings of October 3 and December 17, 1881, and January 10, 1882.

The bill alleges that the bank was entirely solvent on October 3, and engaged in a prosperous business with a large surplus, the shares commanding a premium of fifty per cent. Upon this question there was no issue made as between complainant and Cushing, and while, as hereafter stated, we believe the bank to have been hopelessly insolvent at that date, the case must be determined upon the allegations of the bill, and there is nothing in the record to cast the least suspicion upon the good faith of the transaction. There is no charge of breach of trust prior to the resignation and sale, and the decree as to Cushing must be affirmed.

Charles T. Coit had been the first cashier of the bank and was elected a director in 1870. He was its president from June, 1879, to the date of his death on December 11, 1881. On October 3, 1881, a meeting of the board of directors was held, at which Charles T. Coit, Francis E. Coit, Vought and Lee were present. Cushing, who had resigned on the 24th of September, was absent. It appears that at this meeting a resolution was adopted giving Charles T. Coit, the president, a leave of absence, on account of ill health, for one year. No one was elected president prior to January 10, 1882, in his place. There is no doubt of the severity of his illness and the necessity for his absence; but it is contended that the resolution referred to absence as president and not as director, and that no power existed to allow leave of absence to a member of the board, and so that the resolution should be limited to excuse him from attendance at the bank, but not to permit him to leave the city; and it is said that if he wished to be absolved from responsibility while absent in search of restored health, he should have resigned. If such were the rule, we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and are not called upon by reason of illness to retire at once from the affairs of this world and confine themselves to preparation for their passage into another. There was here no neglectful abandonment of duty from October 3 to December 11, and the decree in favor of the administrators of Charles T. Coit was properly rendered.

We pass, then, to the inquiry as to the liability of defendants Spaulding and Johnson. In what did their negligence consist, and were losses occasioned by that negligence, and what losses? Their conduct is to be judged not by the event, but by the circumstances under which they acted.

Johnson had done business with the bank since 1865, and from 1879 had been a customer individually, and also connected with several firms who kept accounts with the bank

and had a line of discounts there. When requested by Lee in December, 1881, to fill one of the vacancies created by the resignation of Cushing and the death of Charles T. Coit, he objected to doing so, on the ground of want of knowledge of the banking business, and the fact that the nature of his own business carried him away considerably from the city, but finally, upon being informed that the bank was in prosperous condition and that much of his time would not be required, accepted. After the 10th of January he was in the bank from time to time, and inquired about its business, and was told by Lee that everything was going on well. At Lee's request he signed the report of March 11, 1882, which had been sworn to by the cashier, and signed by Francis E. Coit before Johnson signed it. He was informed that the report contained a correct exhibit of the condition of the bank as shown by its books; and Lee testified that it did, and that if incorrect the error could not have been detected by an examination of the books and papers of the bank. Very soon after the 10th of January, Mrs. Johnson became perilously ill, and Johnson, through the extra strain put upon him, fell himself into such a physical and mental condition as incapacitated him from properly attending to business.

Spaulding had had a large and various experience and, as a member of Congress, drafted the original national banking act, was president of a leading bank and connected with several financial corporations, and testified that the practice of banks, so far as he knew, all over the country, was to a large extent to carry on the business through their executive officers, especially where these officers held a majority of the stock; that when he purchased his stock he believed this bank was being conducted by its duly-authorized officers, and his judgment was that his duty as a director was discharged if he attended the meetings to which he was summoned, performed such duties as were specifically required of him and gave such advice as was asked from him; that his summers were spent upon his farm in the country; that in 1882 he was seventy-two years of age; that he was in a measure retired from business, so that he gave very little attention to the affairs of his

own bank, but was ready to give any advice or suggestions when called upon for that purpose upon any special matters; that for many years it had been the practice in the corporations in which he was a director to treat him as an advisory director, and not as a director occupied in the daily management of their affairs; and that he accepted the position upon the understanding that he should occupy this relation.

He set forth in his answer, which was made under oath as required by the bill, and which was, therefore, evidence, that it was well known to the stockholders and most other persons dealing with the bank that he had retired from active pursuits, and that it was only expected of him by the stockholders and the depositors of the bank that he should more especially perform such duties as he should be specifically required to perform by its board of directors and officers, and that he should impart such advice in its management as he should be asked to give in the course of its business.

He further stated that he never received or expected to receive any compensation or benefit from the bank as a director; that Lee was the owner of a large majority of the stock; that, as is customary in such cases, Lee had assumed, to a large extent, the management and control of the bank, with the knowledge of the other directors and with the knowledge of the stockholders of the bank, and most, if not all, of the depositors therein; and upon information and belief "that long before he became a stockholder of said bank, and up to the time he became such stockholder, and while he was such stockholder, it was understood by all persons having dealings with the said bank that the said Lee practically administered the affairs thereof, as its chief executive officer."

A large amount of evidence was given tending to show that nearly if not all of the present creditors of the bank were familiar with the fact that the business of the bank was conducted, so far as its discounts and other banking business was concerned, without the intervention of the board of directors, or a committee of that board.

Mr. Spaulding further testified that he never received any notice to attend directors' meetings; that he had no actual

knowledge of the by-laws; that he was not appointed on any committee or requested to perform any duty; that he supposed the bank was in a prosperous condition down to the day of its failure; that he had confidence in Lee's capacity and integrity, and that the business of the bank was being conducted safely and prosperously under his management; that he talked with Lee in regard to the affairs of the bank, who told him the bank was in good condition; that he examined the reports made to the comptroller, December 31, 1881, and March 11, 1882, and saw by them that everything was going right; and that he knew the duty of making an examination had not been devolved upon him; and further stated that it would have taken a month to have ascertained whether the reports to the comptroller were correct; and that it was the duty of the comptroller and the bank examiner to do so.

The evidence fairly establishes that this bank was in good credit up to the time of its failure. It had been in existence for eighteen years; had been prosperous; had paid dividends regularly, down to and into 1881, and its stock had for years stood far above par, at fifty per cent above, October 3, 1881, according to complainant. Neither the defendants, nor the bank's customers, nor the community, appear to have entertained the least suspicion as to its solvency. The losses which it is claimed rendered it insolvent, and for the recovery of which losses this action was instituted, occurred by reason of the discounting by Lee of the paper of persons engaged with him in outside business and speculations, who were not adequately responsible for their engagements. The vice in the situation lay, not in the reports nor in the books, upon their face, but in the unreliability of the bills receivable.

Were these defendants guilty of negligence in allowing Lee to remain in charge of the bank? Would they have been so guilty if they had put him in charge for the first time on the 10th of January?

It appears that Lee went into the employment of this bank in 1868, being then eighteen years old, and so remained until April 14, 1882, occupying in succession the positions of messenger boy, book-keeper, teller, assistant cashier, cashier, vice-

president and president. He was the son of an old and well-known citizen of Buffalo, a graduate of its high school, was or had been one of the trustees and treasurer of a leading church in Buffalo, treasurer of the Young Men's Christian Association, and a member of the Young Men's Association. His general character was good, his reputation for integrity and financial capacity excellent, and he possessed the confidence of his fellow-citizens. Upon the 10th of January, 1882, he was the owner of two-thirds of the stock of the bank, and had apparently a greater interest than any other person in seeing that its affairs were so managed that its capital would remain unimpaired. The business of the bank had been conducted for years by the president, assisted by the other executive officers, and it had seemingly been well conducted. Lee was selected to assume the management when Charles T. Coit retired in October, 1881, by the then board of directors, and there was nothing to indicate that the choice was not a proper and fit one. We think no jury would have been justified in finding defendants guilty of negligence in retaining Lee in the management of the bank. Nor was there any violation of law in permitting him to conduct its business, for he was duly authorized to do so under the provisions of the act. We do not mean that this dispensed with reasonable oversight by the directors, but that belongs to a different branch of inquiry.

But it is contended that defendants should have insisted on meetings of the board of directors or had special meetings called, and at those meetings or otherwise made personal examination into the affairs of the bank, and that had they done this they would have discovered the condition of the bank and prevented losses occurring subsequently to the 10th of January.

Here, again, it should be observed that even trustees are not liable for the wrongful acts of their co-trustees unless they connive at them or are guilty of negligence conducive to their commission, and that Lee and Vought had long been directors.

It is shown that for fourteen years the affairs of the bank

had been left wholly with the president and cashier, and that from the 10th of January to the stoppage of the bank the business was done as it had always been done. No bonds had been required of the officers for at least fourteen years; no meetings were held by the board of directors except the annual meeting and meetings to declare dividends or on some special occasion; no exchange committee had been appointed since 1875; and no committees had ever been appointed to examine into the bank's affairs, question its cashier, or compare its assets and liabilities with the balances on the general ledger. So that this manner of conducting the business had been sanctioned by long-continued usage, and the evidence tends to show that the method pursued must have been and was well known to many of its customers, including those who were creditors at the time of its failure, as well as its stockholders. All this was not as it should have been, and ought not to be countenanced, but the facts have an important bearing on the question whether Spaulding and Johnson should be held liable because they did not at once endeavor to change the entire methods of doing business and enter upon an exhaustive investigation of the assets. Would ordinarily prudent and diligent men have done so under similar circumstances? It is not so much a question of holding meetings, as of examination, searching and thorough; an overhauling of the bills receivable, and the detection of the uncollectible indebtedness which rendered the bank insolvent. Were Spaulding and Johnson guilty of negligence in that they did not make such an examination within ninety days after they became directors, in the teeth of the assurances of Lee, in whom they reposed confidence, who had been connected with the bank for so many years, and who owned two-thirds of the stock?

The kind of examination required is indicated by the fact that although the evidence leaves it beyond question that the bank was insolvent on the third of October, 1881, its capital and surplus wholly exhausted, and losses incurred for thousands of dollars beyond that amount, complainant, after a year's close investigation, alleges that the bank was at that time

solvent, engaged in a prosperous business, with an unimpaired capital and a surplus, and with stock standing at fifty per cent above par. Indeed, the books and papers of the bank were kept in such a condition that even the cashier swore that he did not suspect anything wrong in the management until April 10, 1882.

There were, it is true, two transactions in violation of the provisions of the banking law, not entered on the books, and to which the learned circuit judge refers. On the 18th of January, 1882, Lee took $23,680 from the cash of the bank, which he replaced by a slip of paper with the amount on it in the cash drawer. This was called a cash item, and was thereafter counted as cash. It was reduced from time to time until on April 12 it was $12,405. On February 15, he took $16,737.50 in the same way from the bank's cash and placed a similar slip in the drawer. This was reduced by April 12 to $11,435. These transactions were not concealed from the cashier and subordinate officers of the bank, yet, in view of Lee's position and character, excited no suspicion, and the directors were not informed of the facts.

Again, under section 5200 Rev. Stat., the total liabilities for money borrowed to any national banking association of any person, company, etc., should at no time exceed one-tenth part of the capital stock, but the discount of bills of exchange drawn in good faith against actually existing values, and of commercial or business paper actually owned by the person negotiating the same, is not to be considered as money borrowed. This provision was grossly violated, but while Lee testified in chief for complainant that the directors could have ascertained from an examination of the books, papers and notes whether or not the loans, which exceeded $10,000, were for discounts of bills of exchange or business paper, within the exception, he stated, on cross-examination, that it would not have been possible, from an inspection of the paper simply, or an examination of the books of the bank, or both, to have made the discovery, thus drawing a recognized distinction between bare inspection and thorough examination, a distinction also applicable to loans when the reserve was below

fifteen per cent of the deposits, and generally. We are impressed by the evidence with the conviction that a cursory glance would not have been enough.

Would it not have been the exercise of an extraordinary degree of care if these defendants had insisted, within the first ninety days, upon making such an examination?

Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption.

"I know of no law," said Vice-Chancellor McCoun, in *Scott* v. *De Peyster*, 1 Edw. Ch. 513, 541, "which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued. But, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable."

Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman* v. *Dalley*, 51 N. Y. 27, 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: "He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors gen-

erally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should."

And so Sir George Jessel, in *Hallmark's Case*, 9 Ch. D. 329, 332: "It is contended that *Hallmark*, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *Ex parte Brown*, 19 Beav. 97, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case."

We are of opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation and did not themselves individu-

ally conduct an examination, during their short period of service; or because they did not happen to go among the clerks and look through the books, or call for and run over the bills receivable.

Of course a thorough examination would have ascertained that the bank ought to be put into liquidation at once. Nothing that could have been done on or after the 10th of January would have saved it. Insolvent on the 3d of October, its condition had changed for the worse January 10. And it is worthy of notice that the persons or firms, losses by reason of advances to whom are named in argument as the main cause of the failure and basis of recovery, were all debtors of the bank October 3, 1881, some of them for a long time before, and all debtors January 10, 1882, and the figures of the experts seem to show that the amounts due from them at the latter date were not many thousand dollars greater in the aggregate on April 14, 1882. The indebtedness of Lee, his father and his wife was nominally less, while that of some of those through whom he appears to have conducted his operations was larger. According to him such increase in poor assets, as there was, was substantially attributable to increased loans made in the hope of carrying through parties already in debt to the bank, and he says that there was really no material change in the character of the paper between January 9 and the stoppage of the bank.

But it is unnecessary to do more than refer to these matters as indicative of the uncertainty as to what losses would have been prevented if the bank had been wound up earlier than it was and as to the point of time to which the supposed liability should be referred, if an interlocutory decree had been entered.

We are not disposed, therefore, to reverse the decree as to defendants Spaulding and Johnson, and although the case of Francis E. Coit was in some aspects different, and particularly in that he was a director for a longer period, we think it should take the same course. He was elected a director May 20, 1881, to fill a vacancy created by the death of George Coit. He was at the time an invalid, and by reason of his

infirmity in health unable to transact business, at least with facility. His co-directors at the time of his election were Charles T. Coit, Vought, Cushing and Lee. He was re-elected January 10, 1882. The evidence shows that he had for many years been afflicted with rheumatism. So far as appears, Lee, Vought and Cushing were in good health, although Charles T. Coit was not, but the latter continued in the management of the bank down to the third of October. While it may be said that Francis E. Coit should not have accepted the position of director, and should not have allowed himself to be re-elected, yet upon this question of passive negligence the rule would be an exceedingly rigorous one which made no allowance for the person charged under such circumstances. And upon the whole we do not feel called upon to question the decision as to him.

It must be remembered that in cases turning upon questions of fact, in order to reverse, we must be prepared to hold that the findings were not justified. And this we cannot do, taking into consideration all the facts contained in this voluminous record, which we have attempted thoroughly to explore.

The turning point, so far as defendants Spaulding and Johnson are concerned, (and we include with them Francis E. Coit,) is whether under all the circumstances they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them; and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted.

Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought

they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors, and it is really to that the case becomes reduced at last. For the reasons given, the decree will be

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Gray, Mr. Justice Brewer and Mr. Justice Brown, dissenting.

Mr. Justice Gray, Mr. Justice Brewer, Mr. Justice Brown and myself are unable to concur in the opinion and judgment of the court.

We accept, as sufficient, the reasons given for the exemption of the estate of Charles T. Coit and of Cushing from liability for the losses of the bank here in question. But we are of opinion that, under the evidence, the defendants Elbridge G. Spaulding, Francis E. Coit, and W. H. Johnson became respectively liable for such of those losses as could have been prevented by proper diligence upon their part as directors. It would serve no useful purpose to refer in detail to all the evidence establishing their dereliction of duty. In our opinion, the proof is clear and convincing that a considerable part of the amount lost to the bank, and therefore to its stockholders and depositors, could have been saved, if they had exercised such care in the supervision and management of the bank's business, as men of ordinary diligence exercise in respect to their own business. In fact, those gentlemen, while they were directors, had no knowledge whatever of what was being done by Lee in the conduct of the bank. They took his word that all was right, and gave no attention whatever to the management of its business. Their eyes were as completely closed to what he did, from day to day, in directing the affairs of the bank, as if they had deliberately determined not to see and not to know how he controlled its

business. In the cases of Francis E. Coit and Johnson, there are some mitigating circumstances arising out of the condition of their health, at particular dates, but they are not such as to relieve them from the responsibility they assumed by becoming directors. When Lee asked Johnson to become a director, the latter expressed doubt as to whether he could give the bank much of his time. But Lee said to him that "he could fix that all right." Johnson having, upon one occasion, inquired, in a general way, how the bank was getting on, Lee replied, "nicely;" and Johnson was satisfied. Both Francis E. Coit and Johnson signed reports to the comptroller of the treasury that were false and fraudulent, without having the slightest knowledge of their truth or falsity. They signed and certified to their correctness entirely upon their faith in Lee. They acted as if confidence in him discharged them from all responsibility touching the management of the bank.

In the case of Mr. Spaulding, there are absolutely no circumstances of a mitigating character. He was learned in the law, and had large experience in banking. He accepted the position of director to accommodate Lee, and without any examination of the condition of the bank. Lee told him the bank was all right, and upon that, and that alone, he rested with implicit confidence. Having taken the oath required by the statute, that he would, so far as the duty devolved upon him, diligently and honestly administer the affairs of the association, and having ascertained that the executive officers were in charge of the bank, performing the duties belonging to their respective positions, he did not, he says, "go any further." Under such circumstances, and as he interpreted the national banking act, he felt himself "relieved from any specified duty." He "had no knowledge of either the provisions of the by-laws or articles of association." In his opinion, if the directors imposed upon the executive officers of the bank the duty of conducting its business, the duties of directors became thereafter "nominal." He performed no duty, while he was director, except "to examine the reports;" but he made no examination to ascertain their correctness. He says: "I regarded my duty as ended, to a great extent, when I saw

the bank was in the same charge that it had been." Being asked whether he went to the bank and made an examination of its books, papers or affairs, he replied: "I did not; I took Mr. Lee's word for it." When asked in reference to the enormous overdrafts, made while he was director, and whether he did anything to prevent them, he replied: "I didn't go to the bank to ascertain. I left the officers in charge as I found them." In response to the question whether from the 10th day of January down to the failure of the bank he had anything to do with the affairs of the bank, aside from holding ten shares of its stock, he said: "I never examined its books or affairs, and I only examined the reports which it made to the comptroller, whose duty it was to see that those reports were correct." He never requested any of his co-directors, or any officer of the bank, to call a meeting of the board of directors, for, said he, "that duty was devolved upon the cashier." Lastly, and as sufficient evidence that the directors abandoned to Lee the absolute control of all the bank's affairs and forebore to exercise the slightest control or supervision over him or them, only two meetings of the directors were held from October 3d, 1881, until the bank closed its doors on the 14th of April, 1882, *over the whole of which period the dishonest practices of Lee extended;* one, December 12th, 1881, for the purpose only of passing resolutions relating to the death of Charles T. Coit, and the other, January 10th, 1882, when Spaulding and Johnson were made directors. One of the by-laws provided for regular meetings of the board of directors on the first Tuesday in every month. But he had no knowledge of such a by-law or of any such meetings. It is plain from the evidence that if, with his long experience in banking business, he had given one hour, or at the utmost a few hours' time, in any week while he was director, to ascertain how this bank was being managed, he would have discovered enough that was wrong and reckless to have saved the association, its stockholders and depositors, many, if not all, of the losses thereafter occurring. Upon his theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and

honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again, unless they are notified to come there, or until they are informed that there is something wrong. And when it is ascertained that these officers or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed by them, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way. Such a system cannot be properly characterized otherwise than as a farce. It cannot be tolerated without peril to the business interests of the country.

We are of opinion that when the act of Congress declared that the affairs of a national banking association shall be "managed" by its directors, and that the directors should take an oath to "diligently and honestly administer" them, it was not intended that they should abdicate their functions and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by "duly authorized officers or agents," in respect to matters of current business and detail that may be properly intrusted to them by the directors. But, certainly, Congress never contemplated that the duty of directors to manage and to administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty remains, as between the directors and those who are interested in the bank, to exercise proper diligence and supervision in respect to what may be done by its officers and agents.

Dissenting Opinion: Harlan, Gray, Brewer, Brown, JJ.

As to the degree of diligence and the extent of supervision, to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge.

In respect to the dealings of a bank with others this court has said: "Directors cannot in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." *Martin* v. *Webb*, 110 U. S. 7, 15. A rule no less stringent should be applied as between a banking association and directors representing the interests of stockholders and depositors. Subscriptions to the stock of a banking association, and deposits with it, are made in reliance upon the statutory requirement, which cannot be dispensed with, that its affairs are to be managed and administered by a board of directors, acting under oath and with such diligence as the situation requires.

In *Cutting* v. *Marlor*, 78 N. Y. 454, 460, Chief Justice Church, delivering the unanimous judgment of the court, said: "A corporation is represented by its trustees and managers; their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The

bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry." This case was referred to, with approval, in *Preston* v. *Prather*, 137 U. S. 604, 614. So in *Hun* v. *Cary*, 82 N. Y. 65, 71, which involved the question of the degree of diligence to be exercised by directors of a savings bank, Judge Earl, speaking for the whole court, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them — the same degree of care and prudence that men prompted by self interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty — *crassa neglegentia* — not to bestow them." *Ackerman* v. *Halsey*, 37 N. J. Eq. 356, 361; *Halsey* v. *Ackerman*, 38 N. J. Eq. 501, 510; *United Society of Shakers* v. *Underwood*, *&c.*, 9 Bush, 609, 621; *Horn Silver Co.* v. *Ryan*, 42 Minnesota, 196; *United States* v. *Means*, 42 Fed. Rep. 599, 603; *Delano* v. *Case*, 121 Illinois, 247, 249; *Percy* v. *Millaudon*, 3 La. 568, 591; *Marshall* v. *F. & M. Savings Bank of Alexandria*, *&c.*, 85 Virginia, 676, 684; *Building Fund Trustees* v. *Bossieux*, 3 Fed. Rep. 817.

The case of *Charitable Corporation* v. *Sutton*, *&c.*, 2 Atk. 400, 405, 406, which involved questions of the liability of directors of a corporation for alleged breaches of trust, fraud

and mismanagement, is very instructive upon this general subject. Among the objects of the corporation was the lending of money upon pledges, etc., and banking with notes payable on demand within the amount of its stock. One of the breaches of duty complained of was non-attendance by committee-men or directors upon their employment. While conceding that the employment was not one affecting the government, Lord Chancellor Hardwicke said: "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. . . . Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance." Referring to malfeasance or nonfeasance upon the part of directors, he said: "To instance, in non-attendance; if some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely *honorary;* and therefore they are within the case of common trustees. Another objection has been made, that the court can make no decree upon these persons which will be just, for it is said every man's non-attendance or omission of his duty is his own default, and that each particular person must bear just such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of the court. Now, if this doctrine should prevail, it is indeed *laying the axe to the root of the tree.* But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine they are not all guilty. Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." So, in *Land Credit Company*

of Ireland v. *Lord Fermoy*, L. R. 5 Ch. 763, 770, Lord Hatherley said: "I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I quite agree that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company."

The observations of Lord Chancellors Hardwicke and Hatherley were referred to, with approval, by the Court of Errors and Appeals of New Jersey in *Williams* v. *McKay*, 40 N. J. Eq. 189, 201, where Chief Justice Beasley, speaking for the court, said: "I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committee-men, and then, when disaster to the innocent and helpless *cestui que trustent* ensued, stifle all complaints of their neglects by saying, we did not do these things, and we know nothing about them. . . . The misconduct in question was manifested in frequent, glaring instances, and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers, on the supposition which, in their favor, the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the life of the institution, and thus evince a systematic and habitual disregard of the directions of the company's charter and a very striking indifference to the security of the money held in trust by them."

These salutary doctrines, if applied to the present case — as, in our judgment, they ought to be — require a reversal, with directions that a decree be entered adjudging Elbridge G. Spaulding, Francis E. Coit's estate and W. H. Johnson liable for such losses occurring during the period in question, as could have been avoided by the exercise of reasonable diligence upon the part of said Coit, Johnson and Spaulding, respectively, in performing the duties appertaining to them as directors. The case is one of supine, continuous negligence, upon the part of the three directors named, in the discharge of duties they owed to the bank and to those interested in it.

Syllabus.

No usage of a national bank, nor any authority to carry on its business through executive officers and agents, will relieve its directors from the duty imposed upon them by law of diligently managing and diligently administering its affairs, and actively supervising the conduct of its officers and agents. There was here no diligence, no supervision, but absolute inaction in respect to the affairs of the bank.

It was said at the bar that if such a rule be rigidly applied, a gentleman of property and means would hesitate long before accepting the position of director in a banking association. This could not be the result if gentlemen of that class, becoming directors of such institutions, would exercise anything like the care and supervision they or any other prudent, discreet persons give to the management of their own business. They ought not, by accepting and holding the position of directors, to give assurance to stockholders and depositors, whose interests have been committed to their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors; a fact which, of itself, shows that the abdication by directors of their duties and functions not only tends to defeat the object for the creation of such an institution, but puts in peril the interests of stockholders and depositors.

McALLISTER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 238. Argued March 24, 1891. — Decided May 25, 1891.

A person appointed by the President, by and with the advice and consent of the Senate, under the provisions of the act of May 17, 1884, 23 Stat. 24, c. 53, § 3, to be the judge of the District Court of the District of

Alaska, is not a judge of a court of the United States within the meaning of the exception in section 1768 of the Revised Statutes, relating to the tenure of office of civil officers, and was, prior to its repeal, subject to removal before the expiration of his term of office by the President, in the manner and upon the conditions set forth in that section.

THE case is stated in the opinion.

Mr. Samuel F. Phillips for appellant. *Mr. F. D. McKenney* was with him on the brief.

Mr. John S. Blair and *Mr. Joseph K. McCammon* filed a brief for appellant.

Mr. Solicitor General for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

Ward McAllister, Jr., was appointed by President Arthur, by and with the advice and consent of the Senate, to be District Judge for the District of Alaska. His commission, of date July 5th, 1884, authorized and empowered him to execute and fulfil the duties of that office according to the Constitution and laws of the United States, and to have and to hold the said office, with all the powers, privileges and emoluments to the same of right appertaining "for the term of four years from the day of the date hereof, and until his successor shall be appointed and qualified, subject to the conditions prescribed by law." He took the required oath of office on the 23d day of August, 1884.

On the 21st day of July, 1885, President Cleveland, in writing, "by virtue of the authority conferred upon the President of the United States by section 1768 of the Revised Statutes of the United States," suspended him from office until the end of the next session of the Senate, and designated "Edward J. Dawne of Oregon, to perform the duties of such suspended officer in the meantime, he being a suitable person therefor, subject to all provisions of law applicable thereto." Dawne took the prescribed oath of office on the 20th of August, 1885. Subsequently, December 3d, 1885, the President, by virtue of

the same statute, suspended Dawne and designated Lafayette Dawson of Missouri, to perform the duties of the suspended officer, subject to all the provisions of law applicable thereto. Dawson took the required oath of office December 16, 1885. Having been nominated and, by and with the advice and consent of the Senate, appointed to this position, Dawson was commissioned August 2, 1886, for the term of four years from that date and until his successor should be appointed and qualified, subject to the provisions prescribed by law. He took the oath of office on the 3d of September, 1886.

Judge McAllister, without resistance, vacated the office on the 28th of August, 1885, and received the salary up to and including that date; after which he did not perform any of the duties or exercise any of the functions of the position. The salary appropriated for the period between August 29, 1885, and March 12, 1886, inclusive, has not been paid to any one and remains in the Treasury to the credit of the proper appropriation. Judge Dawson has received the salary since the latter date, except for the period between August 6, 1886, and September 2, 1886, the salary for which has not been paid to any one, but remains in the Treasury.

The appellant has not instituted proceedings of any kind other than this action to determine his right or title to the office in question since August 28, 1885, on which day he vacated his position.

He claims by his petition in this case, "as due him for said salary from the 29th of August, 1885, to the 6th day of September, 1886, the sum of three thousand and seventy dollars."

Counsel for the appellant state his contention to be (1) that he was entitled to hold the office of District Judge for the District of Alaska for four years from July 5, 1884, the date of his commission, and until his successor was appointed and qualified; or, (2), in the alternative, that his right to perform the duties and receive the emoluments of the office continued until September 3, 1886, when Judge Dawson qualified, upon which basis the amount due him would be $3041.09; or, (3), that he is, in any event, entitled to the salary from the first day after the end of the session of the Senate, August 7, 1886,

to September 3, 1886, when his successor qualified, upon which basis there would be due him $221.91.

Although the determination of the second of these propositions may, to some extent, involve a decision of the first one, it is proper to remark that no question is distinctly raised by the petition as to the right of the appellant to hold the District Judgeship for Alaska for the full term designated in his commission, namely, four years and until his successor was appointed and qualified. He sues only for the salary from the 29th of August, 1885, the day succeeding his suspension from office, to the 6th day of September, 1886, a few days after Dawson took the oath of office.

The government disputes the right of the appellant to receive any part of the sum for which he brings suit. Its defence rests upon § 1768 of the Revised Statutes. That section and the one preceding it are as follows:

"Sec. 1767. Every person holding any civil office to which he has been or may hereafter be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he was appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided.

"Sec. 1768. During any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed, in his discretion, by the designation of another, to perform the duties of such suspended officer in the meantime; and the person so designated shall take the oath and give the bond required by law to be taken and given by the suspended officer, and shall, during the time he performs the duties of such officer, be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended. The President shall, within thirty days

after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the place of all officers suspended; and if the Senate during such session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to the same session of the Senate for the office."

These sections were brought forward from the act of March 2, 1867, regulating the tenure of certain civil offices, and the act of April 5, 1869, amendatory thereof. 14 Stat. 430, c. 154; 16 Stat. 6, c. 10. By an act of Congress approved March 3, 1887, those sections, as well as sections 1769, 1770, 1771 and 1772, relating to the same subject, were repealed, subject to the condition that the repeal should not affect any officer theretofore suspended, or any designation, nomination or appointment, previously made under or by virtue of the repealed sections. 24 Stat. 500, c. 353. As the appointment and suspension of Judge McAllister occurred prior to the passage of the act of 1887, the present case is not controlled by its provisions, but depends upon the effect to be given to the sections of the Revised Statutes above quoted, interpreted in the light of the act establishing the court of which the appellant was made judge in the year 1884. What may be the powers of the President over territorial judges, now that section 1768 is repealed, is a question we need not now discuss.

By an act passed May 17, 1884, 23 Stat. 24, c. 53, the territory ceded to the United States by Russia, and known as Alaska, was constituted a civil and judicial district, with a governor, attorney, judge, marshal, clerk and commissioners, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their respective offices for the term of four years, and until their successors were appointed and qualified. §§ 1, 9. The third section relates to the court established by the act, and is in these words: "That there shall be, and hereby is, established a District Court for

said district, with the civil and criminal jurisdiction of District Courts of the United States and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a District Judge shall be appointed for said district, who shall, during his term of office, reside therein, and hold at least two terms of said court therein in each year, one at Sitka, beginning on the first Monday in May, and the other at Wrangel, beginning on the first Monday in November. He is also authorized and directed to hold such special sessions as may be necessary for the dispatch of the business of said court, at such times and places in said district as he may deem expedient, and may adjourn such special session to any other time previous to a regular session. He shall have authority to employ interpreters, and to make allowances for the necessary expenses of his court." By the seventh section, the general laws of Oregon, then in force, were declared to be laws of Alaska, so far as the same were applicable, and not in conflict with the provisions of that act or of the laws of the United States. By the same section writs of error in criminal cases were to go to the District of Alaska from the United States Circuit Court for the District of Oregon in the cases provided in chapter 176 of the laws of 1879; the jurisdiction by that chapter conferred upon Circuit Courts of the United States being given to the Circuit Court of Oregon, and the final judgments or decrees of said Circuit and District Courts being reviewable by this court as in other cases.

In view of these and other provisions of that act, it is clear that the District Court for Alaska was invested with the powers of a District Court and a Circuit Court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the Constitution and laws of the United States.

But is the court, thus established for Alaska, one of the "Courts of the United States" within the meaning of section 1768 of the Revised Statutes? If it be, then the President

had no authority, by that section, to suspend Judge McAllister, and his claim to salary, up to, at least, the confirmation by the Senate of the nomination of Dawson, is well founded. If it be not, then the judge of the Alaska court is not of the class excepted by that section, and being a civil officer, appointed by and with the advice and consent of the Senate, was within the very terms of the clause authorizing his suspension by the President, during the recess of the Senate.

An affirmative answer to the question just stated could not well be given upon the theory that a Territorial court is one of those mentioned in article three of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time establish, the judges of which hold their offices during good behavior, receiving, at stated times, for their services, a compensation that cannot be diminished during their continuance in office, and are removable only by impeachment. We say this because numerous decisions of this court are inconsistent with that theory. To these decisions we will now advert.

The leading case upon the subject is *American Insurance Company* v. *Canter*, 1 Pet. 511, 546, decided in 1828. The question there was as to the validity of a decree passed by a court, consisting of a notary and five jurors, created by a statute of the Territorial legislature of Florida, whose powers, under certain acts of Congress, extended to all rightful subjects of legislation, subject to the restriction that their laws should not be inconsistent with the laws and Constitution of the United States. On one side it was contended, that, under those acts, jurisdiction was vested exclusively in the Superior Courts of the Territory created by the acts of Congress establishing a Territorial government in Florida. Chief Justice Marshall, speaking for the court, said: "It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested in 'one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.' Hence it has been

argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial legislature. We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the judges, both of the supreme and inferior courts, shall hold their offices during good behavior.' The judges of the Superior Courts of Florida hold their offices for four years. These courts, then, are not Constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a state government."

Equally emphatic is the decision in *Benner* v. *Porter*, 9 How. 235, 242, 243. The court, speaking by Mr. Justice Nelson, said that the distinction between the Federal and state jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments; that "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." Again, after citing the judicial clause of the Constitution, (Art. 3, sec. 1,) the court said: "Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the consti-

tutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. 1 Pet. 546. Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State."

The subject next received consideration in *Clinton* v. *Englebrecht*, 13 Wall. 434, 447, where the question was whether a law of a Territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors was obligatory upon the District Courts of the Territory. The Supreme and District Courts of the Territory supposed that they were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, and not by the statutes passed by the Territorial legislature. In its discussion of the general subject this court, speaking by Chief Justice Chase, said: "The judges of the Supreme Court of the Territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in *The American Insurance Company* v. *Canter*, 1 Pet. 546, and in the later case of *Benner* v. *Porter*, 9 How. 235. There is nothing in the constitution which would prevent Congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the Territory and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. Indeed, it hardly can be supposed that the earliest Territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period. There is no Supreme Court of the United States, nor is there any Dis-

trict Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the General Government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

In *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655, the inquiry was as to whether or not the practice, pleadings, forms and modes of proceedings of the Territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the Territorial assemblies, and to such regulation as the courts themselves might adopt. This court, speaking by Mr. Justice Bradley, said: "The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the constitution, and to be exercised in correlation with the presence and jurisdiction of the several state courts and governments. They were not intended as exertions of that plenary municipal authority which Congress has over the District of Columbia and the Territories of the United States. . . . As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction."

In *Good* v. *Martin*, 95 U. S. 90, 98, the language of the court, speaking by Mr. Justice Clifford, was: "Territorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities." So in *Reynolds* v. *United States*, 98 U. S. 145, 154, Chief Justice Waite, speaking for the whole court, said: "By section 1910 of the Revised Statutes the District Courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States; but this does not make them Circuit and District Courts of the United

States. We have often so decided. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States." Again, in *City of Panama*, 101 U. S. 453, 460: "It is competent for Congress to make provision for the exercise of admiralty jurisdiction, either within or outside of the States; and in organizing Territories Congress may establish tribunals for the exercise of such jurisdiction, or they may leave it to the legislature of the Territory to create such tribunals. Courts of this kind, whether created by an act of Congress or a territorial statute, are not, in strictness, courts of the United States; or in other words, the jurisdiction with which they are invested is not a part of the judicial power defined by the third article of the Constitution, but is conferred by Congress in the execution of the general powers which the legislative department possesses, to make all the needful rules and regulations respecting the public territory and other public property."

These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories, created under the plenary municipal authority that Congress possesses over the Territories of the United States, are not Courts of the United States created under the authority conferred by that article. And there is nothing in conflict with this view in *Page* v. *Burnstine*, 102 U. S. 664, where it was held that section 858 of the Revised Statutes of the United States, relating to the competency as witnesses of parties to actions by or against executors, administrators, or guardians, applied to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. That conclusion was reached, not because the courts of the District of Columbia were adjudged to be of the class in which the judicial power of the United States was vested by the Constitution, but because all the acts relating to the competency of witnesses, when construed together, indicated that that section of the Revised Statutes applied to the courts of the District of Columbia.

For the reasons we have stated it must be assumed that the

words "judges of the courts of the United States," in section 1768, were used with reference to the recognized distinction between courts of the United States and merely territorial or legislative courts.

This view, it is contended, is not supported by the history of Congressional legislation relating to the organization of courts in the Territories. We do not assent to this proposition. The acts providing for courts in the Territories of Orleans, Iowa, Minnesota, New Mexico, Utah, Colorado, Nevada, Dakota and Arizona,[1] fixed the tenure of office for judges in those Territories, respectively, at four years. Those providing for courts in the Territories of Missouri, Arkansas, Florida, Oregon, Washington, Nebraska, Kansas, Idaho, Montana, Wyoming and Oklahoma[2] fixed the tenure of judges at four years, with the addition, in some cases, of the words, "unless sooner removed;" in others, of the words, "unless sooner removed by the President," or, "and no longer," or "and until their successors shall be appointed and qualified," or "unless sooner removed by the President with the consent of the Senate." Of course, Congress would not have assumed, in the acts providing for courts in the Territories named, to limit the terms of the judges, in the modes indicated, if it had supposed that such courts were courts of the United States of the class defined in the first section of article three of the Constitution, the judges of which hold, beyond the power of Congress to provide otherwise, during good behavior. Nor is the view that courts in the Territories are legislative courts, as distinguished from courts of the United States, weakened

---

[1] Orleans (1804), 2 Stat. 284, c. 38, § 5; Iowa (1838), 5 Stat. 238, c. 96, § 9; Minnesota (1849), 9 Stat 406, c. 121, § 9; New Mexico (1850), 9 Stat. 449, c. 49, § 10; Utah (1850), 9 Stat. 455, c. 51, § 9; Colorado (1861), 12 Stat. 174, c. 59, § 9; Nevada (1861), 12 Stat. 212, c. 83, § 9; Dakota (1861), 12 Stat. 241, c. 86, § 9; and Arizona (1863), 12 Stat. 665, c. 56, § 2.

[2] Missouri (1812), 2 Stat. 746, c. 95, § 10; Arkansas (1819), 3 Stat. 495, c. 49, § 7; Florida (1822), 3 Stat. 657, c. 13, § 8; Oregon (1848), 9 Stat. 326, c. 177, § 9; Washington (1853), 10 Stat. 175, c. 90, § 9; Nebraska (1854), 10 Stat. 280, c. 59, § 9; Kansas (1854), 10 Stat. 286, c. 59, § 27; Idaho (1863), 12 Stat. 811, c. 117, § 9; Montana (1864), 13 Stat. 88, c. 95, § 9; Wyoming (1868), 15 Stat. 180, c. 235, § 9; Oklahoma (1890), 26 Stat. 85, c. 182, § 9.

by the circumstances that Congress, in a few of the acts providing for territorial courts, fixed the terms of the office of the judges of those courts during "good behavior."[1] As the courts of the Territories were not courts the judges of which were entitled, by virtue of the Constitution, to hold their offices during good behavior, it was competent for Congress to prescribe the tenure of good behavior, as in the acts last referred to, or to prescribe, as in the other acts above referred to, the tenure of four years and no longer, or four years unless sooner removed, or four years unless sooner removed by the President, or four years unless sooner removed by the President with the consent of the Senate, or four years and until a successor was appointed and qualified. The significance of these enactments, as well as of the acts of 1867 and 1869, and of section 1768 of the Revised Statutes, is in the fact that Congress has uniformly proceeded upon the theory that the judges of territorial courts were merely legislative courts, and were not entitled, by virtue of their appointment and the Constitution of the United States, to hold their offices during good behavior, unless it was so declared in the respective acts providing for the organization of such courts. That Congress when providing a government for Alaska so regarded them is apparent from the fact that the act of May 17, 1884, fixed the tenure of the office of the judge of the District Court of Alaska at four years, and until his successor was appointed and qualified. This provision did not repeal section 1768 of the Revised Statutes; for it was not inconsistent with that section. So that the Alaska act must be taken as qualified by that section which confers upon the President the power of suspension.

It is, however, suggested that if the words "except judges of the courts of the United States," in section 1768 of the Revised Statutes, embraces only those that are called constitutional courts, as distinguished from legislative courts, it was

[1] Northwest Territory (1787), 1 Stat. 51, *note* a; Mississippi (1798), 1 Stat. 550, c. 28, § 3; Indiana (1800), 2 Stat. 59, c. 41, § 2; Michigan (1805), 2 Stat. 309, c. 5, § 2; Illinois (1809), 2 Stat. 514, c. 13, § 2; Alabama (1817), 3 Stat. 372, c. 59, § 2; Wisconsin (1836), 5 Stat. 13, c. 54, § 9.

entirely unnecessary to introduce them into the statute, because, in respect to the judges of the former, the Constitution itself makes the exception. This view is plausible and is not without some force; and yet it is not sufficient to justify the conclusion that Congress regarded judges of territorial courts as upon the same footing with judges of the courts of the United States. The acts of 1867 and 1869 inaugurated a new policy in reference to civil officers appointed by and with the advice and consent of the Senate. The presumption must be that Congress did not overlook the numerous decisions of this court, holding that territorial courts were not courts of the United States; and the words "judges of the courts of the United States," were used in those acts, as well as in section 1768, simply out of abundant caution, and to remove all doubt as to the object of Congress, by giving an assurance that there was no attempt to confer upon the President the power of *suspension* in respect to such judges.

An elaborate argument, displaying much thought and extended research upon the part of counsel, has been made in support of the proposition that, upon general principles, lying at the foundation of our institutions, the judicial power in the Territories, exercised as it must be for the protection of life, liberty and property, ought to have the guaranties that are provided elsewhere within the political jurisdiction of the nation for the independence and security of judicial tribunals created by Congress under the third article of the Constitution. We have no occasion to controvert the soundness of this view, so far as it rests on grounds of public policy. But we cannot ignore the fact that while the Constitution has, in respect to judges of courts in which may be vested the judicial power of the United States, secured their independence, by an express provision that they may hold their offices during good behavior, and receive at stated times a compensation for their services that cannot be diminished during their continuance in office, no such guaranties are provided by that instrument in respect to judges of courts created by or under the authority of Congress for a Territory of the United States. The absence from the Constitution of such guaranties for territorial judges was

no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union. The whole subject of the organization of territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive and the manner in which they may be removed or suspended from office, was left, by the Constitution, with Congress under its plenary power over the Territories of the United States. How far the exercise of that power is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire; though we may repeat what was said in *Mormon Church* v. *United States*, 136 U. S. 1, 44: "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." It is only necessary in this case to say that those principles and limitations are not violated by a statute prescribing for the office of judge of a territorial court a tenure for a fixed term of years, or authorizing his suspension, in the mode indicated in section 1768, and his ultimate displacement from office, after suspension, by the appointment of some one in his place, by and with the advice and consent of the Senate.

It has been suggested that the conclusion reached in this case is not in harmony with some observations of Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch, 137, 162. It was there said: "Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed." Again: "Mr. Marbury, then, since his commission

[as a Justice of the Peace in the District of Columbia] was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country." Further: "It [the office of Justice of the Peace in the District of Columbia] has been created by special act of Congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years." 2 Stat. 107, c. 15, § 11. Nothing in those observations militates, in any degree, against the views we have expressed. On the contrary, the Chief Justice asserted the authority of Congress to fix the term of a Justice of the Peace in the District of Columbia beyond the power of the President to lessen it by his removal, or by withholding his commission after his appointment has been made, pursuant to an act of Congress, by and with the advice and consent of the Senate, and after the commission has been signed by the President and sealed by the Secretary of State. So, in the present case, while Congress fixed the term of office of the District Judge for Alaska at four years, and until his successor qualified, it did so without modifying, and, therefore, in view of the statute then in force, giving the President power to *suspend*, in his discretion, any civil officer (other than judges of the courts of the United States) appointed by him, with the advice and consent of the Senate, until the end of the next session of that body. The decision in the present case is a recognition of the complete authority of Congress over territorial offices, in virtue of "those general powers which that body possesses over the Territories of the United States," as *Marbury* v. *Madison* was a recognition of the power of Congress over the term of office of a Justice of the Peace for the District of Columbia.

It was insisted, at the bar, that a territorial judge, appointed and commissioned for a given number of years, was entitled, of right, to hold his office during *that term*, subject only to the condition of good behavior. This view was not rested upon any specific clause of the Constitution, but was

supposed to be justified by the genius and spirit of our free institutions, and the principles of the common law. This argument fails to give due weight to the fact that, in legislating for the Territories, Congress exercises "the combined powers of the general and of a state government." Will it be contended that a State of the Union might not provide by its fundamental law, or by legislative enactment not forbidden by that law, for the suspension of one of its judges, by its governor, until the end of the next session of its legislature? Has Congress under "the general right of sovereignty" existing in the government of the United States as to all matters committed to its exclusive control, including the making of needful rules and regulations respecting the Territories of the United States, any less power over the judges of the Territories than a State, if unrestrained by its own organic law, might exercise over judges of its own creation? If Congress may — and it is conceded that it may — prescribe a given number of years as the term of office of a territorial judge, we do not perceive why it cannot provide that his appointment shall be subject to the condition, that he may be suspended by the President, until the end of the next session of the Senate, and displaced altogether by the appointment of some one in his place, by and with the advice and consent of that body. The principles of life tenure and good behavior established for judges of courts, in which the Constitution vests the judicial power of the United States, "to be exercised in correlation with the presence and jurisdiction of the several *state* courts and governments," has no application to courts that are incapable of receiving the judicial power conferred by the Constitution, and which cease to exist, as territorial or legislative courts, when the Territory becomes a State.

Judge McAllister claims the salary appertaining to the office of judge of the District Court for Alaska from the date he was suspended until Dawson was commissioned under an appointment made with the advice and consent of the Senate. The statute expressly forbids the allowance of this claim; for it provides that the officer who may be suspended, in virtue of its provisions, shall not, during the suspension, receive the

salary, but that the salary and the emoluments of the office shall belong to the person performing in his stead the duties of the office. Judge McAllister accepted the office in question subject to the provisions of section 1768, because, not being inconsistent with, it was not repealed by, the Alaska act; and as there is no ground for holding the statute to be invalid, and as his office was not of the class excepted from the operation of its provisions, there is no foundation for his claim to the salary.

It is insisted that the appellant is entitled to claim, at least, the salary from the end of the session of the Senate, August 7th, 1886, until September 3d, 1886, on which day Dawson took the oath of office under his commission of date August 2d, 1886. This contention rests upon the ground that Dawson's authority to act as judge under his appointment in place of Dawne, suspended, ceased when the Senate closed its session of 1885–6. It is a sufficient answer to this suggestion to say that when the Senate confirmed the nomination of Dawson — which must have been prior to August 2d, 1886 — and his commission was signed and sealed, the suspension of Judge McAllister became permanent. If the Senate had adjourned without acting upon that nomination a different question would have been presented.

The judgment of the Court of Claims dismissing the petition (22 C. Cl. 318) is

Affirmed.

Mr. Justice Field, with whom concurred Mr. Justice Gray and Mr. Justice Brown, dissenting.

I am unable to agree with the majority of the court in the judgment in this case, or in the reasoning upon which that judgment is reached; and I will state briefly the grounds of my conclusion.

On the 5th of July, 1884, the appellant, Mr. McAllister, was appointed by the President, "by and with the advice and consent of the Senate, District Judge for the District of Alaska, to execute and fulfil the duties of that office accord-

ing to the Constitution and laws of the United States, and to have and hold the said office with all the powers, privileges and emoluments of the same of right appertaining," for the term of four years from that date, and until his successor should be appointed and qualified, subject to the conditions prescribed by law.

The office to which the appellant was thus appointed was one of great power and responsibility. The District Court over which he was to preside was invested not only with the civil and criminal jurisdiction usually exercised by the District Courts of the United States, but also with the jurisdiction in such cases exercised by the Circuit Courts of the United States. 23 Stat. c. 53, secs. 3 and 9. The duties which devolved upon him, therefore, required qualities of a high order. It is not even suggested that he did not possess them.

He took the oath of office on the 23d of August following the appointment, and entered upon its duties, which he discharged until the 28th of August, 1885. During this period no complaint was made of his want of ability as a judge, or of official integrity, or of the manner in which he performed his duties. But on the 21st of July, 1885, and so far as appears by the record, without notice to him, or any complaint being made against him, and without any indication of what was forthcoming, he was summarily suspended from his office by the President, in the following notice:

"Executive Mansion,

"Washington, D. C., *July* 21, 1885.

"Sir: You are hereby suspended from the office of District Judge for the District of Alaska, in accordance with the terms of section 1768 of the Revised Statutes of the United States, aud subject to all provisions of law applicable thereto.

"Grover Cleveland.

"To the Hon. Ward McAllister, Jr., District Judge for the District of Alaska, Sitka, Alaska."

It was the President's will that this incumbent should cease to act, and so far as the record discloses, that was all there was

of it. His will was deemed sufficient, in his estimate of the law, to take a judicial officer charged with the great duties mentioned, a judge of a court of record created by the United States, from the exercise of his judicial functions. On the same day he proceeded to fill the office by the appointment of Edward J. Dawne of Oregon, to discharge its duties until the end of the next session of the Senate.

There have been several instances where the power to remove a judicial officer of a court of the United States in one of the Territories has been exercised by the President; but the legal right to do so has never been brought directly to the test of judicial decision in this court. The two cases which presented the question are *United States* v. *Guthrie*, 17 How. 284, and *United States* v. *Fisher*, 109 U. S. 143, but they went off on other grounds. In the first case, the Chief Justice of Minnesota Territory had been removed before his term of office had expired. Two years afterwards he applied for a mandamus against the Secretary of the Treasury to require him to pay his salary. This was refused, as there had been no appropriation to pay the claim. In the second case, the claimant had been Chief Justice of Wyoming Territory. At the time of appointment his salary was $3000 per annum; which was subsequently reduced to $2600. He brought suit for the difference; but he had accepted the reduced salary in full compensation for his services, and on that ground his suit failed.

My objection to the power exercised by the President in this case arises from the nature of the judicial office, when held by a judge of a court of record, and from its conflict with the tenure of the office conferred by the law under which the appellant was appointed. 1st. The idea essentially appertaining to and involved in the judicial office is that its exercise must be free from restraint, without apprehension of removal or suspension or other punishment for the honest and fearless discharge of its functions within the sphere of the jurisdiction assigned to it. No one in my judgment, under our system of law, can be appointed a judge of a court of record having jurisdiction of civil and criminal cases, to hold the office at

the pleasure and will of another. No such doctrine has been maintained in England since the statute of 13 William III, chapter 2, "for the further limitation of the Crown and better securing of the rights and liberties of the subject," passed in 1700, one of the great acts which followed the revolution of 1688. Previously to that period most of the judges of the higher courts held their offices during the pleasure of the Crown. Although in some instances their commissions were issued to them during good behavior, yet it was within the power of the Crown to prescribe the tenure of the office. This power exerted a most baleful influence upon the administration of justice, destructive of private rights and subversive of the liberties of the subject. In political accusations, to use the language of Mr. Justice Story, it must often have produced, what the history of the times shows actually occurred, "the most disgraceful compliances with the wishes of the Crown, and the most humiliating surrender of the rights of the accused." DeLolme, in his History of the English Constitution, states that before the year 1688 subserviency to the Crown was so general in state prosecutions that it ceased almost to attract public indignation.

After the statute of 13 William III, which Chancellor Kent speaks of as in the nature of a fundamental charter, imposing further limitations upon the Crown and adding fresh securities to the rights and liberties of the subject, commissions to judges of the courts of record could no longer be held at the pleasure of the Crown, *durante bene placito*, but they continued during the good behavior of the judges, *quamdiu bene se gesserint.* They were only removable afterwards by the King, upon the address of both houses of Parliament, although their commissions expired with the death of the reigning monarch. This latter condition was changed by the act of 1 George III, so that thereafter their commissions should not then expire and that full salaries should be secured during their continuance. This change was produced upon the special recommendation of the King, who on that occasion made a declaration, which Story says is worthy of perpetual remembrance, that "he looked upon the independence and upright-

ness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honor of the Crown." 2 Story on Const. § 1608.

Since that period no judge of a court of record in England except the Lord Chancellor (and of this exception we will presently speak) could be removed or suspended from his office by the Crown, except upon the address of both houses of Parliament, a limitation upon the exercise of the power which always secures to the accused a notice of the grounds of complaint, and a hearing upon their truth and sufficiency. This condition of permanency during good behavior in the office of judges of the courts of record is now a part of the settled public law of England. The great statutes referred to were passed long before our Revolution, and qualified the existing law of the English Kingdom and its dependencies as to the conditions upon which the judicial office in courts of record could be held. The law thus modified then constituted a part of the public or common law of this country. Whoever is here clothed with a judicial office, which empowers him to judge in any case affecting the life, liberty or property of the citizen, cannot be restrained from the fearless exercise of its duties by any apprehension of removal or suspension, in case he should come athwart the will or pleasure of the appointing power. I cannot believe that under our Constitution and system of government any judicial officer invested with these great responsibilities can hold his office subject to such arbitrary conditions. In my judgment good behavior during the term of his appointment is the only lawful and constitutional condition to the retention of his office.

The tenure of the Lord Chancellor's office is somewhat different, and though dependent more or less on the pleasure of the Crown as to the duration of his term, he is secured absolute independence in his judicial duties. Originally the Lord Chancellor was an ecclesiastic, the keeper of the king's conscience, and exercised power in his name, chiefly in ecclesiastical matters. When the necessity of his being an ecclesiastic was changed he was the King's counsellor as before, and is

now a member of his cabinet, and generally retires from office with his associates upon the change in his party's ascendency. He has both a political and judicial character, participating in the public measures of government and performing judicial functions in the Court of Chancery and in the House of Lords when sitting as a court of appeals. But no interference is ever attempted, or would be tolerated, with his independence as a judicial officer, by reason of the political functions which he also discharges. The public sense of the necessity of such independence now prevailing in England is as powerful as the most positive enactment. There is no such union of political and judicial functions in any officer in this country, and the relation of the Chancellor in England to the government in no respect affects the importance of an independent tenure of office by judges of courts of record in this country during the prescribed period of their terms.

Whenever this principle has been disregarded it has aroused deep and general indignation. Among the repeated injuries and usurpations of the King of Great Britain, which our fathers declared just ground for separation from the mother country, was that he had "made judges dependent upon his will alone for the tenure of their office and the amount and payment of their salaries." This was one of the wrongs which our fathers submitted to "a candid world" as justifying the people of the United States in withdrawing from the English nation and establishing for themselves a new form of government.

When the Constitution of the United States was framed, the Convention took special care to prevent the possibility of the commission of such a wrong, under the new government to be created, by embodying in that instrument the declaration that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Art. III, sec. 1.

This provision was only the expression of a principle that had become the established law of all English-speaking people.

When the Constitution was under discussion before the country previous to its adoption this article received special attention. The writers of the Federalist published several articles on the subject, which were widely read and discussed. One of them, No. 78, written by Mr. Hamilton, is directed especially to the tenure of office of the judges. He says: "The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws."

And again, after stating that the judiciary is the weakest of the three departments of the government, and that though oppression may now and then proceed from the courts of justice, he says: "The general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislative and the executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security."

It is contended that because courts established in the Territories are not the courts to which the Constitution has refer-

ence they are not therefore courts of the United States in any sense, and that their judges are bereft of that independence which is deemed so essential in the judges of the courts under the Constitution. But it seems to me that in this contention the character of the judicial office is entirely overlooked. The courts for the Territories, though not permanent like the courts referred to in the Constitution, are courts of the United States; they are created by the laws of the United States, and are designed to give that security and protection in the enforcement of the private rights of the inhabitants of the Territories which the courts in the States are empowered to give to their citizens, beside exercising some of the powers of the Federal courts. Their judges are appointed by the same authority, by the President, by and with the advice and consent of the Senate, and are secured their compensation from the Treasury of the United States. They enforce the laws of the United States, and from their judgment and decree an appeal lies to this court. Although differing in the period prescribed for their terms, they are clothed with many of the powers and perform many of the duties which the judges of the United States appointed within the States perform there. The same learning, integrity and ability are required of them; the same necessity for independence and freedom from apprehension of executive or legislative interference with the performance of their duties exists with reference to them as exists with reference to all judges appointed under the Constitution. It is true that in many cases the two kinds of courts, those existing in the States created under the Constitution and those created by Congress and existing in the Territories, are mentioned, and they are distinguished. Thus in *American Insurance Co.* v. *Canter*, 1 Pet. 511, Chief Justice Marshall, speaking of the courts of the Territory of Florida, says: "They are not 'constitutional courts,' but are 'legislative courts,' created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules for the territory of the United States." All this decision affirms is that the judges of those courts do not derive their existence

from the Constitution, for if they did they would hold their office during good behavior for life, and the term of it could not be otherwise limited by Congress.

Similar language is also found in other cases, some of which are cited in the opinion of the court; but this does not show that they are not courts of the United States, though created for the Territories. The fact that they exercise a peculiar jurisdiction and are created for the Territories does not change their character as courts of the United States.

In *Hunt* v. *Palao*, 4 How. 589, a judgment had been rendered in the Court of Appeals of the Territory of Florida, in the year 1844. After Florida became a State its legislature ordered the records of that court to be transferred to the custody of the clerk of the Supreme Court of the State. Speaking of this subject, Chief Justice Taney said: "The Territorial Court of Appeals was a court of the United States, and the control of its records therefore belongs to the general government, and not to the state authorities; and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred; and how these judgments shall be carried into execution, or reviewed upon appeal or writ of error."

When a Territory becomes a State, the records of the courts of the Territory are transferred to the new State courts and to the Federal courts respectively; the judicial proceedings existing in the courts of the Territory being continued by federal law in the respective state and federal courts, according to the questions involved and the citizenship of the parties.

2d. But assuming that judicial offices in the Territories may be held subject to the will of the creating power; that is, assuming that Congress may provide that the incumbent may be removed or suspended from his office during the prescribed term at the pleasure of the President, the statute creating the office of District Judge of Alaska and prescribing his term has not attached to it any such conditions. It declares that the District Judge shall hold his office for the term of four years and until his successor is appointed and qualified. To assert that the President can remove the incumbent or suspend him from his office without the direction or permission of Con-

gress, is to affirm that he is superior in that respect and may disregard its enactments at pleasure. And more, it is to affirm that Congress cannot prescribe the term of an office created by it, which no one would pretend.

The President placed the authority, which he assumed to exercise in suspending the appellant from his office, upon section 1768 of the Revised Statutes. The part of that section upon which reliance is had is as follows:

"SEC. 1768. During any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, *except judges of the courts of the United States*, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed, in his discretion, by the designation of another, to perform the duties of such suspended officer in the meantime; and the person so designated shall take the oath and give the bond required by law to be taken and given by the suspended officer, and shall, during the time he performs the duties of such officer, be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended."

I do not understand how the language in this section, "except judges of the courts of the United States," can be construed to apply only to judges of courts created under the Constitution. Why should the exception, if thus limited, have been inserted at all? It is not pretended, and never has been, that such judges could be suspended or removed by the President. It is very plain to me that it was intended to meet the position, which had been advanced in some quarters, that judges of the courts of the United States in the Territories were subject to be removed or suspended by the President equally with other officers. Otherwise there is no assignable cause for its insertion.

For these reasons, therefore, first, that the judicial office in question was to be held by the incumbent during good behavior, for the term prescribed, and second, that section 1768, upon which the suspension was founded, expressly excepts the judges of the courts of the United States from suspension by

the President, and that exception includes all judges of all courts established under the laws of the United States, whether those courts perform their judicial duties within the States or within the Territories, I dissent from the judgment of the majority of the court in this case.

I am authorized to state that MR. JUSTICE GRAY and MR. JUSTICE BROWN concur in this dissent.

WINGARD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 319. Submitted March 24, 1891. — Decided May 25, 1891.

The same questions are presented here that were determined in *McAllister* v. *United States*, *ante*, 174, and it is affirmed on the authority of that case.

THIS appeal brought up for review a judgment by the Court of Claims sustaining a demurrer to a petition filed by the appellant, in which he claimed as due him from the United States for salary as Associate Justice of the Supreme Court of the Territory of Washington the sum of $1964.55, from December 11, 1885, to August 5, 1886, inclusive, and $1543.03, from August 24, 1886, to February 27, 1887, inclusive; in all, $3507.58.

The petition showed that on the 27th day of February, 1883, appellant was duly appointed by and with the advice and consent of the Senate, and commissioned to be, Associate Justice of the Supreme Court of the Territory of Washington, for the term of four years from that date, and until his successor should be appointed and qualified, with all the powers, privileges and emoluments appertaining to that office; that he took the oath of office May 11, 1883, and entered upon, executed and fulfilled the duties of such office; that he was at all times, from and after May 11, 1883, until February 27, 1887, ready and willing to perform those duties; that on the 3d of December, 1885, President Cleveland transmitted to him a communication, which declared that he was thereby "suspended from the office of Associate Justice of the Supreme

Court of the Territory of Washington, in accordance with the terms of section 1768, Revised Statutes of the United States, and subject to all provisions of law applicable thereto;" that, on the day last named, the President issued to William G. Langford a document reciting the suspension of appellant from his office in "virtue of the authority conferred upon the President by section 1768 of the Revised Statutes of the United States," and the designation of said Langford "to perform the duties of such suspended officer in the meantime, he being a suitable person therefor, subject to all the provisions of law applicable thereto;" that, on the 11th day of August, 1886, the President sent to the appellant and to Langford, respectively, communications similar to those of December 3, 1885, the one to appellant being a second order of suspension by the President under section 1768 of the Revised Statutes, and the one to Langford showing his designation to perform the duties of the office in the meantime; that Langford was commissioned January 29, 1887, as Associate Justice of the Supreme Court of the Territory of Washington, for the term of four years from that date, and until his successor was appointed and qualified, subject to the conditions prescribed by law, the commission showing that he had been nominated and appointed to that position by and with the consent of the Senate; and that Langford performed the duties of the office from December 11, 1885, to August 5, 1886, and from August 24, 1886, to February 27, 1887, under and by virtue of said several written appointments issued to him.

Mr. Roger S. Greene for appellant.

Mr. Solicitor General for appellee.

Mr. Justice Harlan delivered the opinion of the court.

Substantially the same questions are presented in this case that have been determined in *McAllister* v. *United States*, *ante*, 174, just decided. Upon the authority of that case, and for the reasons stated in the opinion, the judgment is

Affirmed.

Mr. Justice Field, with whom concurred Mr. Justice Gray and Mr. Justice Brown, dissenting.

Dissenting Opinion: Field, Gray, Brown, JJ.

I dissent from the judgment of the court in this case, on the grounds stated in my dissenting opinion in *McAllister* v. *United States*.

I may also add to those grounds the fact that, by the laws of the United States applicable to all the Territories, it is provided that for each Territory there shall be appointed a Governor, a Secretary, a Chief Justice and two Associate Justices of its Supreme Court, an Attorney and a Marshal, and that their terms shall be four years and until their successors are appointed and qualified, with this difference: that it is declared with reference to all the officers, except the Justices of the Supreme Court, that they shall hold their offices for that term, unless sooner removed by the President; but that qualification is not added to the term of the Justices. (Rev. Stat. §§ 1841, 1843, 1864, 1875, 1876, 1877.)

It is also to be observed that the acts of Congress organizing the different Territories of the United States, and providing for judicial tribunals therein, from the foundation of the government down to the present time, with three exceptions, have fixed the term of the judicial officers of the Territories at definite periods absolutely, without any conditions, or simply with the condition "upon good behavior." In two of these exceptions where the words "unless sooner removed" are added, the power of removal is not vested in the President, but left to be exercised under the general law of the country applicable to such officers; that is, by impeachment or by the joint action of the President and Congress, after full opportunity is given to the accused of being heard upon the grounds of complaint. In the third exception the words added are: "unless sooner removed by the President with the consent of the Senate of the United States," which implies a previous consideration by the Senate of the grounds of removal, and this would usually be accompanied with notice to the accused and an opportunity afforded to him of being heard thereon.[1]

[1] The following list exhibits the terms of the judges and the organic acts for all the Territories:

Northwest of Ohio: "During good behavior."

Ordinance of 1787; 1 Stat. 51, note; Rev. Stat. 2d ed. 13.

From this statement it is apparent that the general legislation of Congress has been against making the tenure of the

Mississippi: "During good behavior."
Act 7 April, 1798. Sec. 3, 1 Stat. 550.
Act 27 March, 1804. Sec. 2, 2 Stat. 301.
Act 2 March, 1810. Sec. 2, 2 Stat. 564.
South of Ohio: "During good behavior."
Act 26 May, 1790. Sec. 1, 1 Stat. 123.
Indiana: "During good behavior."
Act 7 May, 1800. Sec. 3, 2 Stat. 59.
Orleans: "Four years," absolute.
Act 26 March, 1804. Sec. 5, 2 Stat. 284.
Louisiana (District): "During good behavior."
Act 26 March, 1804. Sec. 12, 2 Stat. 287.
Michigan: "During good behavior."
Act 11 January, 1805. Sec. 3, 2 Stat. 309.
Act 30 January, 1823. Sec 1, 3 Stat. 722.
Illinois: "During good behavior."
Act 3 February, 1809. Sec. 3, 2 Stat. 515.
Missouri: Four years, "unless sooner removed."
Act 4 June, 1812. Sec. 10, 2 Stat. 746.
Act 27 January, 1814. Sec. 1, 3 Stat. 95.
Alabama: "During good behavior."
Act 3 March, 1817. Secs. 2 and 3, 3 Stat. 372.
Arkansas: "Four years, unless sooner removed."
Act 2 March, 1819. Sec. 7, 3 Stat. 495.
Florida: (Judges not appointed by the President.)
Act 30 March, 1822. Sec. 6, 3 Stat. 656.
Act 26 May, 1824. Sec. 1, 4 Stat. 45.
Act 21 January, 1829. Sec. 4, 4 Stat. 333.
Wisconsin: "During good behavior."
Act 20 April, 1836. Sec. 9, 5 Stat. 13.
Iowa: "Four years," absolute.
Act 12 June, 1838. Sec. 9, 5 Stat. 237–38.
Oregon: "Four years," absolute.
Act 14 August, 1848. Sec 9, 9 Stat. 326.
Minnesota: "Four years," absolute.
Act 3 March, 1849. Sec. 9, 9 Stat. 406.
Utah: "Four years," absolute.
Act 9 September, 1850. Sec. 9, 9 Stat. 455.
Act 25 June, 1888. Sec. 2, 25 Stat. 204.
New Mexico: "Four years," absolute.
Act 9 September, 1850. Sec. 10, 9 Stat. 449.
Washington: "Four years," absolute.
Act 2 March, 1853. Sec. 9, 10 Stat. 175.
Act 4 July, 1884. Sec. 10, 23 Stat. 102.

judicial office in courts of record of the Territories subject to the will of the President. The last exception is the only one in which any authority in that respect could be exercised by him, and that is to be with the conjoint action of the Senate.

I am authorized to say that Justices GRAY and BROWN agree with me in this dissent.

Nebraska: "Four years," absolute.
Act 30 May, 1854. Sec. 9, 10 Stat. 280.
Kansas: "Four years," absolute.
Act 30 May, 1854. Sec. 27, 10 Stat. 286.
Colorado: "Four years," absolute.
Act 28 February, 1861. Sec. 9, 12 Stat. 174.
Act 2 March, 1863. Sec. 3, 12 Stat. 700.
Nevada: "Four years," absolute.
Act 2 March, 1861. Sec. 9, 12 Stat. 212.
Dakota: "Four years," absolute.
Act 2 March, 1861. Sec. 9, 12 Stat. 241.
Act 4 July, 1884. Sec. 2, 23 Stat. 101.
Act 9 August, 1888. Sec. 2, 25 Stat. 398.
Arizona: "Four years," absolute.
Act 24 February, 1863. Sec. 2, 12 Stat. 665.
Idaho: "Four years," absolute.
Act 3 March, 1863. Sec. 9, 12 Stat. 811.
Montana: "Four years," absolute.
Act 26 May, 1864. Sec. 9, 13 Stat. 88.
Act 10 July, 1886. Sec. 1, 24 Stat. 138.
Wyoming: "Four years," "unless sooner removed by the President with the consent of the Senate of the United States."
Act 25 July, 1868. Sec. 9, 15 Stat. 178.
Alaska: "Four years," absolute.
Act of May 17, 1884. 23 Stat. 24.
Oklahoma: "Four years," absolute.
Act of May 2, 1890. 26 Stat. 81.

GORMAN *v.* HAVIRD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 1296. Submitted March 23, 1891. — Decided May 25, 1891.

Although it is true as a general rule that where judgment goes for the defendant, the amount of the plaintiff's claim is the test of jurisdiction, this rule is subject to the qualification that the demand shall appear to have been made in good faith for such amount; and if it appear clearly from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim, this court will decline to assume jurisdiction of the case.

This was a petition for a mandamus filed in the Supreme Court of the Territory of Idaho by the appellee Havird, who was sheriff *de facto*, and also claimed to be sheriff *de jure*, of Boisé County, to compel the county commissioners to issue warrants upon the treasury for the sum of $5595.47, for his services and expenses as sheriff for the years 1887 and 1888. His claim consisted of a salary fixed by law at the sum of $2798, and of expenses incurred as sheriff in the sum of $2797.47, making the aggregate of $5595.47. The items of his claim for expenses were $692.25 for boarding prisoners; $1302 for jailor's fees; $595.22 for collecting a license tax; $156.15 for transportation of prisoners; and $51.85 for collecting a Territorial license tax.

The answer of the county commissioners averred in excuse of their non-payment of the claim, that an action in the nature of *quo warranto* had been begun against petitioner, and was still pending in the District Court for the county of Boisé, upon the relation of the appellant John Gorman, to test the title to the office of sheriff, and that under the laws of Idaho, Rev. Stats. § 380, "when the title of the incumbent of any office in this Territory is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined." By leave of the court, Gorman, the contestant, intervened in the case, claiming to have

been duly elected sheriff, setting forth the pendency of the proceedings in the *quo warranto* case, and demanding that the writ of mandamus be denied.

The suit in reality turned upon the question whether the proceedings in *quo warranto* were still pending, or had been dismissed, and resulted in a judgment that the *quo warranto* case then pending in the District Court should be dismissed, and that a writ of mandamus forthwith issue, directing the defendants, the county commissioners of Boisé County to order the issuing of a warrant for the amount theretofore allowed by the board for the time specified on account of fees and expenses; and that immediately upon the dismissal of the action in *quo warranto* a writ of mandate issue, "commanding said commissioners to order the issuing of a warrant or warrants in the name of plaintiff herein, for the amount due him as salary for the time specified, and that a copy hereof be certified to said District Court." From this judgment Gorman appealed, but the County Commissioners did not. Petitioner thereupon made this motion to dismiss upon the ground that the requisite jurisdictional amount was not involved.

Mr. John Goode for the motion.

Mr. Samuel Shellabarger and *Mr. Jeremiah M. Wilson*, opposing.

Mr. Justice Brown delivered the opinion of the court.

While the whole amount of Havird's claim was $5595.47 — more than enough to give this court jurisdiction — the sum of $1994.25 was for disbursements in boarding prisoners and in jailor's fees, leaving but $3601.22 as representing the salary, fees and other perquisites of the office. As Havird was sheriff *de facto*, Gorman, even if he had maintained his suit, could not in any case have recovered of him more than the salary and perquisites of the office, less Havird's lawful disbursements, which, under any view which can be taken of this case, would have reduced his recovery below the sum of $5000. In entering its judgment in this case the Supreme Court evidently

had this distinction between disbursements and salary in mind, as the order was that the County Commissioners should issue warrants at once for the amount of fees and expenses, but should not issue warrants for the amount due as salary until after the dismissal of the action of *quo warranto* in the District Court. It was evidently contemplated that Havird should receive the amount of his disbursements in any event, but that the salary should be withheld until the *quo warranto* proceedings had been dismissed. This was also a compliance with the Idaho statute, which inhibited only payment of the salary while the contest was pending.

It is true as a general rule that where judgment goes for the defendant, the amount of the plaintiff's claim is the test of jurisdiction; but this rule is subject to the qualification that the demand shall appear to have been made in good faith for such amount. If it appear clearly from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim, this court will decline to assume jurisdiction of the case. If, for instance, a greater amount than $5000 were claimed in the *ad damnum* clause of the declaration, and the bill of particulars showed the actual claim to be less, the latter would determine the jurisdiction. Examples of the distinction between the sum demanded and the sum actually in dispute are frequent in the decisions of this court. *Lee* v. *Watson*, 1 Wall. 337; *Schacker* v. *Hartford Fire Ins. Co.*, 93 U. S. 241; *Gray* v. *Blanchard*, 97 U. S. 564; *Tintsman* v. *National Bank*, 100 U. S. 6; *Hilton* v. *Dickinson*, 108 U. S. 165; *Jenness* v. *Citizens' Bank of Rome*, 110 U. S. 52; *Wabash, St. Louis &c. Railway Co.* v. *Knox*, 110 U. S. 304.

Gauged by the rule laid down in these cases,

It is clear that we have no jurisdiction, and the motion to dismiss will therefore be granted.

CALDWELL *v.* TEXAS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

No. 1541. Submitted May 11, 1891. — Decided May 25, 1891.

There having been some irregularity in the submission of this case on the 15th of December, 1890, the court allows a resubmission, and an additional brief is filed at its request; and it now adheres to its former decision, dismissing the writ for want of jurisdiction. 137 U. S. 692.

THE case, as stated by the court, was as follows:

The writ of error in this case was dismissed January 12, 1891. *Caldwell* v. *Texas*, 137 U. S. 692. Plaintiff in error applied for a rehearing upon the ground that no notice had been given of the motion to dismiss. The record here showed that a motion to advance and a motion to dismiss were submitted on December 15, 1890, and the order in relation to the latter motion stated that it was submitted on the record and printed arguments of counsel for both parties.

An extended printed argument on the merits had been previously filed on behalf of plaintiff in error, as well as the written consent of his counsel that the cause might be advanced, but from the affidavits accompanying the application for rehearing it appeared that through some inadvertence the notice of the motion to dismiss had not in fact been given. The court therefore, on the 9th of March, directed the judgment to be vacated and notice to be served, returnable on the second Monday in April, the motion to be then considered upon such additional printed briefs as might be presented.

This was accordingly done, but no further briefs were filed, and on April 14 suggestion of illness of counsel was made, and the time twice enlarged. On the 11th of May the case was taken on resubmission, and a request having been made that the cause be continued to next term, or that other counsel be assigned to represent plaintiff in error, other counsel has examined the record and filed an additional brief.

Argument for Plaintiff in Error.

Mr. Augustus H. Garland, at the request of the court, prepared and filed the following brief on behalf of the plaintiff in error.

The question presented on this petition, as to notice to plaintiff in error of the motion to dismiss, is to be disposed of by the facts of record in the cause, and I take it the court waives that, as it is willing to receive argument as if that motion were now pending, and of which plaintiff in error had due notice.

Then upon the point of the jurisdiction of this court in respect of a Federal question, it is to be said that while the case of *Hurtado* v. *California*, 110 U. S. 516, and others go to the extent that a State may by law provide for punishing persons charged, as Caldwell is here, without indictment, yet if indictment is by the state law the prescribed method, there must be a good indictment, such as is understood by the common law. Such is unquestionably the doctrine of *Ex parte Bain*, 121 U. S. 1 *et seq.* Although Bain's case was in the United States court, yet this court, in passing upon the indictment, held this doctrine substantially as obtaining in the state courts, the United States courts and the courts of England.

No question is raised here as to the power of the State to dispense with indictment and take some other method in lieu of it, but the question is, can the State, keeping the procedure by indictment in existence, convict upon an indictment fundamentally defective?

That this indictment is essentially defective, Mr. Burns, in his brief, filed November 28, 1890, seems to show, and nothing more need be said on that subject.

It must follow necessarily that, as a fundamental right to Caldwell to have a good indictment, he is protected by the Fourteenth Amendment as to "due process of law." The authorities abundantly show that whatever process — indictment, information or what not — brings a man into court for trial, it must be one giving him full notice of all the material facts constituting the offence charged. There can be no "due process of law" without this.

The party "must be notified exactly of the case he is to meet." *Foster* v. *Kansas*, 112 U. S. 201 *et seq.;* 2 Hare Am. Constitutional Law, 845–849, 858–863, 874, 876, and cases cited.

It is nothing to the purpose to say, in response to this, the State of Texas has ruled this to be a good indictment and that it suits her purposes. Some other authority, having an interest in this citizen, and which has the right to his allegiance, and therefore owing him protection, must also see that it is good and sufficient. The State cannot by direction or indirection, keep this question from this court. It was in part to prevent all this that brought forth the Fourteenth Amendment. This court, if the Fourteenth Amendment is not meaningless, must take this question and pass upon it, whether it was raised in the court below or not, as it is a question going to the very bottom of the proceeding, and affects it from the beginning to the end; and this question is waived in no case, and certainly never in one involving life.

In *Gelpcke* v. *Dubuque*, 1 Wall. 175 *et seq.*, it was attempted to beg the question away from the court on just such grounds as are urged here for the dismissal of this case, which were answered in strong and impressive language thus: "We shall never immolate truth, justice and the law because a state tribunal has erected the altar and decreed the sacrifice," pp. 206, 207; words quite applicable here and now.

It is submitted, in view of the fact that Caldwell's life is at stake, and in view of the general importance of the question involved, that his counsel should be heard upon the merits.

Mr. Chief Justice Fuller delivered the opinion, (including the above statement,) of the court.

We have again considered the case but see no reason to change the conclusion heretofore announced.

The writ of error will therefore be

Dismissed.

UNITED STATES *v.* GRIFFITH.

APPEAL FROM THE COURT OF CLAIMS.

No. 114. Submitted December 5, 1890. — Decided December 8, 1890.

It is irregular for counsel for an appellant to file, with a motion to dismiss, the appeal papers stating the grounds on which the motion is made.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for the motion.

No appearance for appellee.

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

The motion by appellant for leave to dismiss its appeal in this cause is accompanied by certain correspondence which is referred to as stating the grounds on which the motion is made. We cannot be called upon to examine into these papers for the purpose of arriving at a conclusion as to whether the dismissal is justifiable or not, and must decline to permit them to be filed and to thereby leave it to be inferred hereafter that we may have acted upon them. Appellant undoubtedly has the right to dismiss its appeal with the leave of the court, and may renew its motion to that effect unaccompanied by other matter, and the order of dismissal will be entered.

Mr. Assistant Attorney General Maury thereupon withdrew the papers, and renewed the motion without them, and the appeal was ordered to be

Dismissed.

SCHUTZ *v.* JORDAN.

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

No. 280. Argued April 1, 2, 1891. — Decided May 25, 1891.

When goods belonging to one party pass into the possession of another surreptitiously and without the knowledge of the latter, no contract of purchase is implied; and if the agent of the latter, who is a party to the surreptitious transfer, sells the goods and puts the proceeds into his principal's possession, but without his knowledge, the principal is not liable in an action for goods sold and delivered, whatever liability he may be under in an action for money had and received.

When the defence in an action for goods sold and delivered to an agent of the defendant is a denial that any such sale was made, the burden is on the plaintiff throughout the case to prove every essential part of the transaction, including the authority of the alleged agent to make the alleged purchase in the manner alleged.

The presumption that a letter properly directed and mailed reached its destination at the proper time and was duly received by the person to whom it was addressed is a presumption of fact, subject to control and limitation by other facts.

The plaintiffs in error, plaintiffs below, were merchants doing business in the city of New York. The defendants were merchants doing business in the city of Boston. The latter had a large establishment, divided into different departments, fifty or sixty in number, with a superintendent in charge of each, and in the neighborhood of two thousand employés. The action was on an account for goods sold and delivered, was commenced in the Supreme Court of New York, and removed thereafter to the Circuit Court of the United States for the Southern District of New York. The complaint alleged: "At divers times on and between May 7, 1884, and July 30, 1885, the plaintiffs, at the special instance and request of the defendants, and at prices agreed upon, sold and delivered to the defendants certain goods, wares and merchandise, amounting in the aggregate, at such agreed prices, to the sum of thirty-two thousand six hundred and four $\frac{99}{100}$ dollars;

that the defendants have not paid the same, nor any part thereof, though due and payable." The answer at some length developed a defence which may be briefly stated as follows: That the defendants never purchased the goods in question; that among their various departments was one known as the "cloak department," which was in charge of one John H. Hewes, an employé, as superintendent; that while the superintendents of these various departments had general authority to buy, these defendants, finding that the stock of goods in this department was more than that desired, directed such superintendent not to increase the stock; that such directions were communicated to the plaintiffs; that, disregarding such instructions, they entered into a fraudulent combination with Hewes, by which they were to ship the goods to the defendants; and that he was to receive and distribute them alongside of the other goods in his department. The scheme further contemplated that by reason of the confidence and powers vested in Hewes by the defendants, and his management of the details, payment was to be secured in the name of the defendants, and from their funds, though without their knowledge. In other words, the plan as developed was that the plaintiffs, finding a general agent of defendants with authority to purchase, but aware of special restrictions on that authority, conspired with him to ignore such restrictions, and in defiance thereof to purchase these goods in defendants' name, and secure payment therefor out of the funds of the defendants in their name and without their knowledge. On trial before a jury the verdict was for the defendants in respect to these matters, and to the judgment entered thereon the plaintiffs sued out this writ. 32 Fed. Rep. 55.

Mr. A. Blumenstiel for plaintiffs in error.

I. The mailing of the invoices was presumptive evidence of their receipt. *Howard* v. *Daly*, 61 N. Y. 362, 365; *Austin* v. *Holland*, 69 N. Y. 571; *Huntley* v. *Whittier*, 105 Mass. 391; *Rosenthal* v. *Walker*, 111 U. S. 185; *Bell* v. *Lycoming Fire Ins. Co.*, 19 Hun, 238.

II. It was the duty of the court to charge the jury as to the shifting of proof — to inform them that the burden had shifted to the defendant. *Heliman* v. *Lazarus*, 12 Abbott N. C. 19, 24; *Nicholls* v. *Mase*, 94 N. Y. 160, 164; *Seybolt* v. *New York, Lake Erie &c. Railroad*, 95 N. Y. 562, 569; *Murphy* v. *Coney Island & Brooklyn Railroad*, 36 Hun, 199; *Howell* v. *Wright*, 41 Hun, 167; *Gay* v. *Parpart*, 106 U. S. 679; *Nelson* v. *Woodruff*, 1 Black, 156; *McKinney* v. *Neil*, 1 McLean, 540.

III. As to the ratification arising from the retention of the goods and the receipt of the proceeds after knowledge of the alleged fraud, see *Peoples' Bank* v. *National Bank*, 101 U. S. 181, 183; *Gaines* v. *Miller*, 111 U. S. 395; *Drakely* v. *Gregg*, 8 Wall. 242, 267; *Murray* v. *Binninger*, 33 How. (N. Y.) 425; *Meehan* v. *Forrester*, 52 N. Y. 277; *Cobb* v. *Dows*, 10 N. Y. 335.

Mr. Nathaniel Myers for defendant in error.

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

On the general merits of the case, it may be observed that the action is on a contract for goods purchased by defendants. If no such contract of purchase was in fact made, the verdict was right; and this, although goods of the plaintiffs were surreptitiously put into the possession of defendants, and the proceeds of sales made thereof by their employés passed into their hands. While from the fact that goods belonging to one party pass into the possession of another a contract of purchase may sometimes be implied, it will not be implied when it appears that such transfer of possession was surreptitious, and without the knowledge of the latter. A party cannot be compelled to buy property which he does not wish to buy; and no trick of the vendor, conspiring with an agent of such party, by which possession is placed in him, creates on his part a contract of purchase. Nor is any contract of purchase created, even if it also appears that, unknown to the party, his agent who has entered into this wrongful combination has sold the

property and put the proceeds into his principal's possession. Whatever liability might exist in an action brought under those circumstances, for money had and received, no action will lie for goods sold and delivered. The party is not responsible under a contract and as a purchaser, whatever may be his liability for the moneys which he has received as the proceeds of the sales. The law in respect to these matters is clear; and the verdict of the jury was fully justified by the testimony. It would be a needless waste of time to develop the various details of the plan by which the plaintiffs and the agent of the defendants sought to take the goods of the plaintiffs, put them in the store of defendants, incorporate them with the general mass of their goods, and secure payment out of the funds of the defendants without their knowledge. As might be expected, reliance was placed on the confidence and powers reposed and vested in Hewes by the defendants, and his familiarity with the details of their business. The plan worked successfully so far as regarded the introduction of the goods into the store of the defendants without their knowledge; but Hewes was not so successful in securing payment; so that, after nearly a year and a quarter, over thirty thousand dollars, according to the price agreed upon between Hewes and the plaintiffs, for goods thus transmitted, was still unpaid. It is true that the plaintiffs, and their agent by whom the arrangement was in the first instance made, denied the existence of any such arrangement. Upon this question of fact the verdict of the jury would be conclusive; and, notwithstanding their denial, the whole conduct of the business, as developed by their own testimony, makes strongly in favor of the truthfulness of Hewes in respect to the transaction. The verdict of the jury properly responded to the testimony.

There are several assignments of error; but the conclusions we have expressed upon the merits of the controversy avoid the necessity of referring to most of them. It would have been obviously improper to instruct the jury to find a verdict for the plaintiffs for all or any part of the goods thus surreptitiously placed in the store of the defendants.

There are two matters, however, which require special notice.

One is as to the instructions respecting the burden of proof. The court was asked by the plaintiffs to charge: "The burden of establishing the defence set up in the answer is upon the defendants, and such defence being founded upon allegations of fraud and conspiracy, the same must be proven to the satisfaction of the jury. Fraud is never presumed. It must be proven by facts which warrant such an inference." This request was refused, and the law was thus laid down:

"I have been requested to instruct you as to the burden of proof.

"As to that I can only say that the burden of proof is on the plaintiffs to make out their case and make it out all the way through; that is, in the first place they must show you that these goods were sold in the usual course to Mr. Hewes, acting for the defendants; but if they fail in that, it is for them to satisfy you that this quantity of goods was so large that the defendants must have known about it and ratified it by going right along and selling after they had found out about it, that is, it is on the plaintiffs to make out their case.

"The fact that the goods got into the establishment of the defendants or that the goods were received by the carrier which the defendants authorized to take the goods here in New York, is made out — there is no question about that; no question in the case but what plaintiffs parted with their goods or that they got where the defendants are liable for them if they bought them; there is no question about that. If they make out that the defendants did buy them, then the defendants had the goods and are liable for them.

"But that the bargain was a bargain for the sale of these goods to Mr. Hewes in the usual course of business, it is for the plaintiffs to make out further, and if they do not make that out, that the defendants ought to have known that they were receiving those goods is to be made out by the plaintiffs."

The ruling of the trial court was correct; the burden was on the plaintiffs, and to the extent indicated in the instructions. This is not a case in which some independent matter is set up as a defence — payment, breach of warranty, counter-

claim, and the like, a defence which practically admits the plaintiffs' cause of action, and seeks to defeat it by the existence of other facts. It was not like the plea of confession and avoidance. It was a denial, it denied the sale; and the burden of proving the sale was on the plaintiffs, and rested with them until the close of the case. It would not establish a purchase by the defendants, that an agent of theirs had made a contract. The plaintiffs must go further, and prove that such agent had authority to make the contract. Not to make contracts generally; but to make the contract which in fact was made. A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority to buy outside of that course of business. And when they rely upon contracts made with Hewes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent. There was no error in this respect.

The other specification of error is this: A significant fact in the claim of defendants is that these transactions were going on for fourteen months and over, and that they had no knowledge of them; and that though their house was one of known solvency, with a carefully acquired reputation for early payments, no account of the plaintiffs ever reached them. Of course, if there was a studied concealment on the part of the plaintiffs, it would be very significant. As against this, there was testimony that two or three times a statement of account was mailed to the defendants. The defendants called Joseph N. Bassett, who testified that during this time he was their

book-keeper, and that he had never received any such statement of account. He then explained the course of business in the defendants' establishment; that the letters, of which four or five hundred were received daily, were opened by the corresponding clerk, and by him distributed; that there were fifty or sixty retail departments; that bills when received were distributed by him, the bill of goods for each department being placed in a box with the same number as the department; that the buyer, the party in charge of that department, had access to the box; and that it was his duty and habit to take the bills out and O. K. them and return them to him, the book-keeper, for entry. While there were three or four members of the firm of Jordan, Marsh & Co., defendants herein, only one was on the witness stand to testify as to a want of knowledge on the part of defendants of these transactions. No special instructions were asked by the defendants in respect to this; but the court, of its own motion, charged the jury as follows:

"The fact the plaintiffs mailed such letters, whether the defendants received them or not, bears upon the question as to the conduct of the plaintiffs and their good faith in this transaction. It does not affect the defendants unless they received the letters. The fact that a letter is mailed does not, in court, establish the fact that the person it is mailed to received it. That is not proof of that fact. In certain transactions about protesting notes and charging endorsers of commercial paper and things of that sort, the mere fact of mailing a letter answers; but when a party is to be affected with knowledge of what is in the letter and the contents of it, and what goes with it, they must go further and prove not only that it was mailed, but that the party to whom it was addressed got it."

Of this, plaintiffs now complain. Doubtless this instruction is open to criticism. In *Rosenthal* v. *Walker*, 111 U. S. 185, 193, it was said: "The rule is well settled that if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was

received by the person to whom it was addressed. *Saunderson* v. *Judge*, 2 H. Bl. 509; *Woodcock* v. *Houldsworth*, 16 M. & W. 124; *Dunlop* v. *Higgins*, 1 H. L. Cas. 381; *Callan* v. *Gaylord*, 3 Watts, 321; *Starr* v. *Torrey*, 2 Zabr. 190; *Tanner* v. *Hughes*, 53 Penn. St. 289; *Howard* v. *Daly*, 61 N. Y. 362; *Huntley* v. *Whittier*, 105 Mass. 391." See also *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25.

And yet, under the circumstances of this case, we cannot think that the jury were misled, or that the instruction was erroneous. Ordinarily where the evidence shows that goods passed into the store of defendants, and were received by their agents, it would be held that a purchase was established; but when, as here, the direct testimony shows that the goods were thus passed into the store of defendants surreptitiously, by collusion with one of their employés, the presumption otherwise existing is overthrown, and by special instructions to divert their attention from the positive testimony as to the circumstances under which the goods were thus placed in the store, to the inference which would arise from the unexplained receipt of the goods, would be very apt to mislead a jury. The attention of the jury should rather be directed to the direct testimony, as to the circumstances under which the goods were passed into the store of the defendants, and to the actual knowledge on the part of the defendants of the receipt of the goods. So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts. The undisputed testimony was, that the letters (of which hundreds were received daily) were not taken and examined by the defendants personally, but received and distributed by their corresponding clerk; that statements of goods purchased for the "cloak department" would, by the custom of business, pass into the hands of Hewes, the party who was engaged in these transactions; and that they should have passed from him O. K.'d, to the book-keeper; but that none ever did reach the latter. Under

those circumstances, to instruct that the mailing of these statements creates a presumption that the defendants personally received them, and were thus notified of the purchases being made by Hewes, would probably have misled the jury. When a letter is duly mailed a presumption arises that it is delivered; but that presumption is that it is delivered in the usual course of business; and when the usual course of business is for an agent of a party to receive his mail, the presumption is that the agent received it rather than the principal. Here the testimony shows that the usual course of business sent the letters containing these statements into the hands of Hewes, the wrongdoer; and he testifies that he turned no statements over to his principals, and gave them no information until after the close of these transactions. There is surely no presumption that the ordinary course of business in the establishment of defendants was departed from in the present case. There is no presumption that the defendants themselves received the mail, or distributed it, or that the corresponding clerk in these instances departed from the usual course of business, and handed these special letters to his principals. And an instruction which would lead the jury to suppose that from the fact of mailing all the other presumptions arising from the ordinary course of business in the establishment of defendants were to be ignored, would be incorrect in law, as well as misleading.

These are the only specifications of error, other than those involved in the general merits of the case, which we deem it necessary to mention. We see no error in the proceedings. The judgment was right, and it is

Affirmed.

GREGORY CONSOLIDATED MINING COMPANY *v.* STARR.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Nos. 356, 357. Submitted April 29, 1891. — Decided May 25, 1891.

It being apparent that the proceedings in this court were for delay, No. 356 is affirmed with ten per cent damages, and No. 357 is dismissed, the court being without jurisdiction.

THE case is stated in the opinion.

Mr. Edwin W. Toole and *Mr. William Wallace, Jr.*, for plaintiff in error.

Mr. W. F. Sanders for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On July 28, 1883, the Ætna Iron Works of San Francisco entered into a contract with the Gregory Consolidated Mining Company to build and equip for it at Gregory, Montana, a complete concentrating mill of specified capacity. The contract provided that the mill "shall be completed and delivered in perfect running order within four months from date, provided the lumber required to be used in constructing the building and placing the machinery therein is delivered on the ground at Gregory aforesaid . . . within forty days after the receipt of the bill for said lumber by H. W. Child, representing said party of the second part." In consideration of this the mining company agreed to pay twenty thousand dollars upon receipt at Helena, Montana, of a bill of lading showing a shipment of the machinery from San Francisco, and the sum of thirty thousand dollars in three equal instalments, "in thirty, sixty and ninety days from the acceptance, upon completion, of said mill, by said party of the second part." The

twenty thousand dollars was paid on receipt of the bill of lading; but the three instalments of ten thousand dollars each were none of them paid, and these actions were brought to recover those instalments. No. 357 on our docket, though later in number, was the first action commenced in the District Court of Montana, and was to recover the first instalment. No. 356 was commenced some months thereafter, and was to recover the last two instalments. It was commenced later, was tried later, and judgment was rendered at a later day; but, somehow, it occupies an earlier position on our docket. The differences between the two cases are these: No. 356 was tried by a jury; No. 357, by the court without a jury. In No. 356 a foreclosure of a mechanic's lien was sought; but not in 357. The answer in the suit for the second and third instalments, No. 356, claimed damages for the failure to complete the mill within the time specified in the contract. With these exceptions the cases are substantially identical. The testimony in the two cases was practically the same, being mainly by depositions. Both cases are brought to this court by writ of error. As one of them, No. 357, was tried by the court without a jury, it could only be brought here by appeal. *Hecht* v. *Boughton*, 105 U. S. 235; Act of April 7, 1874, 18 Stat. p. 27, c. 80, sec. 2. We have, therefore, no jurisdiction over this case. As to both of them, it may also be observed, that the requirements of section 997, Revised Statutes, and Rule 21 of this court, as to the assignment and specification of errors, have been ignored. The only suggestion in respect to error presented by either record is that made in the statement of appeal from the District to the Supreme Court of the Territory; and the briefs filed in this court by the plaintiff in error were the same as were filed in the Supreme Court of the Territory without compliance with Rule 21, and with even inaccurate references to the pages of the record on which the specifications in the statement of appeal to the Supreme Court of the Territory are found. We could properly dispose of these cases on the ground of this disregard of the requirements of the statute and rules; but ten per cent damages are asked under clause 2 of rule 23, and, therefore, we pass to

inquire what are the real merits of this controversy, and what are the errors which in any way are suggested by the record.

There is no doubt as to the sufficiency of the complaints. Indeed, no objection was made to them. Upon the general merits of the case, it may be observed that the answers first denied the transfer from the Ætna Iron Works to plaintiff. One witness, himself interested in the iron works, testified to the transfer; and there was no testimony even tending to gainsay this. The answers also denied the making of the contract. The assistant general manager of the mining company was called as a witness, identified the contract, and testified to its execution by himself for the mining company. The testimony is undisputed, not only that the mill was built and equipped, but also that it was accepted and operated by the defendant. A letter from Prof. Hesse was in evidence, signed by him as superintendent of the Gregory Smelter, informing the Iron Works of the completion of the contract; his entire satisfaction with the work done; that the concentrator was of larger capacity than that called for by the contract; and that the building was substantially and well built, and the machinery of first-class workmanship. The party who represented the Iron Works in this transaction testified that Child, the assistant general manager of the mining company, told him he must please Hesse in the construction of the mill; and that if the mill was acceptable to Hesse, it would be to the company. Hesse testified that he showed his letter of acceptance to Child, and that he made no objection to it, and that he accepted it on April 18, 1884. And Child, the assistant general manager, himself, when called as a witness, testified that Hesse was at the time of the building of the mill his representative at the works. Under these circumstances, it does not admit of doubt that the judgments were right, and that substantial justice was done thereby.

If we pass to a consideration of the special matters of objection we find nothing which presents even technical error. It is insisted that the court erred in overruling the objection of defendant to three questions and answers in the deposition of D. H. Malter, the party who represented the Iron Works in

the contract. These questions and answers, numbered 6, 7 and 8, related to the time of the receipt by H. W. Child of the bill for the lumber specified in the contract, the time of its actual delivery on the ground at Gregory, Montana, and to the witness' possession of a copy of the bill of lumber so delivered. The form of the questions was unobjectionable, the answers were responsive thereto, and were not heresay. The objections to these questions and answers are frivolous.

Question number 9 and the answer thereto, in the same deposition, are also challenged. This question was as to the time of the completion of the mill, and the fact of an acceptance. The answer was that the mill was completed about the end of February, 1884, and accepted April 18, 1884, by Charles Hesse, the superintendent of the mining company in Montana. Surely, completion and acceptance were matters which, under the contract, had to be proved; and as the form of the question is not challenged, and the answer was direct and responsive thereto, the objection to them is no better than those heretofore mentioned.

Objection is also made to question and answer number 6, in the deposition of Charles Hesse. That question was, who accepted the mill on behalf of the company, and how was such acceptance made; and the answer of the witness was that he accepted it in writing. It is impossible to conceive of any objection to this testimony.

The answer to question number 12 in his deposition is also objected to. In that answer, he testified to his estimate as to the capacity of the concentrator. It certainly worked no hardship to the defendant that the capacity was larger than that stipulated for in the contract, and it tended to prove that the acceptance, which, in fact, was made, was properly made.

It is further objected that the court erred in refusing to non-suit the plaintiff at the close of his testimony. But considering the scope of the testimony, which we have heretofore noticed, it is obvious that the court did not err in overruling such motion, and would have erred if it had sustained it.

It is also objected that the court erred in refusing to receive in evidence a letter from Child, the manager, to the Iron

Works. As this letter contained nothing of value as tending to determine the matters in dispute between the parties, the court did not err in refusing to admit it. In so far as it referred to the details of shipment, and the difficulty of transporting the machinery to the mine, or the condition of the building, even if these matters were of any importance, it is not perceived how the defendant can make testimony for itself by simply writing a letter to the plaintiff. Mr. Child was a witness on the trial, and if there was any fact stated in the letter which was material to the controversy, he could have been interrogated in respect to it.

Another objection is that the court refused to receive in evidence four letters from Hesse to Child. These letters could not be received for the purpose of impeaching Hesse, for his attention had not been first called to them; and no letter from one officer of a company to another is admissible against another party to prove the truth of the facts stated therein.

A final matter is this: In each case appear instructions, though in a case tried by a court without a jury a request for instructions seems incongruous. But passing that by, for in the case tried by the jury instructions were proper, it is urged that the court erred in refusing this instruction: "The jury are instructed in the above-entitled action that time in the contract sued is of the essence thereof, and that if you find that the failure to fulfil the contract in time was without fault of the Gregory Consolidated Mining Company, then plaintiff cannot recover and you must find for defendant." The only stipulation in the contract as to time was that heretofore referred to for completion within four months from date, provided the lumber required should be delivered on the ground within forty days after the receipt of the bill therefor by Child, the representative of defendant. The testimony establishes the fact that this bill was delivered to Child within a day or two after the signing of the contract; and the only testimony in respect to the delivery of the lumber makes it clear that it was not delivered within forty days thereafter. The stipulation for the completion of the work within four months became, therefore, inoperative, and that through no

fault of the Iron Works. An instruction like that asked was misleading and improper.

It is obvious, from these considerations, that the proceedings in this court were for delay. Under clause 2 of Rule 23 of this court.

It is ordered in No. 356, a supersedeas bond having been given, that the judgment be affirmed and that ten per cent damages, in addition to interest, be awarded. In No. 357, as this court has no jurisdiction by writ of error over the proceedings, all we can do is to dismiss the case, and such is the order.

PACIFIC NATIONAL BANK *v.* EATON.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 239. Argued March 23, 24, 1891. — Decided May 25, 1891.

Delano v. *Butler*, 118 U. S. 634, and *Aspinwall* v. *Butler*, 133 U. S. 595, affirmed and applied to a case where a shareholder in the bank, having subscribed her proportional share to the doubling of its capital and paid therefor, took out no certificate for the new stock and demanded back the money so paid.

A subscription to stock in a national bank, and payment in full on the subscription and entry of the subscriber's name on the books as a stockholder, constitutes the subscriber a shareholder without taking out a certificate.

This was an action at law to recover from the Pacific National Bank an amount paid in as a subscription to an increase of its stock. The circumstances which induced the call for the increase are stated fully in *Delano* v. *Butler*, 118 U. S. 634, and *Aspinwall* v. *Butler*, 133 U. S. 595. The plaintiff below, (defendant in error,) owning forty shares of $100 each, subscribed for an equal amount in the proposed increase of $500,000; and paid in the money. Owing to the fact that some stockholders declined to take the new stock, the actual amount

of increase subscribed was $461,300, and, after the plaintiff's payment of the $4000, an increase to that amount only was approved by the comptroller in lieu of the $500,000 previously authorized. The plaintiff below, not having taken out any certificate of stock, demanded repayment of the $4000, and, the same being refused, brought this action, and obtained judgment for that amount, interest and costs. The bank having become insolvent, the action was defended by the receiver, who sued out this writ of error.

Mr. A. A. Ranney for plaintiff in error.

Mr. J. H. Benton, Jr., for defendant in error.

The decision of the state court that the bank received the money of the defendant in error upon an implied promise to give her forty shares in an increase of five thousand shares was correct. An increase of the capital of a national bank depends on compliance with the conditions of the statutes and articles of association; and not upon an arrangement between the bank and its shareholders or other persons. Rev. Stat. § 5142; *Charleston* v. *People's Nat. Bank*, 5 So. Car. 103, 115.

The payment by the defendant on the 1st of October was an acceptance of this offer, and created a contract between her and the bank, by which it promised to issue to her forty shares of such five thousand new shares, if the whole five thousand were subscribed and paid for and the comptroller approved their issue, and by which she promised the bank to take forty shares of such proposed increase of five thousand shares, if the whole five thousand were subscribed and the comptroller approved their issue, *i.e.*, if such five thousand shares were created. *Spring Company* v. *Knowlton*, 103 U. S. 49.

It was upon this implied contract to issue and to take forty shares of stock in the proposed increase of five thousand shares, if such shares were created, that the defendant paid to the bank four thousand dollars. If the whole five thousand shares were not subscribed and paid for, or if the comptroller

refused to approve their issue, no such shares as were paid for could be created, and the bank was under no obligation to issue any shares to her, and it necessarily follows that unless the whole five thousand shares were subscribed and paid for, and the comptroller approved the issue of them, she was under no obligation to take forty shares of any other increase which might be voted, subscribed and paid for and approved.

The attempted application by the bank of her money to the payment for forty shares in an increase of forty-six hundred and thirteen shares, instead of the payment for forty shares in an increase of five thousand shares, was really an attempt to make her take forty-three shares, when she had only agreed to take forty. *People's Ferry Co.* v. *Balch*, 8 Gray, 303, 314; *Katama Land Co.* v. *Jernegan*, 126 Mass. 155.

It is too plain for contention that no shares in a proposed increase of the capital of a national bank can come into existence till the whole amount thereof is paid. Such is the plain reading of the statute: "No increase shall be valid until the whole amount of such increase is paid in." If this were a case of subscription to original capital under a charter which provided that no capital stock shall be issued until the whole amount of the capital has been subscribed for, the authorities are uniform that a subscription for shares would not be binding until the whole amount of the capital was subscribed. *Santa Cruz Railroad Co.* v. *Schwartz*, 53 California, 106; *Bray* v. *Farwell*, 81 N. Y. 600; *New York, Housatonic, etc. Railroad Co.* v. *Hunt*, 39 Connecticut, 75; *Read* v. *Memphis Gayoso Gas Co.*, 9 Heiskell, 545; *Fry* v. *Lexington etc. Railroad Co.*, 2 Met. (Ky.) 314, 323; *Shurtz* v. *Schoolcraft & Three Rivers Railroad Co.*, 9 Michigan, 269; *Swartwout* v. *Michigan Air Line Railroad Co.*, 24 Michigan, 388; *Livesey* v. *Omaha Hotel Co.*, 5 Nebraska, 50; *Hale* v. *Sanborn*, 16 Nebraska, 1; *Selma, Marion, etc. Railroad Co.* v. *Anderson*, 51 Mississippi, 829; *Hughes* v. *Antietam Mfg. Co.*, 34 Maryland, 316; *Topeka Bridge Co.* v. *Cummings*, 3 Kansas, 55; *Littleton Mfg. Co.* v. *Parker*, 14 N. H. 543; *New Hampshire Central Railroad* v. *Johnson*, 30 N. H. 390; *S. C.* 64 Am. Dec. 800; *Contoocook Valley Railroad Co.* v. *Barker*, 32 N. H. 363; *Peoria & Rock*

Island Railroad v. *Preston*, 35 Iowa, 115; *Haskell* v. *Worthington*, 94 Missouri, 560; *Sommerset & Kennebec Railroad* v. *Cushing*, 45 Maine, 524; *Sommerset Railroad Co.* v. *Clarke*, 61 Maine, 379; *Jewett* v. *Valley Railroad Co.*, 34 Ohio St. 601 to 607; *Winters* v. *Armstrong*, 37 Fed. Rep. 508; *Wontner* v. *Shairp*, 4 C. B. 404, 441; *Pitchford et al.* v. *Davis*, 5 M. & W. 1; *Allman* v. *Havana, Rantoul & Eastern Railroad Co.*, 88 Illinois, 521; *Hendrix* v. *Academy of Music*, 73 Georgia, 437; *Salem Milldam Corporation* v. *Ropes*, 6 Pick. 23; *Katama Land Co.* v. *Jernegan*, 126 Mass. 155.

Mr. Justice Bradley delivered the opinion of the court.

This case belongs to the same group as *Delano* v. *Butler* (118 U. S. 634) and *Aspinwall* v. *Butler* (133 U. S. 595). It relates to certain shares of the increased stock of the Pacific National Bank of Boston issued in September, 1881. The circumstances under which said stock was created and subscribed are detailed in the reports of the cases referred to, and need not be repeated here. It will suffice to state those which are peculiar to the present case, only adverting to such others as may be necessary to understand it. On September 13, 1881, the capital stock of the bank was $500,000, and on that day the directors voted that the capital be increased to $1,000,000, and that the stockholders have the right to take the new stock at par, in equal amounts to that then held by them. Subscriptions to the new stock were payable October 1, 1881. Mary J. Eaton, the defendant in error, having forty shares (equal to $4000) of the original stock, took her full share of the new stock, and paid for it September 28, 1881, and received the following receipt therefor:

"Pacific National Bank,

"$4000. *Sep.* 28,

"Boston, *October* 1*st*, 1881.

"Received of Mary J. Eaton four thousand dollars on account of subscription to new stock.

"J. M. Pettengill, *Cashier*."

The stockholders of the bank did not all avail themselves of the right to take new stock, but $461,300 of the $500,000 were taken and paid in. At the request of the directors, with the sanction of a large majority of the stockholders, the increase of stock was afterwards limited to the said sum paid in, and approved by the comptroller of the currency, who made and executed his certificate to that effect. Certificates for the new stock were made out in a book, with stubs to indicate their contents, and were delivered to the stockholders as they called for them. Such a certificate was made out for Miss Eaton, but she never called for it, though she was registered in the stock register of the bank as owner thereof without her knowledge.

The statement of facts, amongst other things, has the following:

"No certificate of stock in said proposed increase of capital in the amount of five hundred thousand dollars was made by the bank, nor was any certificate in said claimed increase of four hundred and sixty-one thousand three hundred dollars received by or offered to the plaintiff, but when the certificate from the comptroller, made December 16, was received by the bank a certificate of forty shares in said claimed increase of four hundred and sixty-one thousand three hundred dollars was made by the bank, a copy of which is hereto annexed, marked C, which was never called for, taken by, or tendered to the plaintiff, but still remains in the certificate book, and she was then registered in the stock register of the bank as the owner thereof without her knowledge. No certificates in said claimed increase were ever tendered by the bank to any persons to whom they were made, but were delivered to them when called for. No communication was made to the plaintiff with reference to said vote of the directors of December 13, or change in said proposed increase, or said certificate of said comptroller, or said certificate made to her, and she never assented to any change in the proposed increase in the sum of $500,000."

On the 10th of January, 1882, there was held an annual meeting of the stockholders of the bank for the election of

directors and other business, at which it was voted, in accordance with an order from the comptroller of the currency, made under section 5205 of the Revised Statutes, to make an assessment of 100 per cent upon the shareholders of the bank, *pro rata* for the amount of capital stock held by each; the vote being 5494 shares for the assessment and 55 shares against it. The defendant in error on the day of the annual meeting, and before its opening, made the following demand upon the bank in writing, delivered to the directors:

"BOSTON, *January* 10, 1882.

"To the Pacific National Bank:

"The conditions upon which you received four thousand dollars of me on the twenty-eighth day of September, 1881, not having been performed, I hereby demand repayment of said four thousand dollars. "MARY J. EATON,

"By J. H. BENTON, JR., *Att'y.*"

She never paid the assessment made on the 10th of January, but on the 14th of March, 1882, she brought this suit in the Superior Court for the County of Suffolk, to recover back the four thousand dollars which she had paid for the new stock. The cause having been removed to the Supreme Judicial Court of Massachusetts, was tried in May, 1886, and judgment rendered for the plaintiff in May, 1887, a few months after the decision of this court in the case of *Delano* v. *Butler*, 144 Mass. 260, 269. The Supreme Judicial Court in its opinion drew a distinction between that case and the present. Its language is as follows:

"The case raises a question which was suggested, but not decided, in *Delano* v. *Butler*, 118 U. S. 634. It was there said: 'It will be observed that, without waiting to see what the future action of the association and the comptroller of the currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did, in legal contemplation, with knowledge of the law which authorized the association and the comptroller of the currency to reduce the amount

of the proposed increase to a less sum than that fixed in the original proposal of the directors, and such payment and acceptance of the certificates in accordance therewith might amount, under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in; but without insisting upon that point or deciding it, we think that the subsequent conduct of the plaintiff in error amounts to a ratification.' 118 U. S. 650. In the present case the plaintiff paid in her money, but did not accept a certificate of stock."

The court also assumed that the filling of the whole $500,000 of stock was a condition on which the obligation of the subscribers to the new stock to take the same depended. The latter point was fully considered by us in the case of *Aspinwall* v. *Butler*, and we held that the filling of the said $500,000 of additional stock was not a condition of the liability of the subscribers to the new stock, but that the association always retained the power of reducing the amount of stock, with the approval of the comptroller of the currency. It is unnecessary for us to discuss that question again. The defendant in error was just as much bound by her subscription to the new stock as if the whole $500,000 had been subscribed and paid in. The only question to be considered, therefore, is whether the fact that the defendant in error did not call for and take her certificate of stock made any difference as to her status as a stockholder. We cannot see how it could make the slightest difference. Her actually going or sending to the bank and electing to take her share of the new stock, and paying for it in cash, and receiving a receipt for the same in the form above set forth, are acts which are fully equivalent to a subscription to the stock in writing, and the payment of the money therefor. She then became a stockholder. She was properly entered as such on the stock book of the company, and her certificate of stock was made out ready for her when she should call for it. It was her certificate. She could have compelled its delivery had it been refused. Whether she called for it or not was a matter of no consequence whatever in reference to her rights and duties.

Counsel for Parties.

The case is not like that of a deed for lands, which has no force, and is not a deed, and passes no estate, until it is delivered. In that case everything depends on the delivery. But with capital stock it is different. Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party.

The whole matter with regard to the new stock of the Pacific National Bank of Boston was so fully discussed in the cases of *Delano* and *Aspinwall* that it would be a work of supererogation to prolong this opinion. The judgment of the Supreme Judicial Court of Massachusetts is

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

THAYER *v.* BUTLER.

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

No. 300. Argued March 23, 24, 1891. — Decided May 25, 1891.

Pacific National Bank v. *Eaton, ante,* 227, affirmed and applied.

THE case is stated in the opinion.

Mr. J. H. Benton, Jr., for plaintiff in error.

Mr. A. A. Ranney for defendant in error.

Opinion of the Court.

Mr. Justice Bradley delivered the opinion of the court.

This is an action brought by the receiver of the Pacific National Bank of Boston against George L. Thayer, trustee, to recover one hundred per cent of the amount of his capital stock in said bank upon his individual liability as a stockholder under section 5151 of the Revised Statutes. The amount sued for was $8000 (with the interest thereon), being $4000, the amount of forty shares of stock held by him, as trustee, prior to September, 1881, and $4000 for new stock subscribed for and taken by him, as alleged by the plaintiff, in September, 1881, as and for his, the said Thayer's share and proportion of the new stock issued at that time, as shown in the preceding case just decided, and in the case of *Delano* v. *Butler* and *Aspinwall* v. *Butler*, there referred to. His liability to pay the $4000 upon the original stock was not disputed, and judgment for that amount, with interest, was rendered by consent. But Thayer denied any liability by reason of the new stock, denying that it was his stock, and claiming a set-off for the money ($4000) which it was conceded he had paid therefor, on the ground that he only paid for stock which was to form part of an increased capital of $500,000, and no such increase was ever made. The case is in all respects similar to that of *Pacific National Bank* v. *Mary J. Eaton*, *ante*, 227, just decided.

A jury being waived, the cause was tried by the court upon an agreed statement of facts; in addition to which the plaintiff (below) produced the testimony of Mr. Thayer himself, giving the particulars of his acts in relation to the new stock, which elicited nothing important, and which the court disregarded in coming to its conclusion. The statement of facts contained the same facts which were received in evidence in the case of *Pacific National Bank* v. *Eaton*, *ante*, 227, just decided, and in addition thereto a list of payments on account of the new stock, with the date of each payment; a copy of the report of the bank examiner, Needham, dated November 18, 1881; a copy of minutes of meetings of the directors of the bank December 10, 1881, and December 14, 1881; copy of letters from the comptroller of the currency to the bank examiner,

December 13, 1881, and from the examiner to the comptroller, December 14, 1881; and minutes of directors' meeting January 2, 1882. This additional evidence had relation mostly to the voluntary assessment, and to the question of the resumption of business by the bank, and has no further effect upon the present controversy than as going to show, perhaps, good faith on the part of the directors of the bank. We do not think, however, that it alters the case in the slightest degree, so far as the question of the plaintiff in error's liability for the new stock is concerned.

It appears from the agreed statement of facts that, after the directors of the bank had voted, on the 13th of September, 1881, to increase the capital stock from $500,000 to $1,000,000, and notice to that effect had been sent out to the stockholders, giving to each a right to take the new stock at par in equal amounts to that then held by them, Thayer, the plaintiff in error, went to the bank and paid $4000 from the trust money in his hands, belonging to the same trust for which he already held the original forty shares, and received therefor a receipt, a copy of which is as follows:

"Pacific National Bank.

"$4000 *Sep.* 28.

"Boston, *October* 1*st*, 1881.

"Received of Geo. L. Thayer, trustee, four thousand dollars on account of subscription to new stock.

"J. M. Pettengill, *Cashier.*"

He also, at the same time, acting for Mary J. Eaton (the defendant in error in the case just decided), who had forty shares of the capital stock of the bank, paid the same amount for her, and took a similar receipt to her.

As stated in the previous case, certificates for the new stock were made out in a book, with stubs to indicate their contents, and were delivered to the stockholders as they called for them. Such a certificate was made out for Mr. Thayer, but he never called for it, though he was registered in the stock book of

the bank as owner thereof. The entry in the stock book was, and yet is, as follows:

"Geo. L. Thayer, trustee, Boston.

1880.		1878.	
Sep. 1.	To 40 shares, 40.....4,000	Jan. 16.	By 40 shares, 40.....4,000
		1880.	
		Jan. 1.	" 40 do. 40.....4,000
		1881.	
		Oct. 1.	" 40 do. 40.....4,000"

The accounts with other shareholders were similar in form to this, and the bank kept no other list of the names and residences of its shareholders and the number of shares held by each. At what time the certificates or the entries in the stock book were made does not appear except by the books. Section 5210 of the Revised Statutes requires that "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted." And the statement of facts states that —

"The president and cashier of the bank began to issue certificates for stock in the proposed increase on October 1, 1881, and thereafter issued them from time to time as called for to those who had paid, and on November 18, 1881, certificates bearing date Oct. 1, 1881, representing all but three hundred and fifty-four shares of the $461,370, had been thus delivered and the shares credited to the accounts of the respective parties on or as of October 1, 1881, on the stock ledger of the bank."

We think it is sufficiently manifest that the certificates were made out, and that the entry was made in the stock book before the failure of the bank, and before the plaintiff in error had signified to any officer of the bank his dissatisfaction at what he had done in the matter of subscribing for the new stock.

The final disposition of the case is shown by the following extract from the record:

"The defendant objected to the evidence embraced in the

agreed statement of facts that his name was without his knowledge placed upon the stock ledger, and that the certificate was made in his name without his knowledge as owner of forty shares of the so-called new stock, and also objected to the evidence of the correspondence between the bank examiner and comptroller, and reports of the bank examiner to the comptroller, and to the evidence of the proceedings at the annual meeting on January 10, 1882, and to evidence of all other proceedings subsequent to the demand made by the defendant for the return of the money paid September 28, and asked the court to rule that none of these matters were competent evidence against him; and also to rule that he was not bound by the entries made upon the books of the corporation, of which he had no actual knowledge. He also objected to evidence showing that certificates were issued purporting to represent stock in the proposed increase before the failure of the bank, on November 18, 1881, and asked the court to rule that that fact was not competent as against him. He also asked the court to rule and hold the law as stated in the opinion of the Supreme Court of Massachusetts in *Eaton* v. *Pacific National Bank*, reported in 144 Mass. Supreme Court Reports, page 260, and to rule and hold that the vote of the directors of September 13, 1881, was in the nature of a proposition to stockholders to subscribe for 5000 shares of new stock and to pay in for it $500,000; that it was necessary that the stock should all be taken and the money all paid in before the new stock could be created; and that it was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the comptroller should certify that they had been done, and approve of the increase; and that the defendant paid the money to the bank on September 28, 1881, upon the implied condition that he should not be required to take new stock unless the proposed amount of 5000 shares were created, and that as this was not done the defendant did not become a shareholder in respect of the forty shares for which he paid September 28, 1881, and for the assessment upon which the plaintiff seeks to recover.

"The defendant also requested the court to hold and rule

that the vote of the directors of December 13, 1881, was in law an abandonment of the proposed increase of 5000 shares and the authorization of an increase by the issue of 4613 shares, and that the act of the directors in including the amount the defendant had paid in to increase the capital by the issue of 5000 shares in the amount necessary to increase the capital by 4613 shares did not affect the defendant's legal relations with the bank and make him a shareholder in the increase of 4613 shares.

"The defendant also requested the court to find and rule upon the whole case that he was liable to pay an assessment only upon the forty shares of original stock held by him in the bank, and was not liable to pay the assessment claimed on the forty shares of alleged new stock placed in his name, as set forth in the admitted facts.

"The court declined to rule and find as thus requested, but did find and rule upon the facts agreed by the parties and found by the court as facts, as hereinabove set forth, 'as a conclusion of law based upon the admitted facts, without reference to the testimony of Thayer that the stock of the bank was lawfully increased from $500,000 to $961,300, and that all the proceedings resulting in such increase were valid and binding on the defendant, and that by virtue of his payment of $4000, on September 28, 1881, he became a holder of forty shares in the new stock, and that he was therefore liable to assessment upon those shares as well as upon the forty shares originally held by him, and ordered judgment for the plaintiff for the amount of the assessment on 80 shares of stock.'"

As the case is in all essential respects like that of *Pacific National Bank* v. *Eaton*, *ante*, 227, just decided, and as we fully expressed our views upon the questions at issue in that case, it is unnecessary for us to repeat what was there said. We are of opinion that the decision of the Circuit Court was correct, and that there is no error in the record.

The judgment is, therefore,

Affirmed.

BUTLER *v.* EATON.

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

No. 301. Argued March 23, 24, 1891. — Decided May 25, 1891.

Pacific National Bank v. *Eaton, ante,* 227, and *Thayer* v. *Butler, ante,* 234, affirmed and applied to this case.

An action between a plaintiff and a national bank, and an action between the receiver of that bank as plaintiff and the plaintiff in the other action as defendant, are substantially suits between the same parties.

A receiver of a national bank brought an action in a Circuit Court of the United States to recover the amount of an unpaid subscription to stock of the bank. The defendant set up a judgment in her favor in the state court on the same issue as an estoppel, and the Circuit Court held it to be an estoppel. That judgment of the state court being brought before this court by writ of error, was reversed here, and this court in the case from the Circuit Court, also brought here in error, *held,* that the judgment of the Circuit Court should be reversed, and the cause remanded with directions to enter judgment for the receiver.

THE case is stated in the opinion.

Mr. A. A. Ranney for plaintiff in error.

Mr. J. H. Benton, Jr., for defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case is a sequel to the case of *Pacific National Bank* v. *Eaton*, just decided. It was an action brought by the receiver of the Pacific National Bank of Boston against Mary J. Eaton to recover one hundred per cent of the amount of her capital stock in said bank, on her individual liability as a stockholder, under section 5151 of the Revised Statutes. The amount sued for was $8000 and interest thereon, being $4000 and interest for her original stock, and $4000 and interest for her new stock. Her liability to pay the first sum was not disputed. She consented to be defaulted for that, and that judgment should be rendered against her. But she denied any

liability by reason of the new stock, and claimed a set-off for the money she had paid on it on the ground that she only paid for stock which was to form part of an increased capital of $500,000 and no such increase was ever made. By a subsequent plea, *puis darrein continuance*, after specially setting forth the facts relating to said new stock, and denying her liability therefor, she pleaded in bar the judgment rendered in her favor in regard thereto by the Supreme Judicial Court of Massachusetts on the 10th day of May, 1887, which we have just reversed. A jury was waived and the cause was tried by the court upon an agreed statement of facts, including the record and judgment in the said action in the Supreme Judicial Court of Massachusetts. The agreed statement of facts, with the exception of the said judgment, is precisely the same *mutatis mutandis*, as in the case of *Thayer* v. *Butler*, *ante*, 234, just decided, and so far as the case depends on said statement, the same conclusion must be reached.

Upon a hearing of the whole case the Circuit Court gave judgment in favor of the receiver for the amount of the 40 shares of stock originally held by Miss Eaton, with the interest thereon, but not for the amount of the 40 shares of new stock. The ground of the judgment will appear by the following extract from the bill of exceptions:

"The plaintiff objected to the competency of the record of the case of *Mary J. Eaton* v. *The Pacific National Bank*, tried in the state court and constituting a part of said agreed facts, contending that the same constituted no estoppel or bar in defence of this action. The court admitted it, and plaintiff excepted, and his exception was allowed. The plaintiff contended and asked the court to rule that if the adjudication in the state court, as shown by the said record from the state court, was competent evidence, it was not of itself conclusive in this action, and did not operate as an estoppel or bar, and was only to be considered with the other facts agreed in the case.

"The plaintiff contended and asked the court to rule that upon all the facts agreed as aforesaid he was entitled to recover the assessment sued for upon the eighty shares of stock

declared on. The court declined to so rule, and being of the opinion that he was entitled to so recover, except for the said adjudication in the state court, he held that said adjudication was of itself conclusive as a bar to the recovery, so far as the forty shares of new stock in question were concerned, notwithstanding the issuing and pendency of a writ of error, and ordered judgment for the amount only of the assessment upon the forty shares of old stock not in dispute; that is to say, in the sum of $5172. The plaintiff excepted to the ruling in so far as it precluded him from recovering a like sum in addition on account of the other forty shares."

As the sole ground and reason for giving judgment against the receiver, in regard to the amount of the new shares of stock, was the judgment of the Supreme Judicial Court of Massachusetts, which (as stated) we have just reversed, the inquiry arises what disposition may be made of the judgment in this case, supposing that the evidence of the Massachusetts judgment was properly admitted and allowed by the Circuit Court on the trial of the cause. At that time this judgment was valid and subsisting. It was not nominally between the same parties, it is true. It was a judgment recovered by Mary J. Eaton against the Pacific National Bank; whereas the present action is an action between Butler, the receiver of the said bank, and the said Mary J. Eaton. We are inclined to think, however, that the court below was right in determining that the two actions were substantially between the same parties, inasmuch as a receiver of a national bank, in all actions and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator. We think, therefore, that the evidence of the judgment recovered was properly admitted as a bar to the receiver's title to recover in reference to the new stock. And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But by our own judgment just rendered in the other case, the whole basis and foundation of the defence in the present case, namely, the judgment of the Supreme Judicial Court of Massachusetts, is subverted and rendered null and void for the purpose of any

such defence. Whilst in force, an execution issued upon it, and a sale of property under such execution would have been effective. And when it was given in evidence in this case it was effective for the purpose of a defence, but its effectiveness in that regard is now entirely annulled. Are we then bound to affirm the judgment and send it back for ulterior proceedings in the court below, or may we, having the judgment before us, and under our control for affirmance, reversal or modification, and having judicial knowledge of the total present insufficiency of the ground which supports it, set it aside as devoid of any legal basis, and give such judgment in the case as would and ought to be rendered upon a writ of error *coram vobis*, *audita querela*, or other proper proceedings for revoking a judgment which has become invalid from some extraneous matter?

In the case of *Ballard* v. *Searls*, 130 U. S. 50, which was an appeal in equity in which a somewhat similar exigency existed, we remanded the cause to the Circuit Court with instructions to allow the appellant to file such supplemental bill as he might be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree upon the new matter arising from the reversal of the decree on which it was based. There were complications in that case which rendered such a course advisable. A sale had been made under execution, and the purchasers might have acquired rights which a simple reversal of the decree would have embarrassed; and the decree itself was not founded directly upon the other decree which had been reversed, but was rendered on a bill filed to set aside alleged fraudulent conveyances of land which obstructed the execution of that decree. It seemed to us that the necessary investigation to be made would involve the exercise of original jurisdiction by this court, to which it is not competent. Hence we took the course mentioned, by remanding the cause to the Circuit Court in order that the requisite ulterior proceedings might be taken there.

The present case is a more simple one. The judgment complained of is based directly upon the judgment of the Supreme

Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?

Upon full consideration of the matter we have come to the conclusion that we may dispose of the case here.

We, therefore, reverse the judgment of the Circuit Court, and order that the cause be remanded with directions to enter judgment for the plaintiff in error against the defendant in error for the whole amount sued for in the action, namely, eight thousand dollars, with interest and costs, and take such further proceedings as may be proper in conformity with this opinion.

TUSKALOOSA NORTHERN RAILWAY COMPANY *v.* GUDE.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 1606. Submitted January 15, 1891. — Decided February 2, 1891.

In an action at law in a Circuit Court, judgment being rendered for the plaintiff, there was no bill of exception, no writ of error nor an allowance of appeal, but the defendant filed a supersedeas bond in which it was alleged that the defendant had "prosecuted an appeal or writ of error to the Supreme Court of the United States to reverse the judgment." The plaintiff moved for the revocation of the supersedeas created by the bond, which motion was denied. The motion in this court for leave to docket and dismiss the case was granted.

THIS was a motion for leave to docket and dismiss a cause. The motion was as follows:

Statement of the Case.

"Motion is made in this cause, upon the record of the proceedings of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, a duly certified transcript whereof is now submitted to this Honorable Court, on the following prayers for relief in behalf of the plaintiff in said cause.

"*First.* That the plaintiff in said cause, as the defendant in error in this court, have leave to docket said cause and dismiss the same, under section 1 of Rule 9, of the Rules of practice in the Supreme Court, or:

"*Second.* That the plaintiff in said cause have leave to docket the same and file a copy of the record in said case with the Clerk of the Supreme Court and that his counsel have leave to enter his appearance therein, and that the cause shall stand for argument at the present term of the court, under sections 2 and 3 of said Rules of practice: or for motion to dismiss the same under Rule 6: and

"*Third.* That the court will, if said cause is dismissed under Rule 9, or under any other Rule, adjudge damages to the said Albert V. Gude the plaintiff in said judgment, for delay under section 2 of Rule 23, and also a mandate, or other process in the nature of a *procedendo*, to the court below, under Rule 24.

"*Fourth.* That the court will grant to the plaintiff in said judgment any other relief in the premises to secure justice to him, that may be consistent with the law and the practice in the Honorable Court.

"JOHN T. MORGAN,
"*Attorney for Albert V. Gude.*

"STATEMENT OF FACTS SHOWN BY THE DULY CERTIFIED RECORD HEREWITH SUBMITTED.

"On the 24th March, 1890, judgment was rendered on the verdict of a jury, in the said Circuit Court of the United States, in favor of Albert V. Gude, against the Tuskaloosa Northern Railway Company, for the sum of ten thousand dollars and costs, for which execution was ordered to issue.

"On the 25th March, 1890, the attorneys of the parties

entered into the following stipulation: 'In the above cause it is hereby agreed that the time for signing the bill of exceptions in this cause and taking appeal or prosecuting writ of error therein be and the same is hereby extended until the 1st day of June, 1890, and that the said bill of exceptions shall be considered as if filed on the last day of the term of said court now pending.'

"On the filing of this agreement the court ordered 'that no execution issue in this cause until said 1st day of June, 1890, and then that the same should not issue if the defendants have taken said appeal, or prosecuted their writ of error, upon supersedeas bond; and that the said bill of exceptions be, when signed, considered as if filed on the last day of the present term of the court.'

"The certificate of the Clerk of the court shows the transcript now submitted to the court 'to be a true, perfect and complete transcript and copy of the record and proceedings heretofore had and entered of record' in said cause. No bill of exceptions is in the record and none has been signed or filed.

"On the 31st of May, 1890, *a bond was filed in the clerk's office*, which had been '*taken and approved this 24th day of May*, 1890,' by 'John Bruce, Judge of the U. S. Court, Southern Division Northern District of Alabama.'"

The following is a copy of that bond, as the same is set out and certified in the transcript of the record now, here, submitted to the court.

"The Tuskaloosa Northern Railway Company, a body Corporate under the laws of Alabama. *Appellant.* *v.* J. C. Reiley and A. V. Gude, constituting the firm of Reiley & Gude. *Appellees.*"	Circuit Court of the United States of America. For the Southern Division of the Northern District of Alabama.

"Know all men by these presents that we The Tuskaloosa

Statement of the Case.

Northern Railway Company, a body corporate under the laws of Alabama, The Tuskaloosa Coal Iron and Land Co., a body corporate under the laws of Alabama, and the Tuskaloosa Belt Railway Co., a body corporate under the laws of Alabama, all of the county of Tuskaloosa in the State of Alabama are held and firmly bound unto the above named Reiley & Gude in the sum of Fifteen Thousand (15,000) Dollars to be paid the said Reiley & Gude.

"For the faithful payment of which sum well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally and firmly by these presents.

"Sealed with our seals and dated at Tuskaloosa, Alabama, the 23d day of May, A.D., 1890.

"Whereas the above bounden Tuskaloosa Northern Railway Co., has prosecuted an appeal or writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause at the spring term 1890, of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, holden at Birmingham, Alabama, by the Hon. John Bruce, judge of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama. Now therefore, the condition of the above obligation is such, that if the above named Tuskaloosa Northern Railway Co. shall prosecute said appeal to effect and answer all damages and costs, if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

"Tuskaloosa Northern
Railway Company.
"By W. C. Jemison, [SEAL.]
"*Presd't.*

"Tuskaloosa Coal
Iron and Land Company.
"By W. C. Jemison, [SEAL.]
"*Presd't.*

Order of the Court.

"Tuskaloosa Belt
Railway Company.
"W. C. Jemison, [SEAL.]
"*Presd't.*

"Taken and approved this 24th day of May, 1890.
"JOHN BRUCE,
"Judge of the U. S. Court
Southern Division Northern District of Alabama.

"There is no other allowance of an appeal or writ of error in the cause of record, except that disclosed in the bond for supersedeas and the orders thereon, as above stated and no formal writ of error appears in the record.

"The plaintiff in said judgment, who is shown by the record to be the surviving partner of the firm of Reiley & Gude, on the 9th of July, 1890, presented his petition to Hon. John Bruce, who took and approved said supersedeas bond, praying that he would revoke the supersedeas created by said bond because it was not valid in law to prevent the issue of execution on the judgment which was not accurately described in the supersedeas bond.

"Judge Bruce denied the petition, and thus sustained the validity of the bond, and treated the case as if it had been removed into the Supreme Court of the United States.

"The petition and the papers relating thereto were filed in said Circuit Court and a certified transcript of the same is submitted with this motion to this Honorable Court.

"These papers, thus certified, are *dehors* the record in the case adjudged by the court, but they are here presented to show that the plaintiff, Gude, is without remedy as to execution on his judgment until the Supreme Court has exercised jurisdiction in the main cause, or has declared that it has no jurisdiction."

Mr. John T. Morgan for the motion.

No one opposing.

The court ordered the case to be docketed and dismissed.

Counsel for Plaintiffs in Error.

WILLIAMS *v.* PASSUMPSIC SAVINGS BANK.

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

No. 1354. Submitted March 30, 1891. — Decided April 6, 1891.

A decree in chancery in a Circuit Court having been brought up by writ of error instead of appeal, the defendant in error consented to the dismissal of the writ, and the court announced that if an appeal is seasonably taken the transcript of the record in this cause may be filed as part of return.

THIS was a motion by the defendant in error to dismiss a writ of error for the following reasons:

First. Because said cause is a suit in equity and not at law and for that reason a writ of error does not lie to revise the proceedings of the United States Circuit Court in the premises.

Second. Because the proceedings sought to be revised by said writ of error terminated in a final decree and judgment on the 19th day of October, 1889, at a term of the United States Circuit Court in and for the Northern District of Florida, which term finally terminated and adjourned on the 22d day of November, 1889, and said writ of error was not sued out until the first day of July, 1890, and no citation has ever been issued or served in said cause.

Thereupon the plaintiffs in error moved as follows:

Now come the plaintiffs in error in the above entitled cause, by H. Bisbee, their solicitor, and consent to granting the motion to dismiss, made by defendant in error; and plaintiffs in error move for leave to withdraw the transcript of the record, on the ground that the failure to bring the cause within the jurisdiction of this court is not attributable to their negligence, but to that of their solicitors in the court below, and plaintiffs desire to take and perfect an appeal and should not be subjected to the expense of another transcript.

Mr. H. Bisbee for plaintiffs in error.

Statement of the Case.

Mr. Henry C. Ide for defendant in error.

FULLER, C. J. The mandate in this cause will issue forthwith, and if the plaintiffs in error seasonably take and prosecute an appeal from that rendered by the Circuit Court, leave will be granted them to file as part of the return on said appeal the transcript of the record in this cause.

UNION PACIFIC RAILWAY COMPANY *v.* BOTSFORD.

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

No. 1375. Submitted January 6, 1891. — Decided May 25, 1891.

A court of the United States cannot order a plaintiff, in an action for an injury to the person, to submit to a surgical examination in advance of the trial.

THE original action was by Clara L. Botsford against the Union Pacific Railway Company, for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial.

Three days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner; the defendant at the time informing the court that

such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order."

To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

Mr. John F. Dillon and *Mr. Harry Hubbard* for plaintiff in error.

Mr. Addison C. Harris for defendant in error.

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

The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order.

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 29.

For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process, or execution for debt, or writ of replevin. 3 Bl. Com. 8; *Sunbolf* v. *Alford*, 3 M. & W. 248, 253*, 254*;

Mack v. *Parks*, 8 Gray, 517; *Maxham* v. *Day*, 16 Gray, 213.

The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country.

In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy, or of the identity of a party; or, on an appeal of maihem, the issue of maihem or no maihem; and, in an action of trespass for maihem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, "it is not thought necessary to summon a jury to decide it," because "the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof," and, therefore, "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Com. 331–333.

The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to

exercise its jurisdiction; and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. *Briggs* v. *Morgan*, 2 Hagg. Con. 324; *S. C.* 3 Phillimore, 325; *Devanbagh* v. *Devanbagh*, 5 Paige, 554; *Le Barron* v. *Le Barron*, 35 Vermont, 365.

The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Com. 456; Bac. Ab. Bastard, A. In cases of that class, the writ has been issued in England in quite recent times. *In re Blakemore*, 14 Law Journal (N. S.) Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people.

So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history.

The most analogous cases in England, that have come under our notice, are two in the Common Bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it.

In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building and an inspection of the work done thereon; and stated that

the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to avoid being considered trespassers. Thereupon one of the judges said: "Then you are asking the court to make an order for you to commit a trespass;" and Chief Justice Tindal said: "Suppose the defendants keep the door shut; you will come to us to grant an attachment; could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again." On a subsequent day, the counsel stated that he had not been able to find any case in point; and therefore took nothing by his motion. *Newham* v. *Tate*, 1 Arnold, 244; *S. C.* 6 Scott, 574.

In the other case, in 1840, the court discharged a similar order, saying: "The order, if valid, might, upon disobedience to it, be enforced by attachment. Then, it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it." *Turquand* v. *Strand Union*, 8 Dowling, 201; *S. C.* 4 Jurist, 74.

In the English Common Law Procedure Act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order "for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute," the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Taylor on Ev. (6th ed.) §§ 502–504.

Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Taylor on Ev. §§ 1588–1595; 1 Greenleaf on Ev. § 559.

In the case at bar, it was argued that the plaintiff in an action for personal injury may be permitted by the court, as

in *Mulhado* v. *Brooklyn Railroad*, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature or extent, and to enable a surgeon to testify on that subject; and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is, that any one may expose his body, if he chooses, with a due regard to decency, and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury, as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. *Clifton* v. *United States*, 4 How. 242; *Bryant* v. *Stilwell*, 24 Penn. St. 314; *Turquand* v. *Strand Union*, above cited.

In this country, the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868 by a judge of the Superior Court of the city of New York in *Walsh* v. *Sayre*, 52 How. Pract. 334, since overruled by decisions in general term in the same State. *Roberts* v. *Ogdensburgh & Lake Champlain Railroad*, 29 Hun, 154; *Neuman* v. *Third Avenue Railroad*, 18 Jones & Spencer, 412; *McSwyny* v. *Broadway Railroad*, 27 N. Y. State Reporter, 363. And the power to make such an order was peremptorily denied in 1873 by the Supreme Court of Missouri, and in 1882 by the Supreme Court of Illinois. *Loyd* v. *Hannibal & St. Joseph Railroad*, 53 Missouri, 509; *Parker* v. *Enslow*, 102 Illinois, 272.

Within the last fifteen years, indeed, as appears by the cases cited in the brief of the plaintiff in error,[1] a practice to grant

---

[1] *Schroeder* v. *Chicago &c. Railway*, 47 Iowa, 375; *Miami &c. Turnpike Co.* v. *Baily*, 37 Ohio St. 104; *Atchison, Topeka & Santa Fé Railroad* v. *Thul*, 29 Kansas, 466; *White* v. *Milwaukee Railway*, 61 Wisconsin, 536; *Hatfield* v. *St. Paul & Duluth Railroad*, 33 Minnesota, 130; *Stuart* v. *Havens*, 17 Nebraska, 211; *Owens* v. *Kansas City &c. Railroad*, 95 Missouri, 169; *Sibley* v. *Smith*, 46 Arkansas, 275; *Missouri Pacific Railroad* v. *Johnson*, 72 Texas, 95; *Richmond & Danville Railroad* v. *Childress*, 82 Georgia, 719; *Alabama &c. Railroad* v. *Hill*, 90 Alabama, 71.

such orders has prevailed in the courts of several of the Western and Southern States, following the lead of the Supreme Court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law.

In the State of Indiana, the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. *Kern* v. *Bridwell*, 119 Indiana, 226, 229; *Hess* v. *Lowrey*, 122 Indiana, 225, 233; *Terre Haute & Indianapolis Railroad* v. *Brunker*, 26 Northeastern Reporter, 178. And the only statute, which could be supposed to bear upon the question, simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Indiana Rev. Stat. 1881, c. 2, § 538.

But this is not a question which is governed by the law or practice of the State in which the trial is had. It depends upon the power of the national courts under the Constitution and laws of the United States.

The Constitution, in the Seventh Amendment, declares that in all suits at common law, where the value in controversy shall exceed twenty dollars, trial by jury shall be preserved. Congress has enacted that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and has then made special provisions for taking depositions. Rev. Stat. §§ 861, 863 *& seq.* The only power of discovery or inspection, conferred by Congress, is to "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," and to nonsuit or default a party failing to comply with such an order. Rev. Stat. § 724. And the provision of § 914, by which the practice, pleadings and forms and modes of proceeding in the courts of each State are to be followed in

actions at law in the courts of the United States held within the same State, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. *Nudd* v. *Burrows*, 91 U. S. 426, 442; *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 300; *Ex parte Fisk*, 113 U. S. 713; *Chateaugay Iron Co., petitioner*, 128 U. S. 544, 554.

In *Ex parte Fisk*, just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the State had been removed into the Circuit Court of the United States. It was argued that the object of § 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial; and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717. But this court, speaking by Mr. Justice Miller, held that this was a matter of evidence, and governed by that section, saying: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel, to extract something which he may use or not as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this." 113 U. S. 724.

So we say here. The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The Circuit Court, to adopt the words of Mr. Justice Miller, "has no power to subject a party to such an examination as this."

Judgment affirmed.

Dissenting Opinion: Brewer, Brown, JJ.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE BROWN, dissenting.

Mr. Justice Brown and myself dissent from the foregoing opinion. The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seem to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various States are conflicting. This is the first time it has been presented to this court, and it is, therefore, an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the

extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial, or dismissing the case.

For these reasons we dissent.

Syllabus.

GRISWOLD *v.* HAZARD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

GRISWOLD *v.* HAZARD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

GRISWOLD *v.* HAZARD.

GRISWOLD *v.* HAZARD.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Nos. 50, 53, 51, 52. Argued and submitted April 10, 13, 1891. — Decided May 25, 1891.

An admitted or clearly established misapprehension of law in the making of a contract creates a basis for the interference of a court of equity, resting on its discretion, and to be exercised only in unquestionable and flagrant cases.

Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case.

In this case it is held on the evidence that the bond given by Griswold in the *ne exeat* proceeding conditioned that the defendant in that proceeding should "abide and perform the orders and decrees" of the court was executed by him under such an apprehension of the obligations in law assumed by him in executing and delivering it, as to make it the duty of a court of equity to reform it so as to make him liable for the penal sum named, only in the event that the principal fail to appear and become subject to the orders and decrees of the court; but that, the defendant in the suit in which the *ne exeat* was issued having died, and such a decree being therefore inappropriate, and Griswold being guilty of no laches, a decree should be entered perpetually enjoining the prosecution of any action, suit or proceeding to make him liable in any sum on or by reason of said bond.

In the action at law upon the bond given in the *ne exeat* proceedings (No. 53) the court erred in ordering the amended pleas to be stricken from the files.

D. was sued in the Supreme Court of Rhode Island by stockholders in the Crédit Mobilier for an accounting and payment of what might be found

Statement of the Case.

due on the accounting, for securities and moneys coming into his hands as president of the Crédit Mobilier. The receiver of that company in Pennsylvania released him from such liability. The Supreme Court of Rhode Island would not allow that release to be interposed as a defence. *Held*, that the error, if any, in this respect could not be corrected by bill in equity filed by a surety on a bond given to release D. when arrested on *ne exeat* proceedings in that Rhode Island suit.

A pleading presenting only a question of error in a judgment of a state court does not go to the jurisdiction.

The first of the above suits was brought by Griswold, a citizen of New York, against the appellees, citizens of Rhode Island, to obtain a decree cancelling, or (if relief of that character could not be granted) reforming a certain bond, for the sum of $53,735, executed by Thomas C. Durant, as principal, and Griswold and S. D. Bradford, as his sureties. It was heard upon bill, answer and proofs, and the bill was dismissed.

The action at law, No. 53, was brought by the appellees against Griswold upon the above bond in one of the courts of Rhode Island, and was removed, upon his petition, to the Circuit Court of the United States for the District of Rhode Island, where a judgment was rendered against him for the sum of $66,470.

The other two cases, Nos. 51 and 52, were suits in equity brought by Griswold, pending the action at law in the Circuit Court, to obtain an injunction against its further prosecution. The relief asked, in each of those suits, was denied, and the bills were dismissed.

All of the cases have their origin in a suit in equity brought, August 22, 1868, in the Supreme Court of Rhode Island, by Isaac P. Hazard, of that State, against Thomas C. Durant, Oliver Ames, Benjamin E. Bates, John Duff, Cornelius S. Bushnell, Sidney Dillon, Henry S. McComb, the Crédit Mobilier of America, a Pennsylvania corporation, and the Union Pacific Railroad Company, a corporation created by acts of Congress. Hazard sued on behalf of himself and all other stockholders in the first-named corporation who should become parties to his bill. Durant, from an early date in 1864 until May 18, 1867, was president of the Crédit Mobilier of America, having, it

was alleged, to a great extent, the management of its affairs and the confidence of its directors and trustees, as well as the control of its finances and disbursements, and of its treasurer, clerks and servants. The theory of the bill was that he had acquired a large amount of the stock of the Crédit Mobilier of America upon which dividends had been paid in money and in the stock and bonds of the Union Pacific Railroad Company, the amount of such bonds exceeding, it was alleged, seven hundred thousand dollars, and the amount of such stock of the last-named corporation being nearly two millions of dollars; and that the shares of stock, bonds and moneys, so received by him, belonged equitably to the Crédit Mobilier of America and its stockholders.

The bill alleged that Durant's pecuniary condition was precarious; that he was, and for a long time had been, largely engaged in hazardous speculations and financial operations, sustaining thereby heavy losses, and liable to sustain others; that any recovery against him, it was feared, could not be enforced by execution or the ordinary process of law; that he was "about to depart out of the State and out of the jurisdiction of this court;" and that the defendants, (the individual defendants being sued as trustees in a certain contract with the Union Pacific Railroad Company, the profits of which belonged to the Crédit Mobilier of America and its stockholders,) "though requested so to do," had wholly neglected and refused to take any steps to compel him to account for said moneys, stocks and bonds, so received and improperly appropriated.

The principal relief asked was that Durant be required to pay over and deliver to the Crédit Mobilier of America and the plaintiff Hazard such sums of money and shares of stock as should appear upon an accounting to be justly due or belonging to that corporation and to Hazard, and to make such transfer of the stock and bonds as would fully protect its and his rights in the premises; that the amounts ascertained to be due be adjudged a lien upon the shares in the stock of each of said corporations, owned or held by, or standing in the name of, Durant, as well as upon the above contract assigned to the

defendant trustees, and the dividends, earnings, stocks and bonds received or to be received by virtue of that contract, to the extent of the shares to which Durant might be entitled under it; and that on default in the payment and delivery of the moneys, stocks and bonds so found due, all such stocks and bonds be sold under the direction of the court, or otherwise transferred and apportioned equitably among the rightful owners and claimants thereof; and that such stock, bonds, moneys, interest and rights, so procured by Durant, be deemed and taken as the rightful property of the Crédit Mobilier of America and its stockholders. The bill prayed that Durant be restrained from departing out of the State, and out of the jurisdiction of the court, by writ of *ne exeat*, issued under its seal and by its order.

A writ of *ne exeat* was ordered to be issued, August 22, 1868, for $53,735. It was in these words:

"Whereas it is represented to our Supreme Court, sitting in equity, on the part of Isaac P. Hazard and others, complainants, against Thomas C. Durant and others, defendants, that said Thomas C. Durant is greatly indebted to the said complainants, and designs quickly to go into other parts beyond this State, (as by oath made in that behalf appears,) which tends to the great prejudice and damage of the said complainants: Therefore, in order to prevent this injustice, we hereby command you that you do, without delay, cause the said Thomas C. Durant to come before you and give sufficient bail or security, in the sum of fifty-three thousand seven hundred and thirty-five dollars, that he, said Thomas C. Durant, will not go or attempt to go into parts beyond this State without the leave of our said court; and in case the said Thomas C. Durant shall refuse to give such bail or security, then you are to commit him, the said Durant, to our county jail, in your precinct, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security you are forthwith to make and return a certificate thereof to our said court, distinctly and plainly, under your hand, together with this writ."

Durant was arrested under this writ on the night of August

22, 1868, and on the 24th he executed, with Griswold and Bradford, as his sureties, the following bond, drawn by one of Hazard's attorneys:

"Know all men that we, Thomas C. Durant, as principal, and John N. A. Griswold and S. Dexter Bradford, as sureties, are firmly bound to Isaac P. Hazard, Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee, Anna Hazard, Mary P. Hazard, Lydia Torrey, Sophia Vernon and Anna Horner in the sum of fifty-three thousand seven hundred and thirty-five dollars, to be paid said obligees, their executors, administrators or assigns; to which payment we bind ourselves, our several and respective heirs, executors and administrators, jointly and severally, hereby.

"Sealed with our seals and dated this 24th day of August, A.D. 1868.

"The condition of this obligation is that said Thomas C. Durant shall on his part abide and perform the orders and decrees of the Supreme Court of the State of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now pending in said court within and for the county of Newport." This is the bond above referred to.

Under the latter date, and presumbly before the execution of that bond, the attorneys of Hazard and Durant signed the following agreement: "In the above-entitled case it is agreed that said Thomas C. Durant shall file a bond, with surety in the penalty marked in the writ of *ne exeat* therein, to abide and perform the orders and decrees of the court in said cause, and that thereupon the writ of *ne exeat* aforesaid shall be discharged, and that the court may enter decree accordingly." The court, under the same date, entered the following order: "Thomas C. Durant, one of the defendants in this suit, having executed and filed a bond, with sureties, to abide and perform the orders and decrees of the court made in this suit, it is now, by consent, ordered that the writ of *ne exeat* heretofore issued be discharged." For some reason, not explained, the writ of *ne exeat* was not returned to the clerk's office and filed until October 21, 1868. The sheriff made this return on the

writ: "Newport, August 24, 1868. I caused the within-named Thomas C. Durant personally to come before me, as within commanded, on the 22d day of this month, and now the writ is discharged by order of court."

On the 2d of December, 1882, more than fourteen years after the commencement of Hazard's suit, it was ordered, adjudged and decreed in that suit, among other things, as follows:

"Second. That the defendant, Thomas C. Durant, is accountable for and do, within 90 days from the date hereof, pay the sum of $16,071,659.97, with interest from this date, the said sum, with interest thereon, to be deposited in the registry of this court, or, be paid, in the first instance, to Rowland Hazard, of South Kingston, in said State, and Henry Martin, of Brooklyn, in the State of New York, who are hereby appointed special commissioners, with authority, jointly and severally to collect and receive the same, and with power to take such steps to collect the same as may be necessary and according to law, and said fund, or so much thereof as may be collected by process or otherwise, is hereby directed to be paid and deposited in the registry of this court to the credit of this cause.

"Third. Of the aforesaid total sum of $16,071,659.97, the defendant, Thomas C. Durant, is hereby allowed and is decreed to be entitled to pay and discharge $8,816,232.93, or any part thereof *pro tanto*, by transferring and delivering stock of the Union Pacific Railroad Company and first mortgage and sinking-fund bonds of said company as per statement 'G,' now exhibited to the court and directed to be filed in this cause, with all dividends which may have been collected or received by said defendant or his assigns after the date of this decree, together with interest on the same to the date of payment thereof by said defendant, the certificates of said stock, with transfers thereof, and the said bonds to be delivered to the said Rowland Hazard and Henry Martin, who are hereby appointed special commissioners to receive the same, and who are hereby authorized and directed to sell the same, or such portions thereof as may be delivered to them from time to

time as they are secured, at public auction, and receive the proceeds thereof, and, after deducting the costs and charges of such sales, deposit the same in the registry of this court to the credit of this cause: *Provided, however*, That the said privilege herein granted to the said defendant, Thomas C. Durant, to transfer and deliver said stocks and bonds in partial discharge and payment of the sum herein before decreed to be paid by him be exercised by him within thirty days from the date of the entering this decree; and that in default of such transfer and delivery, or of the transfer and delivery of the entire amount of said stock and bonds within the said thirty days, the obligation of the defendant, Thomas C. Durant, to pay the said proportion of the said sum or of the residue of the same, after deducting the amount of such stocks and bonds as may be delivered, as aforesaid, at their face value, shall become, and is hereby declared to be, absolute: *And provided further, nevertheless*, That the said option or privilege of the said Thomas C. Durant shall not interfere in any manner with any order or decree in the cause touching the transfer, delivery, sale or other disposition of said stock and bonds.

"Fourth. The defendant, Thomas C. Durant, is likewise ordered and directed to transfer and deliver, within thirty days from the date hereof five thousand seven hundred and seven $\frac{45}{100}$ ($5707\frac{45}{100}$) shares of the stock of the Crédit Mobilier of America (which stock has been found by the master to have been purchased with the funds of the Crédit Mobilier, and which stock with any dividends or profits accrued or to accrue on the same, is hereby declared to be the property of said corporation, subject to the decrees and orders in this cause), with any interest, dividends, rights, benefits and profits which may have accrued to the said Thomas C. Durant as the holder of the said $5707\frac{45}{100}$ shares of stock or any part thereof and not hereinbefore charged against him, said transfer and delivery to be made to the said Rowland Hazard and Henry Martin or either of them, as special commissioners, with power, which is hereby granted to said commissioners, forthwith to take such measures, by suit or suits in their own names or

otherwise, as they may be advised is lawful and necessary to enforce such transfer, collection or delivery, and said stocks to be held by said commissioners subject to the further order of the court in this cause.

"Fifth. All interlocutory injunctions heretofore made in this cause, so far as consistent with this decree, are declared to be and are hereby made perpetual, and the further consideration of the cause, and particularly as to allowances to the complainants for costs, expenses and services, and as to the distribution of the funds that may be deposited in the registry of the court to the credit of the cause, and also the consideration of any order or decree which may be necessary in the premises against the defendant, Thomas C. Durant, by reason of any default which may be made by him touching any portion of this decree, and also the consideration of any other and further decree herein against or concerning the defendants other than the said Thomas C. Durant, be, and they hereby are, directed to stand over, with leave to any party in interest, save parties in contempt or parties who may appear to be for any other cause disqualified, to apply at any time for further orders and directions."

The bill in case No. 50 was filed September 13, 1881. That suit proceeds upon these grounds: That the bond of August 24, 1868, whereby Griswold became bound, as one of the sureties of Durant, that the latter should "on his part abide and *perform* the orders and decrees of the Supreme Court of the State of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now [then] pending in said court," was obtained by fraud and by concealment from him of facts he was entitled to have communicated to him before he assumed the obligations imposed by that instrument; that he intended to sign, and believed, at the time, that he signed, a bond which simply bound him for the appearance of Durant, so that he should be personally amenable to the process and orders of the court in the suit brought by Hazard; that the execution of the bond in question was the result of mistake; that the agreement whereby, upon the execution by Durant of a bond, the writ of

ne exeat was to be discharged, was made without his knowledge or consent, as was also the order of court in pursuance of such agreement, and was in derogation of his rights; that his purpose to become surety only for Durant's appearance to answer the process of the court, was well known at the time to the plaintiff and his attorneys, who prepared, and supervised the execution of, the bond; and that the writ of *ne exeat* was sued out upon the ground that Durant was about to depart from the State when, in fact, he only contemplated coming to the State.

Protesting that the legal effect of the bond was that he should be responsible only for the appearance of Durant so as to be subject to the process of the court in the Hazard suit, and averring his willingness to execute a proper *ne exeat* bond, he prayed that the bond in question be set aside as having been obtained by fraud, imposition and mistake, or reformed, as indicated, and that the defendants be restrained by injunction from enforcing it in its present shape.

The answers of the defendants put in issue the material allegations of the bill. The plaintiff filed a replication, and proofs being taken, and the cause heard, the bill as already stated, was dismissed. 26 Fed. Rep. 135.

The action at law, being case No. 53, was commenced, March 3, 1883, in one of the courts of Rhode Island, and was removed, upon Griswold's application, to the Circuit Court of the United States. The declaration set out the bond of August 24, 1868, alleged that Bradford, one of the sureties thereon, was dead, and that Durant had not kept its condition in that he had not performed the above decree of December 2, 1882, in the equity suit brought by Hazard; whereby the plaintiffs Rowland Hazard, Rowland G. Hazard, Anna Hazard, and Lydia Torrey were entitled to have and demand of him the amount of said bond, $53,735. A copy of that decree was made an exhibit in the declaration. The defendant Griswold filed ten pleas, each of which was in bar of the action. One of the pleas made a copy of the proceedings in Hazard's suit a part of it. Demurrers and replications were filed to the pleas, those to the second, third, fourth, fifth and seventh

pleas being special demurrers. By an order entered July 1, 1884, the demurrers were sustained to the second, third, fourth, fifth and seventh pleas, the opinion of the court being delivered by Mr. Justice Gray. 21 Fed. Rep. 178.

Pursuant to a stipulation of counsel, dated November 26, 1883, that the plaintiff might demur specially to the second, third, fourth, fifth and seventh pleas, and, in case the demurrers were overruled, reply to those pleas as if no demurrers had been filed, and that amended pleas, if desired, might be filed by the defendant, and in obedience to the order of court requiring the amended pleas to be filed on or before October 15, 1884, the defendant, on the 14th of October, 1884, filed amended third, fourth, fifth and seventh pleas. The case was subsequently heard on a motion by plaintiff, made November 19, 1884, that the amended pleas be stricken out, and on the 30th of March, 1885, this order was made: "Plaintiff's motion to strike amended pleas from the files is granted." Certain stipulations were made between counsel, among others, one to the effect "that the plaintiffs were able to prove under the decree of the Supreme Court of Rhode Island, in the equity suit brought by Hazard, an amount of damage in excess of the penal sum of the bond declared on in this suit." A jury having been waived in writing, the court gave judgment, as of February 12, 1887, against Griswold, for $66,470.

The suit in equity No. 51 was brought June 12, 1885. The bill in that case, after referring to the suit in equity brought by Isaac P. Hazard in 1868, showed that, on the 17th of November, 1875, Rowland G. Hazard commenced a suit in equity in one of the courts of Pennsylvania, against the Crédit Mobilier of America and others, which was subsequently removed to the Circuit Court of the United States for the Eastern District of Pennsylvania, that being the domicil of the corporation; that in such suit Oliver Ames was appointed receiver of all the goods, chattels, rights and effects of the corporation, and was authorized by the court in Pennsylvania to deliver to Durant a deed of release from all actions, causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, reckonings, accounts, sums of money, judgments, exe-

cutions, extents, quarrels, controversies, trespasses, damages and demands whatever, both in law or equity, which the Crédit Mobilier of America then had, or might at any time thereafter have, claim, allege or demand, against said Durant, for or by reason or means of any matter, cause or thing whatever; that, afterwards, on the 27th day of October, 1881, Ames, under the said authority, and in consideration of the execution by Durant of a deed conveying the title to certain lands mentioned in the order of court authorizing the release, delivered to the latter a deed of release, of the kind above indicated, of all sums of money then due or owing to, or thereafter to become due to, said corporation; that the above equity suit in the Supreme Court of Rhode Island was, and had been, wholly controlled by Rowland G. Hazard; that notwithstanding the delivery of the above deed to Durant, the latter suit was proceeded with, and the Supreme Court of Rhode Island rendered a decree refusing to allow him to set it up as a bar to the entering of such decree, on the ground that he was in contempt of that court for violation of one of its decrees rendered therein; and that after the delivery of the deed of release to Durant the plaintiff requested the defendants to surrender the bond of August 24, 1868, and to abstain from suing him thereon, but they refused to comply with that request. The relief asked was an injunction restraining the defendants from further proceeding in the action at law. Upon a hearing before Judges Colt and Carpenter a demurrer to the bill was sustained, and the bill dismissed, October 28, 1886, Judge Carpenter delivering the opinion of the court. 28 Fed. Rep. 597.

The bill in case No. 52 was filed June 12, 1885. It assailed the jurisdiction of the Supreme Court of Rhode Island over the subject matter of the suit in equity brought by Hazard upon the ground that before bringing it neither the plaintiff therein, Isaac P. Hazard, nor any other stockholder of the Crédit Mobilier of America, requested the managing committee of the board of directors or the stockholders of that corporation to begin legal or equitable proceedings against Durant. The cause was heard upon demurrer before Judges Colt and

Mr. Carter for Griswold.

Carpenter. The demurrer was sustained and the bill dismissed, the opinion of the Circuit Court being delivered by Judge Carpenter. 28 Fed. Rep. 578.

Mr. James C. Carter for Griswold argued Nos. 50 and 53, and submitted Nos. 51 and 52.

In No. 50 the specification of errors relied upon was as follows:

First. — That the court below erred in overlooking the distinguishing feature of the case that the obligation sought to be cancelled or reformed was one of *suretyship*, and was entered into under circumstances well calculated to create *misapprehension* in the minds of the obligors as to its real character;

Second. — That the court below erred by acting upon the view that in order to entitle the complainant to relief it was necessary to show that *both* parties to the instrument understood that it was to be a bond for the *appearance* only of Durant in the equity suit, and that it was not enough to show that the complainant, Griswold, supposed it to be of that character, and that the obligees took it, well knowing or having good reason to know that such was the belief under which the complainant Griswold was acting.

Third. — That the court below, even upon the view that the case was the ordinary one of an attempt to impeach a written instrument on the ground of mistake, and without reference to the points of the character of the obligation as being that of suretyship, and of the peculiar circumstances under which it was procured, erred by deciding, against the weight of evidence, that the mistake was not sufficiently proved.

The following cases were cited by *Mr. Carter* in this case: *Barber* v. *Barber*, 21 How. 582; *Samuel* v. *Howarth*, 3 Meriv. 272, 278; *Railton* v. *Mathews*, 10 Cl. & Fin. 935; *Russell* v. *Asley*, 5 Ves. 96; *Brayton* v. *Smith*, 6 Paige, 489; *McNamara* v. *Dwyer*, 7 Paige, 239; *S. C.* 32 Am. Dec. 627; *Mitchell* v. *Bunch*, 2 Paige, 605; *S. C.* 22 Am. Dec. 669; *Johnson* v. *Clen-*

denin, 5 Gill & J. 463; *Hamilton* v. *Watson*, 12 Cl. & Fin. 109, 119; *Franklin Bank* v. *Cooper*, 36 Maine, 179, 197; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Davies* v. *Lond. Prov. Mar. Ins. Co.*, 8 Ch. D. 469; *Wythes* v. *Labouchere*, 3 De G. & J. 593; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; *Meadows* v. *Meadows*, 16 Beav. 401; *Millar* v. *Craig*, 6 Beav. 433; *Cocking* v. *Pratt*, 1 Ves. Sen. 400; *Brown* v. *Lamphear*, 35 Vermont, 252; *Paget* v. *Marshall*, 28 Ch. Div. 255; *Garrard* v. *Frankel*, 30 Beav. 445; *Small* v. *Currie*, 2 Drewry, 102, 114; *Wauters* v. *Van Vorst*, 28 N. J. Eq. 103; *Slocomb* v. *Robert*, 16 La. 173; *Lloyd* v. *McTeer*, 33 Georgia, 37.

In No. 53 *Mr. Carter's* specification of errors relied on was as follows:

First. — That the court below erred in sustaining the demurrer to the second original plea.

Second. — That the court below erred in sustaining the demurrer to the third original plea.

Third. — That the court erred in striking out the third plea as amended.

Fourth. — That the court erred in sustaining the demurrer to the fourth original plea.

Fifth. — That the court erred in striking out the fourth plea as amended.

Sixth. — That the court erred in sustaining the demurrer to the fifth original plea.

Seventh. — That the court erred in striking out the fifth plea as amended.

Eighth. — That the court below erred in not granting at the trial the motion of the plaintiff in error for judgment on his eighth plea.

Ninth. — That the court below erred in not granting at the trial the motion of the plaintiff in error for judgment on his ninth plea.

He cited: *Railton* v. *Mathews*, 10 Cl. & Fin. 935; *Williams* v. *Bayley*, L. R. 1 H. L. 200, 219; Brandt on Suretyship, §§ 365, 366; Baylies on Sureties, p. 293; *Lee* v. *Jones*, 17 C. B.

Citations for Hazard.

(N. S.) 482; *Franklin Bank* v. *Cooper*, 36 Maine, 179; *Pidcock* v. *Bishop*, 3 B. & C. 605; *The Cumberland Coal Co.* v. *The Hoffman Steam Coal Co.*, 30 Barb. 159, 171; *Howell* v. *Chicago & Northwestern Railroad*, 51 Barb. 378; *Strong* v. *Grannis*, 26 Barb. 122; *Osborn* v. *Robbins*, 36 N. Y. 365; *Ingersoll* v. *Roe*, 65 Barb. 346; *State* v. *Brantley*, 27 Alabama, 44; *Griffith* v. *Sitgreaves*, 90 Penn. St. 161.

Mr. Elias Merwin and *Mr. Samuel Maddox* submitted all the cases on their briefs.

In No. 50 they cited: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; *Griswold, Petitioner*, 13 R. I. 125; *Hazard* v. *Durant*, 9 R. I. 602, 606, Potter, J.; *Dick* v. *Swinton*, 1 Ves. & Bea. 371; *Stewart* v. *Graham*, 19 Ves. 312; *Hearn* v. *Insurance Co.*, 20 Wall. 490; *Snell* v. *Insurance Co.*, 98 U. S. 85; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Mass. 45; *S. C.* 107 Mass. 290, 316; *Harrison* v. *Hartford Insurance Co.*, 30 Fed. Rep. 862; *Hunt* v. *Rousmaniere*, 1 Pet. 1, 15; *Upton Assignee* v. *Tribilcock*, 91 U. S. 45; *United States* v. *Ames*, 99 U. S. 35, 46; *Railroad Company* v. *Souther*, 13 Wall. 517, 524; *Hart* v. *Hart*, 18 Ch. D. 670; *Irnham* v. *Child*, 1 Brown Ch. 92; *Allen* v. *Galloway*, 30 Fed. Rep. 466; *Rashdall* v. *Ford*, L. R. 2 Eq. 750, 754; *Blackburn's Case*, 8 De G. McN. & G. 177, 180; *Germ. Am. Ins. Co.* v. *Davis*, 131 Mass. 316; *Oliver* v. *Insurance Co.*, 2 Curtis, 277, 296.

In No. 53 they cited: *Slack* v. *McLagan*, 15 Illinois, 242; *Capuro* v. *Builders' Ins. Co.*, 39 California, 123; *Murphy* v. *Byrd*, Hemp. 221; *Cole* v. *Joliet Opera Co.*, 79 Illinois, 96; *Service* v. *Heermance*, 2 Johns. 96; *Hale* v. *W. Va. Oil &c. Co.*, 11 W. Va. 229, 235; *Jones* v. *Albee*, 70 Illinois, 34; *Sterling* v. *Mercantile Ins. Co.*, 32 Penn. St. 75; *S. C.* 72 Am. Dec. 773; *Darnell* v. *Rowland*, 30 Indiana, 342; *J'Anson* v. *Stuart*, 1 T. R. 748; *Hynson* v. *Dunn*, 5 Arkansas, 395; *Hopkins* v. *Woodward*, 75 Illinois, 62, 65; *Abraham* v. *Gray*, 14 Arkansas, 301; *Thoroughgood's Case*, 2 Rep. 9; *Hawkins* v. *Hawkins*, 50 California, 558; *Rogers* v. *Place*, 29 Indiana, 577; *Seeright* v. *Fletcher*, 6 Blackford, 380; *Insurance Co.* v. *Hodgkins*, 66 Maine, 109; *Miller* v. *Elliott*, 1 Indiana, 267; *S. C.* 50 Am.

Dec. 475; *Starr* v. *Bennett*, 5 Hill, 303; *Clem* v. *Newcastle & Danville Railroad*, 9 Indiana, 488; *S. C.* 68 Am. Dec. 653; *Blackburn's Case*, 8 DeG. M. & G. 176; *Rashdall* v. *Ford*, L. R. 2 Eq. 750; *McDonald* v. *Trafton*, 15 Maine, 225; *Zehner* v. *Kepler*, 16 Indiana, 290; *Moss* v. *Riddle*, 5 Cranch, 351, 357; *Hazard* v. *Durant*, 11 R. I. 195; *Harvey* v. *Taylor*, 2 Wall. 328; *Cooper* v. *Reynolds*, 10 Wall. 308; *Cornett* v. *Williams*, 20 Wall. 226; *Jesup* v. *Hill*, 7 Paige, 95; *Hazard* v. *Durant*, 9 R. I. 602, 606; *People* v. *Norton*, 5 Selden, 176; *Bassett* v. *Crafts*, 129 Mass. 513; *Huscombe* v. *Standing*, Cro. Jac. 187; *Mantell* v. *Gibbs*, Brownl. & Gold. 64; *Plummer* v. *The People*, 16 Illinois, 358; *Robinson* v. *Gould*, 11 Cush. 55; *Fay* v. *Oatley*, 6 Wisconsin, 42; *McClintick* v. *Cummins*, 3 McLean, 158; *Thompson* v. *Lockwood*, 15 Johns. 256; *Fisher* v. *Shattuck*, 17 Pick. 252; *Bowman* v. *Heller*, 130 Mass. 153; *Harris* v. *Carmody*, 131 Mass. 51; *Griffith* v. *Sitgreaves*, 90 Penn. St. 161; *Peck* v. *Jenness*, 7 How. 612; *Hutchinson* v. *Green*, 2 McCrary, 471; *Atwood* v. *Merryweather*, L. R. 5 Eq. 464; *Tracy* v. *First Nat. Bk.*, 37 N. Y. 523; *Booth* v. *Clark*, 17 How. 322; *United States* v. *Buford*, 3 Pet. 12, 31, 32; *Ex parte Bradstreet*, 7 Pet. 634, 647; *Chirac* v. *Reinicker*, 11 Wheat. 280, 302.

In No. 51 they cited: *Insurance Co.* v. *Bailey*, 13 Wall. 616, 621; *Balance* v. *Forsyth*, 24 How. 183; *Lee* v. *Lancashire &c. Railway*, 6 Ch. Ap. 527; *Fuller* v. *Cadwell*, 6 Allen, 503; *Anthony* v. *Valentine*, 130 Mass. 119; *McElmoyle* v. *Cohen*, 13 Pet. 326; *Mills* v. *Duryea*, 7 Cranch, 481; *United States* v. *Throckmorton*, 98 U. S. 61, 65, 66; *White* v. *Crow*, 110 U. S. 183, 189; *Cooper* v. *Reynolds*, 10 Wall. 308, 316, 317; *Cornett* v. *Williams*, 20 Wall. 308, 316, 317; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201, 204, 205, 206; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Godard* v. *Gray*, L. R. 6 Q. B. 139.

In No. 52 they cited: *Peck* v. *Jenness*, 7 How. 612, 625; *Cooper* v. *Reynolds*, 10 Wall. 316; *Jesup* v. *Hill*, 7 Paige, 95; *Griswold, Petitioner*, 13 R. I. 125.

Mr. Justice Harlan, after making the above statement, delivered the opinion of the court.

These four cases are so closely connected in their facts, as well as in the questions of law presented for determination, that it is convenient to dispose of them by one opinion.

Our attention will be directed first to case No. 50, in which a decree is sought to cancel, or in the alternative, to reform the bond of August 24, 1868, executed by Durant as principal, and by Griswold and Bradford as sureties, and to restrain the defendants from suing upon it in its present form. The granting or refusing of such a decree depends, of course, upon the inquiry whether the plaintiff Griswold has, by evidence sufficiently clear and convincing, manifested his right to the relief asked.

While in respect to some matters there is a conflict among the witnesses, certain facts and circumstances are clearly established, and may be summarized as follows: Durant, in August, 1868, was a citizen and resident of New York. He went to Newport for a brief stay, and was there on the morning of Saturday, August 22. About noon of that day the suit, in which the writ of *ne exeat* issued, was commenced against him. He was then sailing, with several friends, in his yacht on the high seas. The yacht landed at the Newport wharf shortly before eleven o'clock at night. Upon his stepping ashore he was notified by two officers, who had kept continuous watch for him at the wharf during the afternoon, that they had a writ for his arrest — meaning the above writ of *ne exeat* — and that he must go to jail. He accompanied them to that place, one of the counsel of Hazard, Mr. Peckham, following on foot to the sheriff's office. Information of the arrest having been communicated to Mr. H. W. Gray, also a citizen of New York, temporarily at Newport, that gentleman went to Griswold, who was his uncle, and begged the latter to go to the jail and become bail for Durant's appearance. Griswold had only a slight acquaintance with Durant, never having met him until the spring of 1868, and held no personal or business relations of any kind with him. To oblige his nephew, who was Durant's friend, and merely as an act of kindness and courtesy to a stranger (Griswold then resided in Newport), he acceded to the request to become bail for Durant's appearance in court,

and for that purpose only went to the jail. Hazard learned, a little before eleven o'clock, that Durant had been arrested as he landed from his yacht, and that owing to the lateness of the hour the sheriff had taken him directly to the jail instead of his own office, "as had been previously arranged." He went immediately to the lodgings of one of his attorneys, Mr. Bradley, and caused him to "go and see what could be done to prevent Durant from remaining in jail over Sunday;" authorizing his attorney to use his name "for the purpose of releasing said Durant from jail until Monday, it being regarded as very doubtful whether Durant in the short time then remaining before Sunday would be able to provide the necessary bonds."

Shortly after Griswold, accompanied by Gray, reached the jail, the two counsel of Hazard, namely, Bradley and Peckham, arrived there, and a few moments later Governor Van Zandt came in obedience to a message from Durant, conveyed by Bradford, to act as his counsel. Hazard, it seems, did not accompany his counsel to the jail. It was now nearly twelve o'clock. All who were at the jail agree that they were there only because of the arrest of Durant under a writ commanding the sheriff to take bail from him, in the sum of $53,735, that he would not go or attempt to go into parts beyond the State without the leave of the court, and, if such bail were not given, to commit him to and keep him in jail until he gave bail of his own accord; and, such security being taken, the officer was required by the writ to return a certificate thereof to the court. There is no claim that any one present was ignorant of the terms of the writ, or of the extent of the authority of the officer charged with its execution. It is further agreed by all the witnesses that there was a conversation at the jail between the lawyers and Durant as to what could be done in order to effect the latter's release. But in this discussion or conversation Griswold took no part whatever. That much is distinctly stated by Peckham, one of Hazard's attorneys who drew the bond, and supervised the execution of the writ of *ne exeat*, although he says that the sureties could not "help hearing, if they paid any attention." It is equally beyond dispute that

the object of Griswold's presence at the jail was well known to Hazard's attorneys.

Just here arises the difference among the witnesses as to what took place at the jail. Detailing what occurred according to his recollection at that place, Peckham says: "When I got to the jail I found there Judge Bradley, who had only preceded me there by a minute or two, Mr. Durant, Charles C. Van Zandt, his counsel, Mr. Griswold, Dexter Bradford, and a stranger, who was, I presume, Mr. Gray. Mr. Van Zandt and Judge Bradley were already talking about the release of Mr. Durant from custody. Judge Bradley said: 'That is a simple matter. Let him give the bond called for by the writ.' The nature of that bond was briefly explained. Mr. Durant said that it was out of the question for him to give it; that he couldn't remain any longer in Rhode Island; that his presence was absolutely demanded outside of the State, and forthwith; and that he must leave here Monday morning. It was suggested that he might file his answer and apply for the discharge of the writ immediately; but he said, 'I know what proceedings in court are, and I can't remain here at all.' It was then proposed that he should give a bond in the same amount marked in the two writs in the two cases, conditioned to abide and perform whatever decrees the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and Mr. Durant. During all this interview Judge Bradley did all the talking for the complainants, and Mr. Van Zandt and Mr. Durant spoke about equally for their side." The same witness states: "Mr. Van Zandt having conferred with Mr. Durant, and those two having conferred with the sureties — I mean Mr. Griswold and Mr. Bradford — Mr. Van Zandt then announced that they would give the bonds proposed. As it was then very late, it was further agreed that all should meet at my office on the following Monday morning, soon after mid-

night, and execute the papers. Besides these bonds, it was also agreed that the respective counsel should sign an agreement that upon the bonds being executed the writs of *ne exeat* should be absolutely discharged. Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suit; that counsel should sign agreements for the discharge of the writs; that all should meet at my office soon after midnight Monday morning and sign the papers; that in the meantime Mr. Durant would go free from custody upon his word of honor, and he appealed to the sureties, saying: 'We rely upon you, gentlemen, to see that he attends.' We then separated. I prepared the papers and had them lying upon my table when we met, pursuant to the arrangement. They were read. Mr. Griswold took an active part at this meeting and, I think, read the papers for himself. The papers were signed without any objection or discussion at that time. Probably we were not together at my office more than ten minutes." Referring to the interview at the jail, Bradley testified that nothing was said, to the best of his recollection and belief, by any one, conveying the idea that the complainants were to obtain from the defendant only a bail bond for his appearance; and that "the terms of the bond were expressed, so as to exclude the idea that it was merely a bail for appearance, and to provide that it should be a bond to abide and perform the order of the court." He further said that the bond "was to be a security," and it was so announced. In all material respects his evidence was in accord with the recollection of Peckham.

But there was other evidence which precludes our accepting the version of the affair given by those gentlemen. Gray, Griswold, Durant and Van Zandt, with more or less distinctness, but all emphatically, state that neither at the jail Saturday night, nor at the meeting before daylight on Monday morning, was there a hint, suggestion or proposition, in any

form, that Durant should give bond, with sureties, conditioned that he would abide and *perform* the decrees that might be rendered in the Hazard suit, or that any bond was talked of except one that would make the sureties responsible simply for his appearance in the State, so as to be subject to the orders and process of the court. Gov. Van Zandt testifies, touching the meeting at the jail: "It was proposed by Judge Bradley that Dr. Durant should give bond, with two sureties, which should be substituted for the writ and the writ withdrawn. I then understood from the conversation that the bond was in the nature of a bail bond, and that when the sureties delivered Dr. Durant into the custody of the court, to either perform its orders and decrees personally, or to suffer such penalties personally as the court might impose, they would comply with the conditions of the bond. Nothing was said in my presence by any person inconsistent with these views." Again, referring to what took place at the time the bond was actually signed, the same witness says: "A bond, prepared by Messrs. Peckham and Bradley, was handed to me as counsel for Mr. Durant; there was some little discussion as to whether it should be made to the sheriff of Newport County, or to the complainants in the then suit. Judge Bradley preferred the latter, and it was so done. I told Mr. Durant that, in my opinion, it was a proper bond to secure his appearance in the suit, and the bond was then executed. . . . I heard nothing said by Judge Bradley or Mr. Peckham, except what I have already stated. I myself told Mr. Durant that, in my opinion, the instrument was, in effect, a bail bond." Further: "There was nothing said or intimated by any person in my presence or hearing on that occasion to indicate that the bond was a security instead of a surety." The statements of Gov. Van Zandt are fully sustained by the depositions of Gray, Griswold and Durant.

In view of this great preponderance of evidence upon the side of the plaintiff, as to what occurred at the jail before the separation of the parties to meet Monday morning for the consummation of the business, the court is not at liberty to accept the account given by the defendants' attorneys of

the interview of Saturday night. And we have a strong conviction that the recollection of Griswold, Gray, Durant and Van Zandt, as to that interview, is sustained by all the inherent probabilities of the case. And in saying this, we would not be understood as reflecting upon the integrity of Hazard's attorneys. The difference in the recollection of gentlemen, in respect to transactions in which they took part, often happens, without any reason to suspect that any of them would intentionally deviate from the line of absolute truth. Such differences existing, the court can only be guided by the weight of the evidence, where the witnesses are intelligent, of equal credibility, and had equal opportunities to know what occurred. In the first place, it is not at all probable that Griswold would have executed the bond in question, as surety, if he had been informed, or believed, that it bound him absolutely, within the amount specified in such bond, for the payment of any sum adjudged against Durant — almost an entire stranger to him. In the next place, we cannot suppose that the counsel who went to the jail, to represent the interests of Hazard, had any other purpose in going there except to see that that was, substantially, accomplished which the writ of *ne exeat* authorized, namely, the obtaining of bail that would prevent Durant's departure from the State without the leave of the court, and thus have him, at all times, pending Hazard's suit, subject to its rightful power in respect to any decree to be rendered. That was evidently Bradley's purpose, for, according to Peckham's evidence, he suggested that Durant could effect his release by executing the bond specified in the writ. But when the nature of such a bond was explained, and it appeared that the necessity for Durant's being out of the State on Monday rendered that course entirely impracticable, the latter was then informed — according to the evidence of Peckham — that he could file an answer and apply for the discharge of the writ immediately. What was meant by this suggestion? It could have meant but one thing, namely, that it was in the power of Durant to obtain, without objection, if not of right, a discharge of the writ, after answering, by executing a bond of some kind. A party arrested

upon *ne exeat* may obtain the discharge of the writ, upon motion or petition, and after notice, and according to some authorities, "it is a matter of course to order the *ne exeat* to be discharged, upon the defendant's giving security to answer the complainant's bill, and to render himself amenable to the process of the court pending the litigation, and to such process as may be issued to compel a performance of the final decree. . . . Or, where the defendant cannot procure such security as will satisfy the sheriff, or if he wishes to leave the State before the termination of the suit, he may apply to the court to discharge the *ne exeat* upon his giving proper security to answer and be amenable to process. And upon such application, the court will take such security as it may deem sufficient, and will discharge the sheriff from liability." 2 Barb. Pr. 655–6; *Mitchell* v. *Bunch*, 2 Paige, 606, 621; *Brayton* v. *Smith*, 6 Paige, 489, 491; *McNamara* v. *Dwyer*, 7 Paige, 239, 244. See, also, Jacob's Law Dict. Title, *ne exeat regno; Johnson* v. *Clendenin*, 5 G. & J. 463, 481. In *Griswold, Petitioner*, 13 R. I. 126, determined September 20, 1880, Griswold, by petition, sought to be discharged from the bond in question on his principal's placing himself within the jurisdiction of the court and subject to its orders and decrees. He seems to have proceeded, in that case, upon the ground that he was entitled, of right, to the order of discharge asked. But the Supreme Court of Rhode Island did not accept that view, observing that it could not regard "a bond to abide and perform the decree as equivalent merely to a bond to abide the event of the suit." To do so, the court said, would be to ignore wholly the word "perform" contained in the bond, which, upon its face, appeared to be given by agreement of the parties. While it was there said, and properly, that the court may require as a condition of the discharge of a writ *ne exeat*, that the respondent give security to perform the decree — citing *Robertson* v. *Wilkie*, Amb. 177, and *Atkinson* v. *Leonard*, 3 Bro. C. C. 218 — it was conceded that "courts will generally discharge a writ of *ne exeat* upon the respondents' giving security to abide the decree on the hearing of the suit." If Durant had remained in Newport and, upon filing his answer, had applied

for the discharge of the writ of *ne exeat* upon his giving bond with security simply to abide the decree, and place himself, when required, within the jurisdiction of the court, it is inconceivable that the state court would, under the circumstances, have denied his application. But it was further said in that case — and this is quite significant in its bearing upon another question to be presently adverted to — that "even if the bond in question was to be considered as having no other effect than a bond to abide the decree made upon hearing the cause, the petition could not be granted in the present stage of the proceedings. No final decree in the cause has yet been reached."

As, therefore, Durant could have filed his answer, and, conformably to the general rule, have obtained a discharge of the writ upon giving bond, with surety, that he would be amenable to the orders and process of the court; as he could not, consistently with his engagements, remain in Rhode Island long enough to have an answer prepared, and to move for the discharge of the writ, upon sufficient bond to be by him given; and as Hazard and his counsel expressed a desire that Durant should not be held in custody over Sunday, what more natural and equitable than that the parties should, *by consent*, bring about that which Durant must have understood from Bradley that he could accomplish, through the orders of the court, namely, have a bond executed with surety compelling his presence in the State when required by the orders of the court, or subjecting his sureties to personal liability if he did not render himself amenable to its process. If the suggestion that Durant could file his answer and apply to the court for the discharge of the writ (of course, upon bond securing his amenability to the process of the court) had been adopted, the plaintiff would not have obtained a bond making the surety absolutely responsible, within the penal sum named in the writ and bond, for a money decree against Durant. It is, therefore, unreasonable to suppose that the parties separated Saturday night under an agreement that Hazard should have from Durant a bond that would subject his sureties to a larger responsibility than was involved in the suggestion made that

Durant could obtain an order of court for the discharge of the writ. On the contrary, it is more reasonable to suppose that the bond which, on Saturday night, was agreed to be executed on the next Monday morning, was one that would accomplish, by agreement of parties, precisely what Hazard's attorney suggested that Durant might accomplish by an order of court. The agreement of the parties was thus made to take the place of an order of court, because Durant assured Hazard's attorneys that he could not remain in Newport long enough to make a formal application for the discharge of the writ upon a proper bond.

We are of the opinion that, although the condition of the bond in question was that Durant should "abide and *perform* the orders and decrees" of the court in the suit in which it was given, all the parties, according to the decided preponderance of evidence, intended it, at the time, as an instrument binding the sureties for the appearance of the principal so as to be amenable to the process and decrees of the court, upon default in which, and not before, were they to be liable to pay the penalty. If the bond means, in law, more than that — and counsel in this court agree that it does — the case is one of a mutual mistake, clearly established, as to the legal effect of the instrument. There was no mistake as to the mere words of the bond; for it was drawn by one of Hazard's attorneys, and was read by Griswold before signing it. But, according to the great weight of the evidence, there was a mistake, on both sides, as to the legal import of the terms employed to give effect to the mutual agreement. In short, the instrument does not express the thought and intention which the parties had at the time of its execution. And this mistake was attended by circumstances that render it inequitable for the obligees in the bond to take advantage of it. The instrument was drawn by one of Hazard's attorneys, and was presented and accepted as embodying the agreement previously reached. Griswold was unskilled in the law, and took the word "perform" as implying performance in the sense of Durant's becoming amenable to the process of the court. He had no reason — unless the recollection of Gray, Durant, Van

Zandt and himself as to what occurred is wholly at fault — to doubt that the bond expressed the real agreement; especially if he heard Van Zandt's statement to Durant, when the latter was about to sign the bond, that it "was, in effect, a bail bond." A court of equity ought not to allow that mistake, satisfactorily established and thus caused, to stand uncorrected, and thereby subject a surety to liability he did not intend to assume, and which, according to the decided preponderance of the evidence, there was at the time no purpose to impose upon him. While it is laid down that "a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts," yet "the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon this point, both English and American." *Snell* v. *Insurance Co.*, 98 U. S. 85, 90, 92; 1 Story Eq. Jur. § 138 *e* and *f*, Redf. ed.; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Mass. 45, 48; *Underwood* v. *Brockman*, 4 Dana, 309, 316; *Jones* v. *Clifford*, 3 Ch. D. 779, 791, 792; *Canedy* v. *Marcy*, 15 Gray, 373, 377; *Green* v. *Morris & Essex Railroad Co.*, 1 Beasley, 165, 170; *Beardsley* v. *Knight*, 10 Vermont, 185, 190; *State* v. *Paup*, 13 Arkansas, 129; 2 Leading Cases in Eq. pt. 1, 979 to 984; 2 Pomeroy's Eq. §§ 843 to 847.

The conclusion reached upon this branch of the case is the only one consistent with fair dealing towards those who were willing to become sureties for the appearance of Durant. If it be not justified upon the ground of mistake as to the mutual agreement, superinduced by the conduct of the party seeking now to take advantage of it, there could be no escape from the conclusion that the taking of a bond that made Griswold absolutely liable as surety, for any amount adjudged to be due from Durant, and not greater than the penal sum named, was, under all the circumstances disclosed, a fraud in law upon him. If the attorneys of Hazard intended to obtain, by means of a bond, more than he was entitled to by such a bond as the writ

of *ne exeat* called for, and more than the court would ordinarily have given them, upon Durant's application to discharge the writ; if they intended to secure a bond that would make Griswold personally liable, within the penal sum, for any money decree passed against Durant, then a fraud was perpetrated upon him, which entitles him to relief; for, according to the decided preponderance of the evidence, it must be assumed that Hazard's attorneys knew that he signed the bond in the belief that, pursuant to the previous understanding, it was one to secure Durant's appearance, nothing more, and yet they failed to inform him, at the time, that it was drawn so as to impose upon him a much larger responsibility. Their silence upon that question was, under the circumstances, equivalent to a direct affirmation that the bond meant what Griswold supposed it did. In view of what passed at the jail on Saturday night, their duty was, by sufficient explanation, to correct the misapprehension under which he evidently labored. Besides, there can be no doubt, under the evidence, that the agreement to discharge the writ was reached without consultation with Griswold. No one of the witnesses states that he was consulted about that matter, or that he was informed as to the legal result of an agreement or order to discharge the writ. He testifies that he knew nothing of any such agreement. So, that, while Hazard's attorney, according to his evidence, was preparing a bond that would bind Griswold absolutely to pay any decree, not in excess of $53,735, that might be rendered against one who was almost a stranger to him, and who, Hazard stated in his bill, was then engaged in hazardous speculations and was in a precarious condition pecuniarily, he was, as the representative of Hazard, under an agreement with Durant, of which Griswold had no knowledge, that the writ of *ne exeat* should be discharged; thus compelling the surety to risk the insolvency of the principal, and putting it out of his power, for his own protection, to surrender the principal, and obtain the cancellation of the bond, as, in that case, the surety might have done, if the bond had been, as he supposed it was, one simply for the appearance of Durant. The concealment of this agreement from Griswold

was, under the circumstances, a wrong to him. "The contract of suretyship," says Mr. Story, "imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract." Again: "If a party taking a guaranty from a surety, conceals from him facts which go to increase his risk and suffers him to enter into the contract under false impressions, as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure." 1 Story's Eq. Juris. §§ 324, 215. To the same effect are *Franklin Bank* v. *Cooper*, 36 Maine, 180, 196; *Smith* v. *Bank of Scotland*, 1 Dow. 272, 292; *Railton* v. *Mathews*, 10 Cl. & F. 935, 943; *Small* v. *Currie*, 2 Drewry, 102, 114; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666, 672; *Pidcock* v. *Bishop*, 3 B. & C. 605; Adams' Equity, § 179. But we do not rest our decision upon any ground of fraud in law or fraud in fact. We acquit the attorneys of Hazard of any desire or purpose to do injustice to Griswold, or to commit a fraud upon him. But we are constrained, by the settled rules of evidence, to hold, as already indicated, that their recollection of the circumstances under which the bond of August 24 was executed is materially at fault, and that the alleged mistake is established by convincing proof.

But it is said that Griswold was guilty of such laches in seeking the relief now asked, that he is not entitled to the aid of a court in equity. This position is based principally upon what Peckham says occurred between him and Griswold in the fall of the year after the execution of the bond. Peckham testifies: "About the last of October or the 1st of November, 1868, along that time, I met Mr. Griswold on Thames Street, in Newport, near my office. He spoke of this bond as if it were a bail bond. I said, 'No; it is a bond upon which you may be liable to pay money. If, for example, the court should find a judgment against Durant for any sum of money

and he did not pay it, you could be held for the amount named in these bonds.' He said, 'Well, I guess you are right, but I must see Durant about it. He must do something about it.' I asked him, 'Why, he is rich enough, isn't he?' and Mr. Griswold said, 'Yes; he is rich enough, but he is reckless, and there is no telling how long such a man may stay rich, and he must give me security.' I would like to add here that I mentioned this to Mr. Honey last winter. Mr. Honey said that he was confident, from conversations he had had with his client, Mr. Griswold, that Mr. Griswold had no recollection of any such conversation with me, and I replied that if Mr. Griswold did not recollect it I should hesitate about swearing to it, and that I did not think I would swear to it under those circumstances, and that certainly I would not like to do so. Still I have felt bound to state it here, upon further reflection with these explanations." If this be a correct statement of what passed between Peckham and Griswold, upon the occasion referred to, it is significant as showing that months after the bond was executed Griswold spoke of it as a bail bond. His declaration, after Peckham's explanation of its terms, "I guess you are right," naturally meant no more than a courteous acquiescence, without discussion, in the opinion expressed by one learned in the law. Griswold, while recalling the fact that he expressed to Peckham his belief that it was a bail bond, denies explicitly that he, on that or any other occasion, ever admitted that it was other than a bail bond.

Besides, there was no absolute necessity for Griswold's moving in the matter until after some decree was passed against Durant, and until an attempt was made to hold him personally responsible for the amount of the bond. He made an effort in *Griswold, Petitioner*, 13 R. I. 125, to be discharged from his bond upon the principal's placing himself within the jurisdiction of the court. But, as we have seen, the court, after declining to discharge the bond, said, that even if the bond in question was to be considered as having no other effect than a bond to abide the decree made upon hearing the cause, the petition for its discharge would not be considered by it until a final decree was passed. The judgment in that case

was passed September 30, 1880. Notwithstanding this announcement, and doubtless because of the intimation that the bond meant more in law than he supposed, Griswold commenced the present suit *more than a year before the decree was rendered against Durant, and before the action at law was brought on the bond.* Under the peculiar circumstances of this case we think the defense of laches is without substantial merit. Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case. There are no circumstances here that would justify a refusal to grant the relief asked because of Griswold's delay in instituting suit to have the bond cancelled or reformed.

In the view the court takes of this case, the proper decree to make, if Durant were living, would be one reforming the bond of August 24, 1868, so as to make Griswold liable for the penal sum named only in the event that the principal failed to appear and become subject to the orders and decrees of the court in the suit in which the writ of *ne exeat* was issued. But such a decree would not now be appropriate. Under the circumstances, the only decree that will accomplish the ends of substantial justice is one perpetually enjoining the prosecution of any action, suit or proceeding to make him liable in any sum on or by reason of said bond.

We come now to the action at law, No. 53, in which there was a judgment against Griswold on the bond of August 24, 1868, for the sum of $66,470. It is assigned for error that the court sustained the demurrers to the original second, third, fourth and fifth pleas, ordered the amended third, fourth and fifth pleas to be stricken from the files, and denied the defendant's motions, at the trial, for judgment on his eighth and ninth pleas. It has been assumed in argument that the record in this case substantially presents among other questions, the following: 1. Whether the bond of August 24, 1868, was not obtained by such fraud and concealment as rendered it void as against Griswold? 2. Whether upon the face of the record of the equity suit in which the order or decree of December 2, 1882, was rendered, the court was not without

jurisdiction of the subject matter of that suit, the essential object of which, it is argued, was to administer the affairs, and distribute the assets, of a Pennsylvania corporation, by means of decrees and orders of a court in Rhode Island? 3. Whether simple duress operating only on the principal in the bond could be taken advantage of by the surety? 4. Whether the plaintiffs, notwithstanding the stipulation of Griswold's counsel, at the trial, that they were able to prove, under the decree of December 2, 1882, "an amount of damage in excess of the penal sum of the bond declared on," could maintain an action on the bond for that or any other sum, until it was ascertained and adjudged in Hazard's equity suit what distinct part, if any, of the $16,071,659.97 for which Durant was adjudged by the Supreme Court of Rhode Island to be accountable to the Crédit Mobilier of America, actually belonged, or would be ultimately awarded, to the obligees in the bond?

These questions have been argued by the counsel of the respective parties with signal ability, and their importance is recognized. But in view of the present condition of the record of this case, it is not deemed best now to discuss them. The ground upon which the court below ordered the amended pleas to be stricken from the files does not appear. It may be that the motion was treated as a formal demurrer (*Slocomb* v. *Powers*, 10 R. I. 255), or was granted, because, in the judgment of the court, the amended pleas did not materially change the defence as presented in the pleas to which special demurrers were sustained, and were not, therefore, fairly embraced by the stipulation made by counsel for their being filed. But, in our judgment, the amended pleas were much broader, as well as more specific in their averments, than were the original pleas; and the questions arising upon them could have been more appropriately raised by demurrer. *Smith* v. *Carrol*, 17 R. I. July 19, 1890. We are more willing to make this disposition of the case, because of the decision in case No. 50 in respect to Griswold's liability upon the bond sued on. In view of what has been there said, the discussion of the above questions would seem to be unnecessary.

The demurrer to the bill in No. 51 was properly sustained.

The error, if any, committed by the Supreme Court of Rhode Island in not allowing the release, executed to Durant by the receiver in the Pennsylvania court of the Crédit Mobilier of America, to be interposed as a defence in the suit brought by Hazard against Durant and others, could not be corrected by bill in equity, filed by a surety on the bond of August 24; for the reason, if there were no other, that the release was delivered prior to the judgment in the state court constituting the basis of the action at law on the bond.

The demurrer to the bill in case No. 52 was also properly sustained. In that case the validity of the proceedings in the Supreme Court of Rhode Island, by Hazard against Durant and others, was assailed upon the ground that the bill in that suit did not sufficiently show that any effort had been made by Hazard, the plaintiff therein, and who sued as stockholder, to procure corporate action against Durant by the Crédit Mobilier of America. It is only necessary to say that this ground presents only a question of mere error in the judgment of the state court, and does not affect its jurisdiction.

The decree in suit No. 50 must be reversed, with directions to enter a new decree perpetually enjoining the defendants therein, and each of them, from prosecuting any suit, action or proceeding, against Griswold on the bond executed by him on the 24th of August, 1868, as one of the sureties of Thomas C. Durant; the decrees in cases Nos. 51 and 52 must be affirmed; and the judgment in the action at law, No. 53, must be reversed with directions for further proceedings not inconsistent with this opinion. Griswold is entitled to his costs in this court in cases 50 and 53, and the appellees in the other cases are entitled to their costs here as against Griswold. It is so ordered.

Mr. Justice Brown, dissenting, in No. 50.

I should have no hesitation in announcing my concurrence in the opinion of the court in this case, did it not seem to me to involve a disturbance of legal principles which I had supposed to be well settled and confirmed by repeated decisions of this court,

Dissenting Opinion: Brown, J.

To entitle the plaintiff to a decree, he is bound to show either mistake or fraud. I think he has failed to show either. There was nothing unprecedented — scarcely anything which could be called unusual — in the character of the obligation he assumed. The bond was such an one as is proper to be given to obtain the discharge of a defendant held upon a writ of *ne exeat.* In treating of this remedy, it is said in Daniell's Chancery Practice, that, "by the terms of the writ, the sheriff is to cause the party, personally, to come before him, and give sufficient bail or security in the sum indorsed on the writ, that he will not go, or attempt to go into parts beyond the seas, without leave of the court; and on his refusal, he is to commit him to the next prison." It is also said that, "the court will discharge the writ upon merits, whenever it appears, by the circumstances of the case, as disclosed by the affidavits upon which it was granted and the answer of the defendant, either that the plaintiff has no case, or that the defendant is not going out of the jurisdiction; and this it will do either absolutely or conditionally: that is, upon the defendant's giving security to abide and perform the decree of the court." 3d. Am. ed. 1814, 1817; 5th Am. ed. 1710, 1713, with some verbal changes; *Howden* v. *Rogers*, 1 Ves. & Beames, 129; *Atkinson* v. *Leonard*, 3 Bro. C. C. 218; *Roddam* v. *Hetherington*, 5 Ves. 91; *Parker* v. *Parker*, 12 N. J. Eq. (Beasley) 105; *McDonough* v. *Gaynor*, 18 N. J. Eq. (3 C. E. Green) 249.

In New York, it seems also to be the proper practice to discharge the writ upon the defendant's giving security to answer the plaintiff's bill, and to render himself amenable to the process of the court pending the litigation. *Mitchell* v. *Bunch*, 2 Paige, 606; *McNamara* v. *Dwyer*, 7 Paige, 239.

The writ in this case required Durant to give sufficient bail or security, in the sum of $53,735, "that he, the said Thomas C. Durant, will not go, or attempt to go, into parts beyond this State, without the leave of our said court." Durant was unwilling to give this security, because, as he said, it was imperatively necessary for him to leave the State and be in New York on the next Monday. It was, therefore, stipulated between his solicitor and that of the plaintiff, Hazard, that he

should file a bond, with surety in the penalty marked in the writ of *ne exeat*, "to abide and perform the orders and decrees of the court in said cause," and thereupon the writ of *ne exeat* should be discharged. These are the exact terms of the bond that was prepared and signed by the plaintiff. There is some conflict as to what took place upon the interview on Saturday night, at which it was agreed that the bond should be given. Plaintiff's witnesses assert that it was understood that a bond was to be given for his appearance before the courts when wanted. Upon the other hand, defendants' witnesses, Judge Bradley and Mr. Peckham, who, although outnumbered by the plaintiff's witnesses, were men of the highest character, members of the legal profession, and understanding thoroughly what they were about, swore that the nature of the proposed bond was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court, was commented upon by them, Judge Bradley speaking for the defendants, and Mr. Van Zandt and Mr. Durant for themselves. The sureties were present, although it is not claimed that they took part in the discussion. I do not care, however, to attempt to reconcile this testimony, or to determine exactly where the truth lies. Griswold himself admits that, when the bond was prepared and submitted for his signature, he read it, and noticed the terms "abide by and perform the decrees of the court;" but, in the absence of any explanation, he inferred that it meant that Durant should appear and render himself subject to the processes of court. He does not complain that its contents or its legal effect were misstated to him, or that Judge Bradley or Mr. Peckham, who represented the plaintiff in the suit, misled him by any false representations as to its tenor or purport. He apparently refrained from asking any explanation of its meaning, but assumed himself to construe it, and gave it a different meaning from that which the law gave it. This, it seems to me, is a mistake of law, against which equity will give no relief. *Griswold, Petitioner*, 13 R. I. 125; *Hunt* v. *Rousmaniere*, 1 Pet.

1, 15; *United States* v. *Ames*, 99 U. S. 35, 46; *Hart* v. *Hart*, 18 Ch. D. 670; *Snell* v. *Insurance Co.*, 98 U. S. 85; 2 Pomeroy Equity Juris. sec. 843.

In *Powell* v. *Smith*, L. R. 14 Eq. 85, 90, the defendant endeavored to defeat the enforcement of an agreement to give a lease upon the ground that he was mistaken as to the legal meaning and effect of an important provision. The Master of Rolls in overruling the defence, said: "All those cases which have been cited during the argument are cases where there was either a dispute and doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner, which might be misunderstood by one of the parties. In all those cases the court has held that it must look at the evidence and that if the mistake is sufficiently proved the court will then set aside the agreement. But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now, that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned."

In *Eaton* v. *Bennett*, 34 Beav. 196, a marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage he knew its contents and executed it under protest, and reserved his right to set it aside. It was held that he could not, after the marriage, sustain a suit to rectify the settlement. The Master of Rolls observed that "the court, in such cases as these, only rectifies a settlement when both parties have executed it under a mistake, and have done what they neither of them intended. Here the plaintiff examined the draft and the settlement prior to its execution, and was perfectly aware of its purport. I think that he cannot set it aside or alter it in this court." Indeed, it is a doctrine familiar to this court, that in order to set aside an instrument for mistake it must appear that the mistake was mutual, and that one party is desirous of taking advantage of an error into which he himself in common with the other party has fallen. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488, 490; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Mass.

45, 48; *Sawyer* v. *Hovey*, 3 Allen, 321; *German-American Ins. Co.* v. *Davis*, 131 Mass. 316.

In view of the stipulation that was entered into between the solicitors for the respective parties to this suit, I do not see how it can be claimed that there was any mistake upon the part of Bradley or Peckham as to the purport of the bond, and as before observed, unless they were parties to such mistake, there is no equity in reforming the instrument upon that ground. In addition to this the evidence must be such as to leave no reasonable doubt in the mind of the court as to the existence of such mistake, and in my view, without discussing it at length, the testimony in this case falls far short of the requisite certainty.

Again; it seems to me that the defence of laches is complete in this case. This bond was executed in August, 1868. It is shown that, as early as October or November of the same year, in a conversation between Mr. Peckham and the plaintiff in Newport, the character of this bond, as being distinct from a mere bail bond, was called to Mr. Griswold's attention by Mr. Peckham, who told him it was a bond upon which he might be liable to pay money. In Mr. Peckham's own words, he said: "If, for example, the court should find a judgment against Durant for any sum of money and he did not pay it, you could be held for the amount named in these bonds. He said, 'Well, I guess you are right, but I must see Durant about it. He must do something about it.' I asked him, Why, he is rich enough, isn't he? And Mr. Griswold said, 'Yes, he is rich enough, but he is reckless, and there is no telling how long such a man may stay rich, and he must give me security.'" It appears then from this testimony, which is practically uncontradicted, that within three months after the bond was given, the plaintiff was distinctly apprised that it was a bond for the payment of money. He appears to have done nothing about it, however, for twelve years, when he filed a petition in the Supreme Court of Rhode Island asking permission to surrender Durant into the custody of the court and be relieved from the bond — a petition which the court refused to grant. In this petition there was "no suggestion of any fraud, imposition, or

unfairness in obtaining it, practised by the complainants on the defendant or his sureties." *Griswold, Petitioner*, 13 R. I. 125, 126.

It was not until after this petition had been denied, and an opinion intimated that he might be bound to pay the penalty of the bond in the event of a decree against Durant, that he filed this bill, and for the first time set up that he had been imposed upon in the execution of the bond. In the meantime Durant has died and Hazard has lost whatever advantage he might have had in the surrender of his body in compliance with the bond which plaintiff says he understood was to be given in discharge of the writ.

I cannot avoid the impression that the present defence is an afterthought. In any view of the case, I think the plaintiff failed to exercise that decree of diligence which this court said in *Grymes* v. *Sanders*, 93 U. S. 55, was necessary to entitle a party to rescind upon the ground of mistake or fraud.

I think the decree of the court below is right and should be affirmed.

Mr. Justice Bradley and Mr. Justice Brewer did not participate in the decision of this case.

Syllabus.

POTTER *v.* COUCH.

HALE *v.* COUCH.

JOHNSON *v.* COUCH.

JOHNSON *v.* COUCH.

COUCH *v.* COUCH.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 1063, 1064, 1065, 1066, 1067. Submitted October 30, 1889. — Decided May 25, 1891.

A testator gave all his estate, real and personal, to his executors for the term of twenty years, "in trust, and for the uses, objects and purposes hereinafter mentioned," and authorized them to make leases not extending beyond the twenty years, and to lend money on mortgage for the same period; and, "after the expiration of the trust estate vested in my executors and trustees for the term of twenty years after my decease," devised and bequeathed one fourth part of all his estate, subject to the payment of debts and legacies, to his widow, one fourth to his daughter, one fourth to his brother, and one fourth to his nephew; gave certain legacies and annuities to other persons; directed his executors to pay a certain part of the income to his brother "until the final division of my estate, which shall take place at the end of twenty years after my decease, and not sooner;" that no part of his estate should "be sold, mortgaged (except for building) or in any manner incumbered until the end of twenty years from and after my decease, when it may be divided or sold for the purposes of making a division between my devisees as herein directed;" and also that, in the event of any of the legatees or annuitants being alive at the end of the twenty years, there should then be a division of all his estate, "anything herein contained to the contrary notwithstanding; and in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors;" and further provided as follows: "It is my will that my trustees aforesaid shall pay the several gifts, legacies, annuities and charges herein to the persons named in this will, and that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that,

Syllabus.

if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same manner as if such child or children had actually inherited the same, and, in the event of such person or persons having no children, then to my daughter and her heirs." He also declared it to be his wish that W., one of his executors, should collect the rents and have the general supervision during the twenty years; and further provided that the share devised to his daughter should be conveyed at the expiration of the twenty years, for her sole use, to three trustees to be chosen before her marriage by herself and the trustees named in the will, and the net income be paid to her personally for life, and the principal be conveyed after her death to her children or appointees; and that, in the event of his wife's marrying again, the share devised to her should be held by his trustees for her sole use. *Held:*

(1) That the powers conferred and the trusts imposed were annexed to the office of executors; and that they took the legal title in fee, to hold until they had divided the estate, or the proceeds of its sale, among the devisees of the residue.

(2) That an equitable estate in fee in one fourth of the residue of the estate vested in the brother and the nephew, respectively, from the death of the testator.

(3) That the limitation over, in case of alienation, was intended to apply to the residuary devises, but was void because repugnant to the estates devised.

(4) That by the law of Illinois such an equitable estate could not be taken, at law or in equity, for the debts of the owner.

(5) That a conveyance thereof by such owner, in consideration of an agreement of the grantee to buy up outstanding judgments against the grantor, and to sell the interest conveyed and pay one half of the net proceeds to the grantor's wife, no part of which agreement was performed by the grantee, gave him no right which a court of equity would enforce.

(6) That these conclusions were not affected by the following facts: The daughter was married ten years after the death of the testator, having first, by indenture with the trustees named in the will, appointed them to be trustees for the benefit of herself and her children. Just before the end of twenty years from the testator's death, a mortgagee of all the real estate agreed with the trustees under the will to postpone payment of the principal and to reduce the rate of interest of the mortgage debt, provided the whole estate should continue to be managed by W.; and thereupon the testator's widow, brother, nephew, daughter and her husband, individually, and the widow, brother and W., as trustees of the daughter, made to W. a power of attorney, reciting that by the will the testator devised his whole estate in trust for the period of twenty years, which was about to expire, and upon the termina-

Statement of the Case.

tion of that trust to the widow, brother, nephew and daughter in equal parts, and that it was deemed advantageous to the devisees, as well as to the mortgagee, that the estate should continue to be managed as a whole, and therefore authorizing W. to take possession, to collect rents, to pay taxes, debts against the estate, and expenses of repairs and management, and to sell and convey the whole or any part of the estate at his discretion.

THESE were appeals from a decree in equity by various persons asserting claims to the real estate devised by Ira Couch, who died January 28, 1857, to his brother James and to his nephew Ira, by his will dated November 12, 1855, and duly admitted to probate March 21, 1857, by which he appointed his wife Caroline E. Couch, his brother James Couch and his brother-in-law William H. Wood executors and trustees, and devised and bequeathed all his property, real and personal, to them in trust for the term of twenty years and for certain uses and purposes; and then, (after payment of debts and legacies,) in equal fourths, to his wife, to his daughter and her children, to his brother James, and to his nephew Ira, the son of James, with devises over in case of alienation. The material provisions of the will are copied or stated in the margin[1];

[1] "First. I do hereby give, bequeath and devise unto my beloved wife Caroline Elizabeth Couch, and my brother James Couch, and my brother-in-law William H. Wood, whom I hereby constitute, make and appoint to be my executrix, executors and trustees of this my last will and testament, and the survivors of them, and, in the event of the death of either of them, the successor appointed by the surviving trustee or trustees, all my estate, both real and personal, of every nature and description, for the term of twenty years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose or object; hereby giving and granting unto my said executors and trustees full power and lawful authority to lease my real estate at such time or times, and in such parcels, and in such way and manner and upon such terms and conditions as to my said executors and trustees, or the survivors or successors of them, in their sound discretion shall be deemed most advantageous and for the true interest of my estate, but no lease shall be granted of any building for a longer term than five years, and all leases shall expire at the end of twenty years from the time of my death. And I do also hereby authorize and empower my said executors and trustees, and the survivor or survivors of them and their successors, from time to time,

and so much of the facts as is necessary to the understanding of the questions of law decided was as follows:

---

as they in the exercise of a sound discretion shall deem for the true interest of the estate, to purchase with the surplus funds belonging to my estate such real estate as they may deem proper and expedient, and take and hold the same, as such executors and trustees as aforesaid, upon the same trusts and for the same uses and purposes as the other real estate now owned by me; and more especially to purchase for the benefit and use of my estate, when they, my said executors and trustees, or the survivors and survivor of them or successors, shall think it expedient so to do, any real estate which is or may be subject to any such judgment, decree or mortgage as is or at any time hereafter may become a lien, charge or incumbrance for my benefit or for the benefit of my heirs or executors upon the same, and, again, that my said executors and trustees have the like discretion to lease the same. And I do hereby authorize my said executors and trustees, if they shall think proper so to do, to loan on real estate situate in the city of Chicago any of the surplus moneys, arising from my said estate as aforesaid, on bond and mortgage; provided always that such real estate shall be worth double the amount so loaned thereon, over and above any other liens and incumbrances existing against the same, and that such moneys shall not be loaned for a longer period than twenty years from my decease.

"And generally I do hereby fully authorize and empower my said executors and trustees, from time to time, to improve my real estate, and invest all surplus moneys belonging to my estate, arising from any source whatever, and not wanted immediately, or required to meet the payments and advances, legacies, annuities and charges, required to be made under this my said will, in such way and manner as to them my said executors and trustees, or the survivor or successors of them, in the exercise of a sound discretion shall be deemed most safe and productive; but no moneys are to be invested, except in improving my real estate, or in the purchase of other real estate, or on bond and mortgage as aforesaid. And I direct that my executors or trustees or their successors shall not purchase or improve by building upon any real estate after the expiration of sixteen years from my decease.

"Relying on the fidelity and prudence of my said executors and trustees in executing the various trusts to them given and confided in and by this my last will and testament, my executors are authorized to mortgage my real estate to improve by building on the same, only in the event of the destruction of some of my buildings by the elements, and then only to supply other buildings in the place of those destroyed.

"It is my will that all my just debts and the charges of funeral expenses be paid and discharged by my executors, as hereinafter named and appointed, out of my estate, as soon as conveniently may be after my decease, and the said debts become due; and I leave the charge of my funeral expenses to the discretion of my said executors.

It was contended by some of the parties that the real estate devised by this will was owned jointly by the testator and his

---

"Second. I give, devise and bequeath to my beloved wife Caroline Elizabeth Couch, after the expiration of the trust estate vested in my executors and trustees for the term of twenty years after my decease, one fourth part of all my estate, both real and personal, after the payment of all my debts, funeral expenses and the legacies in this will mentioned, which are hereby made a charge on said real estate, which part is to be accepted by my said wife and received by her in lieu of dower.

"Third. I give, devise and bequeath unto my beloved daughter Caroline Elizabeth Couch, after the expiration of the trust estate so vested as aforesaid, one fourth part of all my estate, both real and personal, after the payment of all my debts, funeral expenses and the legacies in this will mentioned.

"Fourth. I give, devise and bequeath unto my brother James Couch, after the expiration of the trust estate so vested as aforesaid, one fourth part of all my estate, both real and personal, after the payment of all my debts, funeral expenses and the legacies in this will mentioned.

"Fifth. I give, devise and bequeath unto my nephew Ira Couch, son of my brother James, after the expiration of the trust estate so vested as aforesaid, the remaining one fourth part of all my estate, both real and personal, after the payment of all my just debts, funeral expenses and the legacies in this will mentioned.

"Sixth. I hereby will and direct that the said legacies hereinafter mentioned shall be charged on my real estate, to be paid out of the rents and profits thereof as hereinafter directed."

By the seventh and eighth clauses, the testator gave annuities for life to his sister Rachel and to his mother-in-law; and by the ninth clause an annuity to a brother-in-law who died before him.

"Tenth. I give and bequeath to my wife Caroline Elizabeth Couch, for the support of herself and daughter, from the rents of my real estate, the sum of ten thousand dollars a year until all the debts due by me are paid by my executors, and after my executors have paid such debts I give and bequeath to her for the same purpose fifteen thousand dollars a year, to be paid quarterly to her until my daughter becomes of age or is married, when my daughter may draw one fourth of all the net rents and profits, after payment of all expenses, taxes, repairs, legacies, annuities and other charges on my said estate, and my wife may draw ten thousand dollars a year until my nephew Ira Couch attains his majority, when she shall draw one fourth of all the net rents and profits, after paying all expenses, taxes, repairs, legacies, annuities and other charges as aforesaid.

"Eleventh. I give and bequeath to my brother James Couch, for the support of himself and family, from the rents of my real estate, the sum of ten thousand dollars a year, to be paid quarterly until all the debts due by me are paid by my executors, and after such debts due by me are paid I

brother James. But upon the whole evidence it clearly appeared that, although James lived with the testator and helped

---

give to him for the same purpose fifteen thousand dollars a year, to be paid quarterly to him until my nephew Ira Couch attains his majority, after which time I give to my brother James Couch one fourth part of all the net rents, income and profits of my estate, to be paid him by my executors quarterly until the final division of my estate, which shall take place at the end of twenty years after my decease, and not sooner."

By the twelfth and thirteenth clauses, he gave legacies to children of a deceased brother, and of his sister Rachel.

"Sixteenth. I will and direct that no part of my estate, neither the real nor the personal, shall be sold, mortgaged (except for building) or in any manner incumbered, until the end of twenty years from and after my decease, when it may be divided or sold for the purposes of making a division between my devisees as herein directed.

"Seventeenth. It is my will that any and all real estate which may hereafter be purchased by me shall be disposed of, and is hereby devised, in the same manner and to the same persons as if owned by me at the time of making this my last will and testament.

"Eighteenth. In the event of any of the legatees or annuitants being alive at the end of twenty years after my decease, it is my will and I hereby direct that there shall be a division of all my estate, both real and personal, at the end of said twenty years, anything herein contained to the contrary notwithstanding; and in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors.

"Nineteenth. It is my will that my trustees aforesaid shall pay the several gifts, legacies, annuities and charges herein to the persons named in this will, and that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that, if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same manner as if such child or children had actually inherited the same, and, in the event of such person or persons having no children, then to my daughter and her heirs.

"Twentieth. It is my will that the estate, both real and personal, hereby devised and bequeathed to my daughter Caroline Elizabeth, shall be vested in trustees to be chosen by herself and my trustees herein named, before her marriage; and said trustees shall be three in number, to whom all her estate, both real and personal, shall be conveyed at the expiration of twenty years, the time hereinbefore specified for the termination of the estate of my trustees herein, to such trustees so to be appointed as aforesaid; and it

him in his business, they were not partners, and, as James knew, all the real estate was bought and paid for by the testator out of his own money, and the deeds were taken in his name. The property belonged to the testator; and James had no title in it, legal or equitable, except under the will.

Caroline E. Couch, the testator's daughter, was married January 28, 1867, to George B. Johnson, having before her marriage, and by indenture with the trustees named in the

---

is my will that the estate, both real and personal, herein devised and bequeathed for the benefit of my daughter, shall be held by such trustees for her sole and only use and benefit, and that the same shall not in any manner be subject to the marital rights of any future husband my daughter may have, and that all moneys shall be paid by such trustees to my daughter personally, and to no other person for her, except upon her written order or assent; and it is my will that her said trustees pay to her during her life the entire net income of the estate, both real and personal, herein devised and bequeathed to my daughter, after the same shall have been conveyed to her trustees by my executors and trustees or their successors; and after the death of my said daughter I direct that the said estate, both real and personal, shall be conveyed to the children of my daughter, and, in the event of her having no children, to such person as my daughter may direct by her last will and testament.

"Twenty-first. It is my wish also that William H. Wood, my executor and trustee, shall be charged with and take upon himself the collection of all rents accruing to my estate, and that he shall continue to perform the same during the period of twenty years after my decease; and for the performance of this service and other services, and for his general care and supervision of the affairs of my estate, I hereby direct that the sum of two thousand dollars per annum shall be paid to him; but in the event of his decease before entering upon said duties, or before the twenty years aforesaid shall expire, or shall decline to act as in this section provided, I hereby authorize and direct my said trustees to appoint some other person to act in his stead in collecting said rents and performing the other duties as above specified, and to pay him the same compensation therefor which said Wood would have had.

"Twenty-second. And in the event of the marriage of my said wife after my decease it is my will and I hereby authorize and direct my said trustees and executors to pay over to my said wife, and to no other person, the rents, annuities, legacies and other income herein bequeathed to my said wife, and to take her separate receipts therefor; and it is my will that my said trustees and their successors in such case hold the same, subject to her order, in trust for my said wife, so that said property so devised and bequeathed to her as aforesaid can in no event be subject to the marital rights of such husband."

will, appointed them to be trustees for the benefit of herself and her children, under the twentieth clause of the will. Three children of this marriage were born before 1877.

The testator left real estate, worth about $1,000,000, consisting of nine lots of land in the heart of the city of Chicago, on two of which stood the Tremont House; and left personal property to the amount of $11,000; and owed debts amounting to $112,000, besides unpaid taxes on real estate. The trustees under the will, Wood collecting the rents and having the principal management, improved the real estate, so as to produce a large net income, until the great fire of October, 1871, destroyed all the buildings. In 1872 and 1873, the trustees erected new buildings on the property, at an expense of $1,000,000, of which they borrowed $750,000, on mortgage executed by the trustees, as well as by the widow, James, Ira, and the daughter and her husband, individually, of all the nine lots, payable November 1, 1877, with yearly interest at eight per cent.

On the completion of the new Tremont House, the trustees being unable to find any person, not interested in the estate, who would undertake to pay a fair rent and provide the necessary furniture, a lease thereof was made on November 15, 1873, by the widow, James Couch and William H. Wood, as trustees under the will and as trustees of the daughter, and by the widow, James, Ira, and the daughter and her husband, individually, for ten years, to James Couch, who agreed to furnish it and carry it on as a hotel, and to pay one tenth of the gross amount of his receipts therefrom until February 1, 1877, to the widow and Wood as joint trustees with himself under the will, and after that date to pay to the widow, to Ira and to the daughter's trustees, three fourths of such tenth, retaining the other fourth himself. James Couch carried on the hotel accordingly, but unsuccessfully, until January 18, 1879, when his lease was terminated, and the hotel was leased to another person.

In December, 1876, the mortgagee agreed with the trustees named in the will to extend the term of payment of the principal of the mortgage debt, and to reduce the rate of interest,

provided the whole estate should continue to be managed as before, and Wood should remain in the principal charge and control thereof.

On January 8, 1877, James Couch and wife, the testator's widow, the daughter and her husband, and Ira and his wife, in their individual names, and the widow, James Couch and William H. Wood, as trustees of the daughter, executed and delivered to Wood a power of attorney, containing these recitals: "Whereas by the will of Ira Couch, deceased, all of his estate, both real and personal, was devised and bequeathed to James Couch, Caroline E. Couch and William H. Wood, in trust for the period of twenty years from the time of his death, which period will expire the twenty-eighth day of January, 1877, and, upon the termination of said trust, to the said James Couch, and Caroline E. Couch, and to Ira Couch, son of said James Couch, and Caroline E. Johnson, daughter of said testator, and now the wife of George B. Johnson, one fourth thereof to each of said devisees." "And whereas the said Caroline E. Johnson did, prior to her marriage and pursuant to the provisions of said will, by her deed of trust, appoint the said James Couch, Caroline E. Couch and William H. Wood trustees of all her share and interest in said estate; and whereas, by reason of the destruction of the buildings belonging to said estate, and situate upon said lands, by fire, the said trustees under said will have, as such trustees, incurred a large indebtedness in rebuilding the same, and for other purposes beneficial to said estate, and which indebtedness is a lien or incumbrance thereon; and whereas it is deemed advantageous to the undersigned devisees as aforesaid, as well as to the creditors of said estate, that the same should, from the time of the expiration of the said period of twenty years, be managed as a whole, by some person appointed and agreed upon by the parties interested, to the end that sales of said estate, or parts thereof, may be made from time to time to meet the said indebtedness, that said estate may in the meantime be kept rented, and the income therefrom applied to the payment of the interest on indebtedness, the taxes, premiums on insurance, and the expenses for repairs, and for the management of the estate." This power accordingly

authorized Wood, on and after January 28, 1877, to enter upon and take possession of all the real estate devised; to rent it, and to collect the rents, and also all arrears of rent under leases made by the trustees under the will; to pay taxes and assessments, and the interest and principal of debts against the estate, and all expenses of repairs, preservation and management thereof, and to borrow money when necessary for these purposes; and to sell and convey the whole or any part of the estate whenever and upon such terms as in his judgment should be for the best interest of the constituents; and provided that it should be irrevocable, except that after January 28, 1880, a majority of them, or, on giving six months' notice in writing, any one of them might "revoke this power of attorney and annul this agreement."

By reason of the embarrassment caused by the financial panic of 1873, the real estate depreciated in value, so that it was worth less than the sum due on the mortgage, and during the years 1876, 1877 and 1878 the income was insufficient to pay the interest on the mortgage debt, taxes, insurance and expenses. The estate afterwards increased in value until 1884, when the income had become sufficient to pay annual expenses and interest and a large part of the principal.

The testator's debts, and the legacies given by the twelfth and thirteenth clauses of the will, as well as the annuities to the testator's sister and to his mother-in-law under the seventh and eighth clauses, were all duly paid before 1877, those annuitants having died before that time. The annuities to his widow and daughter under the tenth clause were paid until the fire of October, 1871, but were not paid in full afterwards; and his brother James was paid more than his share of the income under the eleventh clause.

The estate was never divided by the executors among the devisees of the residue, because of the impossibility of making partition of the most valuable lots, or of selling them, except at a great sacrifice.

On February 15, 1879, judgments to the amount of $6000 were recovered against James Couch, in a court of the State of Illinois, on debts contracted since January 28, 1877, and execu-

tions thereon were forthwith taken out and returned unsatisfied. On February 24, 1879, one Sprague, who recovered two of those judgments, amounting to $1097.85, brought a suit in equity in that court, upon which a receiver was appointed, to whom, by order of that court, on March 29, 1879, James Couch executed a deed of all property, equitable interests, things in action, and effects, belonging to him. In 1881 and 1882, James Couch's undivided fourth of the real estate devised was levied on and sold by the sheriff on pluries executions issued on Sprague's judgments at law.

On May 10, 1879, one Brown, as trustee for Howard Potter, recovered judgment in the Circuit Court of the United States against James Couch for $15,038.92 on a debt contracted in 1874; and, in 1881, caused an alias execution thereon to be levied on the same undivided fourth, and purchased the same at the marshal's sale on execution.

On February 9, 1881, James Couch and Elizabeth G. Couch, his wife, executed a deed of all their interest in that fourth to William E. Hale, expressed to be for a nominal consideration, but the real consideration for which was a contemporaneous agreement between the wife and Hale, by which Hale agreed to buy up the judgments existing against James Couch, and to sell the interests conveyed to him by the deed, and, after reimbursing himself for his expenses, to pay one half of the proceeds to her, and hold the other half to his own use. Hale bought up the judgments recovered February 15, 1879, being about one third of the judgments against Couch, as well as the title under the sheriff's sale aforesaid; but on November 16, 1882, sold them again to Potter, and never bought up any of Potter's claims, or paid anything to Elizabeth G. Couch.

Ira Couch, the testator's nephew, came of age January 9, 1869, and never had any children. His interest in the estate of the testator was conveyed by him, being insolvent, on January 29, 1877, to one Dupee, as trustee for his creditors, with authority to sell at private sale; by Dupee on November 26, 1881, to one Everett, in consideration of the sum of $1000 paid by Elizabeth G. Couch, mother of Ira; by Everett on November 28, 1881, to her; and by her, on February 28, 1886, back to Ira.

Statement of the Case.

On March 9, 1885, Caroline E. Johnson, the testator's daughter, conveyed to her husband all right, title and interest she might or could have in real estate under the nineteenth clause of the will. On July 5, 1885, she died, leaving her husband and three children surviving her.

On July 14, 1884, James Couch, Caroline E. Couch and William H. Wood, being the executors and trustees, and the first two of them devisees named in the will, filed a bill in equity in the state court to obtain a construction thereof, to which Caroline E. Johnson and her husband and children, Elizabeth G. Couch, Potter, Hale, Ira Couch, the judgment creditors of James Couch and the receiver appointed in Sprague's suit in equity, were made parties.

On August 4, 1884, Potter filed in the Circuit Court of the United States a bill for partition of the real estate of the testator, making all other parties interested defendants. On October 23, 1884, the bill for the construction of the will, and on May 15, 1885, the bill of Sprague, were removed into that court. On August 3, 1885, these three causes were consolidated by order of the court; and on November 18, 1887, after the various parties had filed answers stating their claims, it was ordered that each answer might be taken and considered as a cross bill.

No question was made as to the share devised to the wife by the second clause, or as to the share devised to the daughter and her children by the third and the twentieth clauses of the will.

The claims of the various parties to the shares devised to the testator's brother James by the fourth clause, and to the testator's nephew Ira by the fifth clause, were as follows:

Potter claimed the share of James under the judgments and the sales on execution against him.

Hale claimed the same share under the deed to him from James and wife.

James claimed his share under the fourth clause of the will.

Ira claimed his share under the fifth clause; and also claimed the share of James, on the ground that, by reason of the alienations thereof to Potter and to Hale, the devise over in the nineteenth clause to his children took effect.

Counsel for Parties.

The daughter's husband and her children respectively claimed the shares of both James and Ira, contending that, by reason of the alienations thereof, they vested, under the ultimate devise over in the nineteenth clause, in the daughter and her heirs; the husband claiming under his wife's deed to him; and the children claiming under the twentieth clause of the will, by reason of her death.

By the decree, it was declared that the devised estate vested at the expiration of twenty years from the testator's death, one fourth in fee in the widow, one fourth in fee in James, one fourth in fee in Ira, and the remaining fourth in the daughter for life, with remainder in fee to her children; and the claims of Potter, of Hale, and of the daughter's husband and children, to the shares of James and of Ira, and of Ira to the share of James, were disallowed. Potter, Hale, the daughter's husband and her children, respectively appealed from the disallowance of their claims; and James Couch appealed from so much of the decree as declared that the legal title under the residuary devises vested at the expiration of twenty years from the testator's death. The five appeals were submitted together on printed briefs and arguments.

Mr. Henry B. Mason for Potter.

Mr. Monroe L. Willard for Hale.

Mr. D. K. Tenney for George B. Johnson, husband of Caroline E. Johnson.

Mr. Charles H. Aldrich for Mrs. Johnson's children.

Mr. John S. Cooper and *Mr. John G. Reid* for James Couch and Elizabeth G. Couch.

Mr. Charles H. Wood for Ira Couch, son of James.

Mr. William H. Wood and *Mr. C. Beckwith* for the trustees.

Opinion of the Court.

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

The matters in controversy concern those shares only of Ira Couch's real estate, which he devised to his brother James and to his nephew Ira, the son of James.

1. In order to ascertain the nature and the time of vesting of their interests, it is important in the first place to determine the extent and duration of the trust estate of the executors and trustees named in the will, bearing in mind the settled rule that whether trustees take an estate in fee depends upon the requirements of the trust, and not upon the insertion of words of inheritance. *Doe* v. *Considine*, 6 Wall. 458; *Young* v. *Bradley*, 101 U. S. 782; *Kirkland* v. *Cox*, 94 Illinois, 400.

In the first clause of the will, the testator appoints his wife, his brother James and his brother-in-law Wood "executors and trustees" of his will, and devises and bequeathes to them all his estate, real and personal, "for the term of twenty years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose or object;" authorizes them to lease his real estate at their discretion, and, out of any surplus funds, to improve his real estate, to purchase other real estate to be held upon the same trusts, and to lend money on bond and mortgage; but, in order that their doings may not create any obstacle to the division of his real estate at the end of the twenty years, provides that they shall not make leases, or lend money on mortgage, beyond twenty years, or purchase, or improve by building, after sixteen years from his death; and he also authorizes them to mortgage real estate for the purpose of rebuilding in case of destruction by the elements.

In the next four clauses, he devises and bequeaths to his widow, daughter, brother and nephew, respectively, "after the expiration of the trust estate vested in my executors and trustees for the term of twenty years after my decease," one fourth part of all his estate, both real and personal, after payment of

debts and legacies, which he charges upon the real estate. In the eleventh clause, he directs his executors to pay to his brother a certain part of the income "until the final division of my estate, which shall take place at the end of twenty years after my decease, and not sooner." And in the twenty-first clause he declares his wish that Wood shall collect the rents and have the general care and supervision of the affairs of the estate during the same period.

These provisions, had the testator said nothing more upon the subject, might have been construed as assuming or implying that the trust estate was to terminate at the end of twenty years from the testator's death, without any act or conveyance on the part of the trustees. But the will contains other provisions concerning the powers and duties of the trustees, which are wholly inconsistent with such a conclusion.

The sixteenth clause is as follows: "I will and direct that no part of my estate, neither the real nor the personal, shall be sold, mortgaged (except for building) or in any manner incumbered, until the end of twenty years from and after my decease, when it may be divided or sold for the purposes of making a division between my devisees as herein directed." The very object of this clause is to define when and for what purposes the trustees may mortgage or may sell the real estate. Before the end of twenty years, it is neither to be mortgaged (except for building, as allowed in the first clause) nor to be sold. At the end of the twenty years, all authority to mortgage it is to cease, but "it may be divided or sold for the purposes of making a division between my devisees as herein directed." This division or sale (like all sales or mortgages spoken of in this clause) is evidently one to be made by the trustees, under authority derived from the testator, and while the legal title remains in them; not a judicial division or sale for the purpose of partition, after the legal title has passed to the residuary devisees.

Again; in the eighteenth clause, the testator directs that, in the event of any of the legatees or annuitants being alive at the end of twenty years after his death, there shall be a division of all his estate at that time, "anything herein contained

to the contrary notwithstanding;" and that "in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors." This clause puts beyond doubt the intention of the testator, not only that the division of his estate, and the assignment and conveyance of the several shares to each devisee, shall be made by his executors, but that the question which share shall be charged with the payment of any legacy or annuity shall depend upon the act of the executors in making the division among the devisees.

Although, at the expiration of twenty years from the testator's death, all the legacies and annuities to others than the residuary devisees had in fact been paid, yet the duty still remained in the executors and trustees to make a division, by sale if necessary. Under the circumstances of this case, it was impracticable to make the division, either by the partition of the lands themselves, or by selling them and distributing the proceeds, immediately upon the expiration of the twenty years; and until a division was made, in one form or the other, by the executors and trustees, the legal title must remain in them. The sale and conveyance by them, whether directly to the residuary devisees, or to third persons for the purpose of paying the proceeds to those devisees, was not in the exercise of a power over an estate vested in other persons, but was for the purpose of terminating an estate vested in the executors and trustees themselves, by conveying it to others.

The twentieth clause, by which the daughter's share, in case of her marriage, is to be conveyed at the expiration of the twenty years by the trustees named in the will to trustees for the benefit of herself and her children, and the twenty-second clause, by which the share of the widow, in case of her marrying again, is to be held by the executors and trustees in trust for her, are also worthy of notice in this connection, although they might not, standing alone, affect the time of vesting of the legal title in the shares of the brother and the nephew. *Wellford* v. *Snyder*, 137 U. S. 521.

There can be no doubt that all the powers conferred, and all the trusts imposed, were annexed to the office of executors, and not to a distinct office of trustees. And, taking the whole will together, it is quite clear that the legal title of the executors and trustees did not absolutely terminate upon the expiration of twenty years from the death of the testator, because it was necessary, for the purpose of enabling them to execute the trusts and to carry out the provisions of the will, that the legal title should be and continue in them until they had, by sale or otherwise, settled the estate, and conveyed to the devisees severally their shares in the estate or its proceeds. The testator doubtless intended that after the expiration of the twenty years the estate should cease to be held and managed by his executors and trustees as a whole, and should be divided into four parts to be held in severalty by or for his residuary devisees. But he intended, and expressly provided, that the division should be made by his executors and trustees; and therefore their trust estate could not terminate until they had made the division and conveyed the shares. *McArthur* v. *Scott*, 113 U. S. 340, 377; *Kirkland* v. *Cox*, 94 Illinois, 400; Perry on Trusts, §§ 305, 315, 320. Whether, in case of unreasonable delay on their part to make the division, a court of equity might have compelled them to do so, is a question not presented by this record.

The decision of the Supreme Court of Illinois in *Kirkland* v. *Cox*, above cited, is much in point. In that case, the testator devised and bequeathed all his estate, real and personal, to trustees, to control and manage it, and to make such disposition of it as should in their judgment increase its value; to pay to his daughter such instalments as they should deem sufficient for her support until she reached the age of thirty-five years, and then to convey the estate to her in fee; authorizing them, however, if she should be then married to a man whom they thought unworthy, to continue to hold the title in trust during his life; and further providing that, if she died without issue, the whole estate, after paying certain legacies, should "be divided equally between" three charitable corporations. It was held that the powers conferred on the trustees implied

a power to sell the lands and convert them into money or interest-bearing securities; and, therefore, that the trustees took and held the title in fee simple, notwithstanding the death of the daughter before reaching the age of thirty-five years, the court saying: "The power implied to sell is to sell the whole title — and to this is essential the power to convey that title, requiring, as a condition precedent, a fee simple estate in the trustees. The property is devised to the trustees to sell and convey if they deem it advisable, or to hold and control until it is to be transferred as directed; and in the contingency that has arisen, it was intended that it should be the duty of the trustees to make the equal division of the property between the corporations designated and convey it accordingly — for the grant to these corporations is in severalty, and not as tenants in common, and their title must necessarily rest on the conveyance of the trustees." 94 Illinois, 415.

The cases cited against this conclusion differ widely from the case at bar. The two most relied on were *Minors* v. *Battison*, 1 App. Cas. 428, in which the facts were very peculiar, and there was much diversity of opinion among the judges before whom it was successively brought; and *Manice* v. *Manice*, 43 N. Y. 303, in which the construction adopted was the only one consistent with the validity of the will under the statutes of New York.

2. From this view of the nature and duration of the estate of the trustees, it necessarily follows that by the terms of the fourth and fifth clauses of the will, devising and bequeathing to the testator's brother and nephew, respectively, "after the expiration of the trust estate vested in my executors and trustees," "one fourth part of all my estate, both real and personal," (after the payment of debts and legacies, which he charged upon the real estate,) no legal title in any specific part of the estate, and no right of possession, vested in either of them, until the trustees had divided the estate and conveyed to each of them one fourth of the estate or of the proceeds of its sale; but, on well settled principles, an equitable estate in fee in one fourth of the residue of the testator's whole property vested in the brother and in the nephew respectively from the death of

the testator. *Cropley* v. *Cooper*, 19 Wall. 167; *McArthur* v. *Scott*, 113 U. S. 340, 378, 380; *Phipps* v. *Ackers*, 9 Cl. & Fin. 583; *Weston* v. *Weston*, 125 Mass. 268; *Nicoll* v. *Scott*, 99 Illinois, 529; *Scofield* v. *Olcott*, 120 Illinois, 362.

To the suggestion that the will violated the rule against perpetuities, which prohibits the tying up of property beyond a life or lives in being and twenty-one years afterwards, it is a sufficient answer that after twenty years from the death of the testator, and after the death of the widow and daughter, (if not before,) the title, legal and equitable, in the whole estate would be vested in persons capable of conveying it. *Waldo* v. *Cummings*, 45 Illinois, 421; *Lunt* v. *Lunt*, 108 Illinois, 307.

3. Nor is the estate of the residuary devisees affected by the nineteenth clause of the will, which is in these words: "It is my will that my trustees aforesaid shall pay the several gifts, legacies, annuities and charges herein to the persons named in this will, and that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that, if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same manner as if such child or children had actually inherited the same, and, in the event of such person or persons having no children, then to my daughter and her heirs."

The devise over in this clause cannot, indeed, by reason of the words "gifts, legacies, annuities and charges," and "bounty or bounties," in the preamble, be confined to the legacies and annuities given by the testator and charged on his real estate by clauses six to thirteen inclusive, and by clause eighteen. So to hold would be utterly to disregard the comprehensive and decisive words, "devisees or legatees," "legacy or devise," and "share intended for such devisee or legatee," by which the testator clearly manifests his intention that the devise over shall attach to the shares of his real estate devised

to his widow, daughter, brother and nephew, respectively, by clauses two, three, four and five, except so far as its effect upon the shares of the daughter and the widow may be modified by the trusts created for their benefit by clauses twenty and twenty-two.

The testator having declared his will that the devises of the shares shall be "for the personal advantage of" the devisees, and that "no creditors or assignees or purchasers shall be entitled to any part," and having directed the devise over to take effect "if either of the devisees shall in any way or manner cease to be personally entitled to the devise made for his benefit," the devise over of the shares of the brother and the nephew, if valid, would take effect upon any alienation by the first devisee, whether voluntary or involuntary, by sale and conveyance, by levy of execution, by adjudication of bankruptcy, or otherwise; or, at least, upon any such alienation before his vested equitable estate became a legal estate after the expiration of the twenty years.

But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit. § 360; Co. Lit. 206 b, 223 a; 4 Kent Com. 131; *McDonogh* v. *Murdock*, 15 How. 367, 373, 375, 412. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. *Howard* v. *Carusi*, 109 U. S. 725; *Ware* v. *Cann*, 10 B. & C. 433; *Shaw* v. *Ford*, 7 Ch. D. 669; *In re Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 13 P. D. 136; *Steib* v. *Whitehead*, 111 Illinois, 247, 251; *Kelley* v. *Meins*, 135 Mass. 231, and cases there cited. And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt* v. *Thurman*, 1 Johns. Ch. 220; *Mandlebaum* v. *McDonell*, 29 Michigan,

77; *Anderson* v. *Cary*, 36 Ohio St. 506; *Twitty* v. *Camp*, Phil. Eq. (No. Car.) 61; *In re Rosher*, 26 Ch. D. 801.

The cases most relied on, as tending to support a different conclusion, are two decisions of this court, not upon devises of real estate, but upon peculiar bequests of slaves, at times and places at which they were considered personal property. *Smith* v. *Bell*, 6 Pet. 68; *Williams* v. *Ash*, 1 How. 1.

In *Smith* v. *Bell*, the general doctrine was not denied; and the decision turned upon the construction of the words of a will by which a Virginia testator bequeathed all his personal estate (consisting mostly of slaves) to his wife "to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of" his son. This was held to give the son a vested remainder, upon grounds summed up in two passages of the opinion, delivered by Chief Justice Marshall, as follows: "The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them." 6 Pet. 76. "The limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the power of absolute disposition, which they purport to confer of the slaves, to such a disposition of them as may be made by a person having only a life estate in them." 6 Pet. 84.

In *Williams* v. *Ash*, a Maryland testatrix bequeathed to her nephew all her negro slaves, naming them, "provided he shall not carry them out of the State of Maryland, or sell them to any one; in either of which events I will and devise the said negroes to be free for life." One of the slaves was sold by the nephew, and, upon petition against the purchaser, was adjudged to be free. As stated by Chief Justice Taney, in delivering the opinion of the court, and recognized in the statute of Maryland of 1809, c. 171, therein cited, "By the laws of Maryland, as they stood at the date of this will, and at the time of the death of the testatrix, any person might, by deed or last will and testament, declare his slave to be free after any given period of service, or at any particular age, or upon the performance of any condition, or on the event of any con-

tingency." 1 How. 13; 3 Kilty's Laws. The condition or contingency, forbidding the slaves to be sold or carried out of the State, was, as applied to that peculiar kind of property, a humane and reasonable one. The decision really turned upon the local law, and appears to have been so understood by the Court of Appeals of the State in *Steuart* v. *Williams*, 3 Maryland, 425. Chief Justice Taney, indeed, going beyond what was needful for the ascertainment of the rights of the parties, added: "But if, instead of giving freedom to the slave, he had been bequeathed to some third person, in the event of his being sold or removed out of the State by the first taker, it is evident upon common law principles that the limitation over would have been good," citing *Doe* v. *Hawke*, 2 East, 481. But the case cited concerned an assignment of a leasehold interest only, and turned upon the construction of its particular words, no question of the validity of the restriction upon alienation being suggested by counsel or considered by the court; and the dictum of Chief Justice Taney, if applied to a conditional limitation to take effect on any and all alienation, and attached to a bequest of the entire interest, legal or equitable, even in personalty, is clearly contrary to the authorities. *Bradley* v. *Peixoto*, 3 Ves. Jr. 324; *S. C.* Tudor's Leading Cases on Property (3d ed.) 968, and note; *In re Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 13 P. D. 136; *Steib* v. *Whitehead*, 111 Ill. 247, 251; *Lovett* v. *Gillender*, 35 N. Y. 617.

The case at bar presents no question of the validity of a proviso that income bequeathed to a person for life shall not be liable for his debts, such as was discussed in *Nichols* v. *Levy*, 5 Wall. 433, in *Nichols* v. *Eaton*, 91 U. S. 716, and in *Spindle* v. *Shreve*, 111 U. S. 542. In *Steib* v. *Whitehead*, above cited, the Supreme Court of Illinois, while upholding the validity of such a proviso, said: "We fully recognize the general proposition that one cannot make an absolute gift or other disposition of property, particularly an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment as to defeat the object of the gift itself, for that would be, in effect, to give and not to give, in the same breath. Nor do we at all question the general prin-

ciple that, upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or curtesy, or that it should not descend to the heirs general of the grantee upon his dying intestate, or that the grantee should have no power of disposition over it, the provision, in either of these cases, would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee simple, and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the State by mere private contract. This cannot be done." 111 Ill. 251.

The restraint, sought to be imposed by the nineteenth clause, upon any alienation by the brother or by the nephew of the share devised to him in fee, being void for repugnancy, it follows that upon such alienation, or upon an attempt to alienate, his estate was not defeated, and no title passed under the devise over, either to the nephew in the share of the brother, or to the daughter or her children in the share of the brother or of the nephew, and therefore nothing passed by the daughter's deed to her husband.

For the reasons already stated, the appeal of the nephew, Ira Couch, from so much of the decree below, as declared the legal title under the residuary devises to have vested at the expiration of twenty years from the testator's death, is well taken; and the equitable estate in fee in one fourth of the residue of the testator's property, having vested in Ira Couch from the death of the testator, passed by his deed of assignment to Dupee, and by mesne conveyances back to him.

The various alienations of the share of the brother, James Couch, require more consideration.

4. The appellant Potter claims the share of James Couch under proceedings against him by his creditors, at law and in equity, the effect of which depends upon the statutes of Illinois.

As we have already seen, the legal title in fee was vested in the trustees, not under a passive, simple or dry trust, with no duty except to convey to the persons ultimately entitled; but under an active trust, requiring the continuance of the legal title in the trustees to enable them to perform their duties; and until the trustees had divided the property, either by conveying the lands to the residuary devisees, or by selling them and distributing the proceeds among those devisees, James Couch had only an equitable interest in the testator's whole estate, and no title in any specific part of his property, real or personal. Such being the facts, it is quite clear that the trust was not executed, so as to vest the legal title in him, by the statute of uses of Illinois. Hurd's Rev. Stat. 1877, c. 30, § 3; *Meacham* v. *Steele*, 93 Illinois, 135; *Kellogg* v. *Hale*, 108 Illinois, 164.

It is equally clear that such an equitable interest was not an estate on which a judgment at law would be a lien, or an execution at law could be levied, under the Illinois statute of judgments and executions, although the term "real estate," as used in that statute, is declared to include "lands, tenements, hereditaments and all legal and equitable rights and interests therein and thereto." Hurd's Rev. Stat. c. 77, §§ 1, 3, 10; *Brandies* v. *Cochrane*, 112 U. S. 344; *Baker* v. *Copenbarger*, 15 Illinois, 103; *Thomas* v. *Eckard*, 88 Illinois, 593; *Howard* v. *Peavey*, 128 Illinois, 430.

By the chancery act of Illinois, "whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property, or thing in action, belonging to the defendant, and of any property, money, or thing in action, due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant; except when such trust has in good faith been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself." Hurd's Rev. Stat. c. 22, § 49.

This statute, as has been adjudged by this court, establishes a rule of property, and not of procedure only; and applies to all cases where the creditor, or his representative, is obliged, by the nature of the interest sought to be reached, to resort to a court of equity for relief, as he must do in all cases where the legal title is in trustees, for the purpose of serving the requirements of an active trust, and where, consequently, the creditor has no lien, and can acquire none, at law, but obtains one only by filing a bill in equity for that purpose. The words "in trust," as used in the exception or proviso, cannot have a more restricted meaning than the same words in the enacting clause. *Spindle* v. *Shreve*, 111 U. S. 542, 546, 547; *Williams* v. *Thorne*, 70 N. Y. 270, 277; *Hardenburg* v. *Blair*, 3 Stew. (30 N. J. Eq.) 645, 666.

As the only title of James Couch in the property devised was an equitable interest which could not lawfully have been taken on execution at law against him, and as the trust was an active trust, "in good faith created by," and "the fund so held in trust proceeded from," the testator, "a person other than the defendant himself," the letter and the spirit of the statute alike require that this equitable interest should not be charged for his debts.

It follows that neither the judgments and executions at law, nor the suits in equity, against James Couch, gave any lien or title to his creditors; and that the deed from him to a receiver was wrongly ordered by the state court in which one of the suits was commenced, and was rightly set aside by the Circuit Court since the removal of that suit.

5. The appellant Hale claims the share of James Couch under a deed from him and his wife. The interest conveyed by that deed being an equitable interest only, Hale requires the aid of a court of equity to perfect his title, and would have to seek it by cross bill, but for the order of the Circuit Court that each answer should be taken as a cross bill. The real consideration of that conveyance was an agreement by which Hale promised to buy up the existing judgments against James Couch, to sell the interest conveyed by the deed of James and wife, and to pay to the wife one half of the net proceeds. In

fact, he bought up some of the judgments only, and sold those again, and never performed his agreement in this or any other particular. Consequently, he is not entitled to the affirmative interposition of a court of equity to obtain the interest included in the deed. *Towle* v. *Ambs*, 123 Illinois, 410.

6. It remains only to consider the contention that by the instrument of January 8, 1877, the devisees entered into an agreement by which they took the whole estate as tenants in common, and rendered any division unnecessary, and therefore all the duties of the trustees ended, and the legal title vested in the residuary devisees, at the expiration of the twenty years. Undoubtedly, those interested in property held in trust, and ultimately entitled to the entire proceeds, may elect to take the property in its then condition, and to hold it as tenants in common; but the acts showing an intention so to take must be unequivocal, and must be concurred in by all the parties interested. *Young* v. *Bradley*, 101 U. S. 782; *Baker* v. *Copenbarger*, 15 Illinois, 103; *Ridgeway* v. *Underwood*, 67 Illinois, 419; 1 Jarman on Wills (4th ed.) 598–602. In the present case, the instrument in question cannot have this effect, for two reasons: In the first place, it manifested no intention to alter in any way the existing titles of the residuary devisees, either as being legal or equitable, or as being in severalty or in common; but was simply a power of attorney, the object of which was to continue Wood's management of the estate as a whole, as under the twenty-first clause of the will. In the next place, the instrument was not executed by or in behalf of all the parties in interest, inasmuch as it was not executed by any one authorized to affect the share devised for the daughter's benefit for life, and to her children or appointees after her death. By the clear terms of the twentieth clause of the will, neither the daughter nor her husband had any authority to do this; and her trustees had no power over her share until it had been conveyed or set apart to them by the trustees under the will; and if the trustees under the will were duly constituted trustees for her and for her children (which is disputed) they had no greater power in this respect, before the estate was divided, than distinct trustees would have had.

The result is, that the decree of the Circuit Court must be affirmed in all respects, except that the declaration therein as to the time when the legal estate of the residuary devisees vested must be modified in accordance with the opinion of this court.

This conclusion, by which the brother and the nephew take the shares originally devised to them, carries out the intention of the testator, though probably not by the same steps that he contemplated.

Decree accordingly: the appellants in each appeal, except James Couch, to pay one fourth of the costs, including the cost of printing the record.

Mr. Justice Brewer and Mr. Justice Brown took no part in the decision of this case.

II.

CASES ADJUDGED

AT

OCTOBER TERM, 1891.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1891.

In re GREEN.

ORIGINAL.

No number. Submitted October 15, 1891. — Decided October 19, 1891.

A writ of mandamus does not lie from this court to the judges of the Supreme Court of a State, directing them to restore to office an attorney and counsellor whom that court had disbarred, and to vacate the order of disbarment.

THIS was a petition for leave to file an application for a writ of mandamus. The averments in the petition, upon which the prayer was founded, are sufficiently set forth in the opinion of the court.

Mr. B. W. Perkins, on behalf of the petitioner, presented the petition, together with a brief by him in support of it.

MR. JUSTICE FIELD delivered the opinion of the court.

It appears from the petition of the applicant, which he asks leave to file, that he has been disbarred from the practice of law as an attorney and counsellor in the courts of Colorado by order of the Supreme Court of that State, and he prays for

a writ of mandamus from this court commanding the judges of that court to restore him to his office and to vacate the order of disbarment.

The ground of the disbarment, as shown by the petition and the opinion of the Supreme Court of Colorado, to which it refers, was vituperative and denunciatory language used by the applicant in the pleadings in a suit brought in the Circuit Court of the United States respecting the conduct of a judge of the Superior Court of the city of Denver, Colorado, in certain proceedings had before him, and respecting the conduct of counsel therein, amounting to charges of corruption and bribery on their part in that suit, which the Supreme Court of the State found to be unwarranted by any evidence and prompted by the malice of the applicant. That court, so far as the charges against the judge of the Superior Court were concerned, evidently proceeded upon the opinion that the obligation of attorneys and counsellors imposed upon them from their office was, among other things, to observe at all times, both in their manner and language, the respect due to courts of justice and judicial officers; and that insulting and defamatory language, prompted by malice, respecting their conduct in court, was a breach of that obligation, for which they could properly be disbarred. It declared that the attorney's privilege does not permit him to enter the courts and spread upon the judicial records charges of a shocking and felonious character against brother attorneys, and against judges engaged in the administration of justice, upon mere rumors coupled with facts which should of themselves create no suspicion of official corruption in a just and fair mind. The applicant affirms that the order of disbarment was unwarranted, arbitrary, tyrannical and oppressive, and asks the interposition of this court by mandamus for his relief.

We cannot give him the aid he seeks by that writ, whatever may be the ground upon which the state court proceeded, and in whatever light its action may be regarded. A writ of mandamus can only be issued from this court in aid of its appellate jurisdiction, except in a few enumerated cases, not embracing the one before us. The Judiciary Act of 1789,

adopted at the first session of Congress, after declaring that the Supreme Court should have appellate jurisdiction from the Circuit Courts and courts of the several States, in certain cases, provided that it should have power to issue writs of mandamus in cases, warranted by the principles and usages of law, "to any courts appointed, or persons holding office, under the authority of the United States." And the Revised Statutes (§ 688) reënacted this provision in a modified form, without removing the limitation as to the courts to which and the officers to whom it may issue. If the applicant has any remedy in this court for his alleged grievance, upon which we express no opinion, it must be sought in another way.

Motion denied.

Mr. Justice Gray was absent at the time of the submission and decision of this case.

McNULTA v. LOCHRIDGE.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 1324. Submitted October 13, 1891.—Decided October 26, 1891.

Whether a person holding the office of receiver can be held responsible for the acts of his predecessor in the same office is not a Federal question, but a question of general law.

A receiver of a railroad, appointed by a Federal court, is not entitled under the act of March 3, 1887, c. 373, § 3, 24 Stat. 552, 554, to immunity from suit for acts done by his predecessor, without previous permission given by that court.

An adverse judgment of a state court, upon the claim of a receiver appointed by a Federal court, of immunity from suit without leave of the appointing court first obtained is subject to review in this court.

Actions will lie by and against a receiver for causes of action accruing under his predecessor in office.

This was a motion to dismiss a writ of error, or affirm the judgment of the court below upon the following state of facts:

Argument against the Motion.

In July, 1887, Lochridge, the defendant in error, began two suits in the Circuit Court of Christian County, Illinois, against McNulta, the plaintiff in error, as receiver of the Wabash, St. Louis and Pacific Railway Company, to recover damages for the death of James and Mary E. Molohon, alleged to have been occasioned by the negligent management of an engine at a public crossing. At the time the cause of action arose Thomas M. Cooley was receiver of the road under an order made by the Circuit Court of the United States for the Southern District of Illinois, in a suit to foreclose a mortgage upon the road. Judge Cooley having resigned his receivership, plaintiff in error, John McNulta, was appointed his successor, and was in possession of and operating the road at the time the suits were brought. Demurrers were interposed to the declarations, and overruled, and the suits were subsequently consolidated by agreement of parties, tried, and a verdict rendered in favor of the plaintiff for six thousand dollars. This judgment was subsequently affirmed by the Appellate Court of the Third District, and again by the Supreme Court of the State. Defendant thereupon sued out this writ and assigned as error, first, that the Supreme Court erred in holding that, under the act of Congress above cited, the plaintiff was entitled to maintain the action, when it appeared from the record that McNulta was not the receiver when the cause of action accrued; and second, in holding that, under said act, McNulta could be sued as receiver with respect to any act or transaction which occurred before his appointment, without previous leave of the court of the United States by which he was appointed. Defendant in error thereupon moved to dismiss upon the ground that no Federal question was involved.

Mr. James W. Patton for the motion.

Mr. George B. Burnett and *Mr. Wells H. Blodgett* opposing.

The learned counsel for defendant in error says that we seem to take the view that the right to sue the receiver depends upon this act of Congress, but that in this respect we are

mistaken: — that long before the existence of that statute it was held that a receiver was liable in his official capacity for injuries caused by the negligence of his employés, and that he is amenable to the same rules of liability that apply to the corporation of which he is receiver, while it was operating the road.

Assuming this to be true, it was always an essential prerequisite to the bringing of a suit against a receiver, that leave should first be obtained of the court appointing the receiver to bring the action, as the authorities cited by counsel show. True, it may be said plaintiff in error was exempt from suit, without leave of the court appointing him, before the passage of the act of Congress; but while that act, as we contend, permitted suits to be brought against a receiver without leave of the court appointing him "respecting any act or transaction" of the receiver sued, it in terms preserved that immunity from suit to a receiver whose "act or transaction" was not the cause of the injury complained of, and the Supreme Court of Illinois having construed the act of Congress, and having denied to plaintiff in error the immunity claimed under that act, the correctness of that decision is a proper subject of review in this court.

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

The substance of the first assignment of error is that under the act of March 3, 1887, plaintiff was not entitled to maintain a suit against McNulta, as receiver, for a cause of action which accrued when the road was in possession of and operated by a former receiver. This is clearly not a Federal question, but a question of general law, viz.: whether one person holding the office of receiver can be held responsible for the acts of his predecessor in the same office. The substance of the second assignment is that the Supreme Court of Illinois erred in holding that such suit could be maintained against the present receiver for the acts of his predecessor without the previous leave of the court appointing him.

(1) Plaintiff in error relies in this connection upon the act of Congress of March 3, 1887, c. 373, 24 Stat. 552, determining the jurisdiction of the Circuit Courts, which provides in section 3, that "every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." It is difficult to see what right can be claimed by the receiver under this act. The right he claims is immunity from suit without the prior leave of the court appointing him; but this is a right not given by the statute, but in obedience to a general and familiar principle of law recognized by this court in *Davis* v. *Gray*, 16 Wall. 203; and *Barton* v. *Barbour*, 104 U. S. 126. The right conferred by the statute to sue without the prior leave of the court, is not given to the defendant, but to the plaintiff, and the only question which could properly arise under the act in this case is, whether the receiver so sued could be held liable for the acts of a prior receiver. The act does not deprive any one of the right to sue where such right previously existed, but gives such right in certain cases, and it was for the court to say whether the plaintiff's cause of action fell within the statute, or whether the defendant was entitled to the exemption given him by the general law. Had the Supreme Court of Illinois decided that under this act the defendant could not be sued without the prior leave of the Federal court, the plaintiff might doubtless have obtained a writ of error from this court upon the ground that he had been denied a right given him by a "statute" of the United States (Rev. Stat. § 709), but it does not follow that the other party is entitled to the same remedy. The case in this particular is analogous to that of *Missouri* v. *Andriano*, 138 U. S. 496, decided at the last term, in which we held that it was only the party whose right under a statute had been denied who was entitled to a writ of error to review the final judgment of the state court.

(2) But, while we think that plaintiff in error is not entitled to immunity by virtue of the statute of 1887, we are authorized

by Revised Statutes, sec. 709, to review the final judgment or decree of a state court where "any title, right, privilege or immunity is claimed under . . . any . . . *authority* exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such . . . authority, . . ." etc. Now, as McNulta was exercising an authority as receiver under an order of the Federal court, and claimed immunity as such receiver from suit without the previous leave of such court, and the decision was adverse to such claim, he is entitled to a review of such ruling whether his claim be founded upon the statute or upon principles of general jurisprudence. We regard this as a legitimate deduction from the opinions of this court in *Buck* v. *Colbath*, 3 Wall. 334; *Feibelman* v. *Packard*, 109 U. S. 421; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Etheridge* v. *Sperry*, 139 U. S. 266; and *Bock* v. *Perkins*, 139 U. S. 628. The motion to dismiss must therefore be denied.

(3) But, as there was, for the reasons above stated, color for the motion to dismiss, we are at liberty to inquire whether there is any foundation for the position of the receiver in this case that he is not liable to suit without permission of the Federal court, and we are of the opinion that there is not. The act of March 3, 1887, declares that "every receiver . . . may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which said receiver or manager was appointed." We agree with the Supreme Court of Illinois that it was not intended by the word "his" to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself or his agents; but that with respect to the question of liability he stands in place of the corporation. His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations for causes of action accruing under their predecessors in office. *Polk* v. *Plummer*, 2 Humphreys, 500; *Jansen* v. *Ostrander*, 1 Cowen, 670. If

actions were brought against the receivership generally or against the corporation by name, "in the hands of," or "in the possession of," a receiver without stating the name of the individual, it would more accurately represent the character or status of the defendant. So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its *personnel* may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands. As the right given by the statute to sue for the acts and transactions of the receivership is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought, or his agents.

The defence is frivolous, and the judgment of the Supreme Court of Illinois must be

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE GRAY, having been absent when this case was submitted, took no part in its decision.

MAGOWAN *v.* NEW YORK BELTING AND PACKING COMPANY.

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

No. 30. Argued October 14, 15, 1891. — Decided October 26, 1891.

Letters patent No. 86,296, granted to the New York Belting and Packing Company, as assignee of Dennis C. Gately, the inventor, January 26, 1869, for "improvements in vulcanized india-rubber packing," involved invention, and were valid.

The Gately packing explained in view of prior packings.
The fact considered, that that packing went at once into such an extensive public use, as almost to supersede all packings made under other methods, and that it was put upon the market at a price from 15 to 20 per cent higher than the old packings, although it cost 10 per cent less to produce it.

In equity. To restrain the infringement of letters patent, and for an account. Decree in complainant's favor, from which respondent appealed. The case is stated in the opinion.

Mr. F. C. Lowthorp for appellant.

Mr. B. F. Lee for appellee. *Mr. W. H. L. Lee* was with him on the brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the District of New Jersey, by the New York Belting and Packing Company, a Connecticut corporation, against Allen Magowan, Spencer M. Alpaugh and Frank A. Magowan, to recover for the infringement of letters patent No. 86,296, granted January 26, 1869, to the plaintiff, as assignee of Dennis C. Gately, the inventor, for "improvements in vulcanized india-rubber packing."

The specification says:

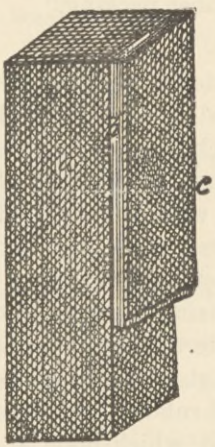
"My invention relates to packing of the kind for which letters patent were issued to Charles McBurney on the 28th of June, 1859. This packing, which is usually employed in the stuffing-boxes of pistons, is composed of piles of cloth or canvas, cut bias, coated with rubber, and pressed together and vulcanized. When thus made, the packing is very solid, and possesses but little elastic property, so that, as it wears, there is some difficulty in maintaining a tight joint between it and the piston. To obviate this disadvantage is the object of my invention, which consists in forming the packing with a backing of pure vulcanized rubber, or rubber of sufficient elasticity for the purpose desired, which may be covered and protected by a strip of canvas or other suitable fabric.

"In the drawing *a* represents the ordinary packing-band, which is backed by the rubber strip *b*, the whole being vulcanized together, so as to be solidly united; and the rubber may be covered, if desired, by the canvas strip *c*, to protect it from injury.

"When the packing is placed in the stuffing-box and around the piston, and the follower is screwed down, so as to compress the packing, the rubber strip will also be compressed, and forced against the sides of the stuffing-box, and, as it cannot expand in the direction of the follower, it acts as a spring to hold the packing against the piston-rod, and to prevent leakage, compensating for any slight wear in the packing, and making a tight joint between the rod and the packing.

"It would be manifestly impracticable to impart this quality of elasticity to the body of the packing, or that part which is in contact with, or bears against the rod, but by backing it with an elastic cushion, which, upon being compressed between the follower and the sides of the stuffing-box, acts as above described, the packing is possessed of every qualification required for its successful use, and a tighter and better joint is made than has heretofore been practicable."

The drawing is as follows:



The claim of the patent is as follows:

"The combination, with the packing, such as herein specified, of an elastic backing or cushion of vulcanized india-rubber, substantially as and for the purposes set forth."

The patent so referred to, issued to McBurney June 28, 1859, was No. 24,569, and was granted for an "improvement in packing for stuffing-boxes of pistons." The specification and drawings of the McBurney patent were as follows:

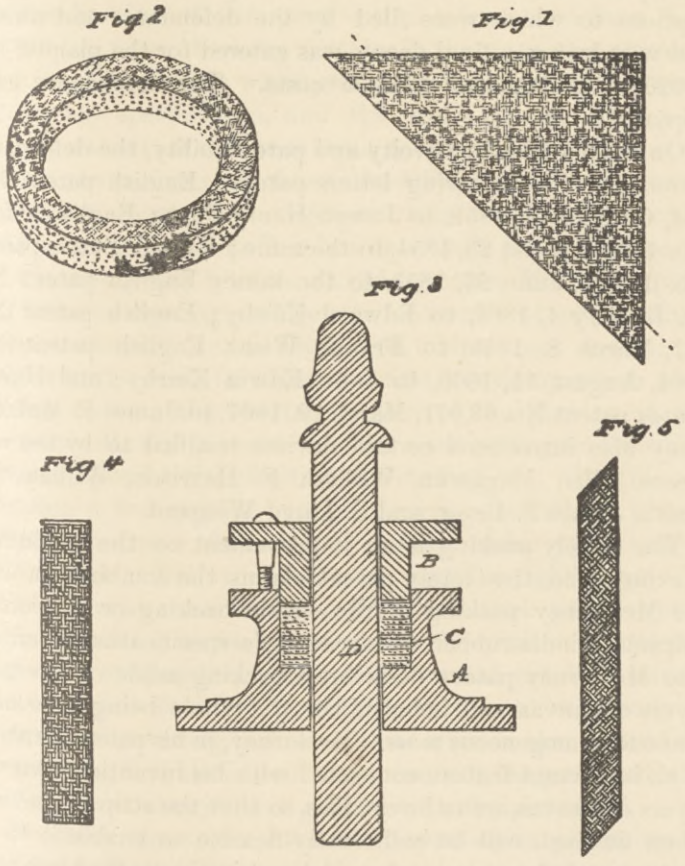
"Fig. 1 is a plan of the packing in the sheet; Fig. 2, a strip as it is bent into a circle when it is in use. Fig. 3, a section through a stuffing-box with the packing inserted. The hempen packing heretofore employed in stuffing-boxes is not easily adjusted so as to produce a uniform pressure upon all sides of the rod, and an elastic, durable, and substitute for it has long been a desideratum. In experimenting for this purpose I have laid together a suitable number of plies of canvas or cotton cloth with india-rubber between them, forming a cake of packing, which was afterward cut into strips. This was found to be objectionable for three reasons: 1st, the longitudinal threads of the canvas rendered the strips of packing very difficult to bend so as to insert it into the stuffing-box; 2d, the short transverse threads prevented the packing from yielding with a sufficient ease when the follower was brought upon it; 3d, the longitudinal threads of the strips were drawn out of place by the motion of the rod, leaving the packing with an uneven surface. The same packing was then cut into rings, the inner circle of which was of the diameter of the rod and the other circle of a diameter just sufficient to fill the stuffing-box; but it is obvious that this method of cutting the packing is very wasteful of material, as each stuffing-box requires a ring of a particular size both upon its inner and outer circle, and, as the ends of the threads are exposed to wear at four points around the circle, while at the four intermediate points the sides of the threads are exposed, these rings wear very irregularly, and when worn they become useless. To remove all these objections is the object of my present invention, the nature of which I will now proceed to describe. I take 25 pounds of india-rubber, 2 pounds of sulphur, and 4 to 8 pounds

of silica or plumbago. With this compound, after it is suitably ground and mixed, canvas or other suitable fabric of cotton, linen or hemp is coated upon each side and a sufficient number of plies of such fabric are united by a heavy pressure or by rolling. The packing is then vulcanized, and to prepare it for use it is cut diagonally into strips (as seen in Fig. 1). These strips are then cut of the right length and are bent into rings (Fig. 2), which are inserted into the stuffing-box, as seen in Fig. 3, in which A is the box, B the follower, C′ the packing, D the valve or piston-rod. In lieu of cutting the packing into short strips and bending it into rings, as above described, a longer strip may be wound spirally around the rod, the pressure of the follower bringing it to a uniform bearing upon the rod. It will be observed that, when cut diagonally, as above described, the ends only of all the threads are exposed to wear, by which it is caused to wear slowly and uniformly, whilst there are no longitudinal threads to resist the action of bending the strips, and they are consequently easily coiled within the stuffing-box; also, as there are no threads running transversely of the packing, it is easily caused to expand against the rod by pressure, and thus, as the packing wears, it may be again and again tightened up by bringing down the follower. In lieu of making the packing of continuous strips of canvas the latter may be cut into lozenge-shaped pieces, Fig. 4, which when matched together (Fig. 5) may be cut longitudinally, as upon the line *y y*, and produce the same effect.

"The compound which I have given above is that which I prefer for the manufacture of the packing, but both the ingredients and the proportions in which they are used may be variously modified without altering the spirit of my invention. Even the vulcanizing process may be dispensed with, and I do not, therefore, restrict myself thereto, but what I claim as my invention and desire to secure by letters patent is a packing for stuffing-boxes composed of canvas and india-rubber, as set forth, and cut diagonally, as described."

The answer to the bill denied infringement, and alleged that Gately was not the first and original inventor of the thing patented, referring to various prior patents, and setting up that,

in view of the state of the art at the time of Gately's alleged invention, the claim of the patent was too broad, covering more than that of which Gately was the first and original inventor; that the specification failed to distinguish sufficiently what was novel from what was old in the art, and was not



distinct and clear; and that, in view of the state of the art, what was described and claimed in the patent exhibited no invention on the part of Gately. Issue being joined, proofs were taken, and the case was heard before Judge Nixon, then the district judge, who entered an interlocutory decree in favor

of the plaintiff for an account of profits and damages and a perpetual injunction. The court, in its opinion, 27 Fed. Rep. 362, held that the patent had been infringed by the defendants, and decided, in view of the exhibits put in to show anticipation and want of patentability, that the combination of Gately involved invention. On the report of the master, exceptions to which were filed by the defendants and waived and withdrawn, a final decree was entered for the plaintiff, for $9026.66 profits and $742.05 costs. The defendants have appealed.

On the question of novelty and patentability, the defendants introduced the following letters patent: English patent No. 384, October 14, 1852, to Joseph Henry Tuck; English patent No. 1865, August 25, 1854, to the same; United States patent No. 13,145, June 26, 1855, to the same; English patent No. 19, January 4, 1865, to Edward Keirby; English patent No. 647, March 8, 1865, to Francis Wise; English patent No. 2064, August 11, 1866, to John Edwin Keirby; and United States patent No. 63,071, March 19, 1867, to James P. McLean. They also introduced certain devices testified to by the witnesses Allen Magowan, William F. Harrison, William W. Smith, James S. Lever, and S. Lloyd Wiegand.

The Gately packing is an improvement on the McBurney packing; and the Gately patent claims the combination with the McBurney packing of the elastic backing or cushion of vulcanized india-rubber which Gately's specification describes. The McBurney patent describes a packing made of alternate layers of canvas and india-rubber, the whole being vulcanized into one homogeneous mass. McBurney, in his patent, explains as an important feature connected with his invention, that the layers of canvas are to be cut bias, so that the strip of packing, when finished, will be sufficiently flexible to enable it to be bent around the piston-rod and placed in the stuffing-box with comparative ease, which would not be the case if the canvas were cut along the line of any one thread. The packing, after being thus made, is to be so used that the ends of the threads are exposed to wear — that is to say, are to lie against the moving surface of the piston-rod. Gately says, in his specifi-

cation, that this McBurney packing did not possess a sufficient amount of elasticity to operate satisfactorily in all conditions — that is, the gland of the stuffing-box would not force the packing with such tightness against the piston-rod that a tight joint would result. The improvement of Gately consisted in the combination with the McBurney packing of a vulcanized rubber backing of pure gum — that is, gum free from layers of canvas, which backing was to lie between the portion of the strip of packing which was made in accordance with the McBurney specification, and the walls of the stuffing-box. Gately states that this backing is to be vulcanized to that portion of the packing which is to be subjected to wear, and the whole is to form one homogeneous mass which can be put into and taken from the stuffing-box as a single piece. The portion of the strip which is made according to the McBurney patent furnishes a wearing surface, the character of which always remains the same and is not altered under wear; and the pure rubber at the back furnishes an elastic backing, which serves always to keep the wearing portion of the packing in close contact with the piston-rod, when such pure gum backing is pressed upon by the gland of the stuffing-box. By this combination a new article results, namely, one which presents always the same character of surface under wear, and one which has sufficient elasticity to make a tight joint. The union by vulcanization of the front and back portions of the strip of packing serves also to insure the position of the packing in the stuffing-box, which result would not be attained if the front and the back portions were formed separately and placed in the stuffing-box as separate articles, the result of such union being that the ends of the threads of the parts submitted to wear must always be in contact with the piston-rod.

We think there was patentable invention in producing this article of Gately's, in view of everything put in evidence by the defendants, and in view of the McBurney patent. In the United States patent to Keirby, and the English patent to Keirby, the packing shown differs from the Gately packing in that the wearing surface is not entirely on one side of the strip of rubber which gives elasticity to the packing, but

the rubber is in the centre of the portion which is to be subjected to the wear of the piston-rod. One of the features of the Gately packing consists in locating the rubber between the part of the packing which is to be exposed to wear and the walls of the box: and the elastic portion is located where it will not be subjected to wear. Moreover, neither of the Keirby patents shows layers of canvas cut bias and so arranged in the packing strips that the ends of the threads are the parts submitted to wear: and neither of them shows layers of canvas cut bias, located so that the ends of their threads will wear upon the piston-rod, and secured to one another and the rubber core by vulcanization; but on the contrary, as the Keirby packings wear they are continually presenting to the piston-rod surfaces having new characteristics.

The Wise packing is similar to the packing of the Keirby patents, except that outside of the canvas or other fabric an exterior metallic armor is provided, which takes the wear of the piston-rod. All that is above said in relation to the packing of the Keirby patents is true of the Wise packing, and in addition, it was intended in the Wise packing that the metallic exterior should be the wearing portion and should make the joint between the packing and the piston-rod. None of these packings show anything which bears upon the Gately invention, except that they show piston-rod packings, but not having the construction or the characteristics found in the Gately invention. As before remarked, the McBurney patent describes only that part of Gately's invention which forms the wearing surface of the Gately packing.

The McLean packing was made up of two parts, one consisting of vulcanized rubber and the other of cork. Of course the front and back portions of this packing could not be united by vulcanization, and the two parts were secured together by a metal strip, which was wound around both the cork and the rubber. In using this packing, the metal strips were first subjected to wear, and, when they were worn through, the cork took the wear; and when this occurred the rubber backing and the cork wearing portion were no longer secured the one to the other, but became separate and independent pieces

in the stuffing-box. The character of the wearing surface altered, until such time as the two parts were left free in the box. When the packing was removed from the box, it would come out in two pieces, the rubber back being one piece and the cork front the other piece. This packing does not show such a wearing portion as the Gately patent shows, and is not a homogeneous article, made one by the vulcanization of the parts together, but is a compound article made up of two pieces so tied or secured together that, after a slight amount of wear, the parts cease to perform the purposes for which they were originally intended. The Gately packing is made at the beginning and sold as one homogeneous strip, and exists as such until it is rendered useless by extreme wear, and taken from the stuffing-box; and even at that time it is still a unit, and not two separate pieces disconnected from each other.

The Tuck patent of 1852 describes canvas coated with rubber, unvulcanized, which canvas is to be rolled upon itself and used in the stuffing-box in connection with rigid wearing surfaces, the object of the canvas being to force such surfaces into contact with the piston-rod. This patent does not show a single feature of the Gately invention.

The Tuck patent of 1854 shows nine forms of packing, none of which are vulcanized. All of the forms consist practically of a rubber core and canvas rolled around such core. In some cases the core is located centrally and in some at one side of the roll; but in all the canvas is rolled upon itself or upon the core, and, when the packing is in use and is subjected to wear, the character of the surface presented to the moving piston-rod is continually changing, it being part of the time a rubber surface and part of the time a canvas surface.

The Tuck patent of 1855 shows five different forms of packing, which are, in substance, copies of five examples shown in the Tuck English patent of 1854. There is no vulcanization referred to in this patent of 1855, and the wearing surface is composed of canvas cut on the bias, and rolled around the elastic or rubber portion, which itself is saturated with rubber. The rubber core is not insisted upon as a necessity; but the patent says that it is used at times for the purpose of giving greater elasticity to the packing.

All three of the Tuck patents show packing which was different in principle from the Gately packing, in that the wearing portion was of such a character that it was continually changing in its conditions during the wear of the packing, and did not, like the Gately packing, present continuously to the piston-rod a surface having the same characteristics. In the Gately packing, the wearing portion of it is not formed by rolling canvas either upon itself or upon a rubber core, but is formed of layers of canvas secured to themselves and to the rubber backing by vulcanization. In fact, the Gately packing could not be made if it were impossible to vulcanize rubber, whereas all of the Tuck packings are capable of being made independently of vulcanization, their structure being such that canvas is used as a binding or cementing means in connection with any adhesive compound to keep the packing together and to form the strips. In the Gately packing the parts are kept together and in place solely by reason of the fact that the rubber has been subjected to vulcanization, thus making the packing a homogeneous whole, and not a strip rolled up upon itself and thus kept together. Therefore, none of the patents introduced by the defendants show the Gately invention. It is true that McBurney shows a part of the combination or article patented by Gately, and McLean shows a rubber backing; but the invention of Gately was new and patentable.

As to the other evidence and exhibits put in by the defendants, none of them show a rubber backing of pure gum and a front wearing portion united by vulcanization to the back portion, so as to produce a homogeneous article; but they all show something which Gately dispensed with, that is, an elastic core and a wrapping of fibrous or textile material around such core. Where the packing has a covering of textile material wrapped around the elastic portion of the packing, the wearing surface presented to the piston-rod cannot continuously, as in the Gately packing, be identically the same surface in character, nor can such feature exist, unless Gately's or McBurney's wearing portion and the elastic backing are united as a homogeneous whole by the process of vulcanization.

Within the requirements of *Atlantic Works* v. *Brady*, 107

U. S. 192, 200, we think that Gately made a substantial discovery or invention, which added to our knowledge and made a step in advance in the useful arts; that within the case of *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59, 73, what Gately did was not merely the work of a skilled mechanic, who applied only his common knowledge and experience, and perceived the reason of the failure of McBurney's packing, and supplied what was obviously wanting; and that the present case involves not simply "the display of the expected skill of the calling," involving "only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice," but shows the creative work of the inventive faculty.

The defendants made two forms of packing, one of them identically the packing of the Gately patent; in the other, a little over one-half of the packing was constructed identically in accordance with the Gately invention, and a little less than one-half was so constructed, except that the canvas was not cut on the bias. This feature made the packing relatively stiffer and injured it; and, even as it was made, like surfaces, or surfaces of the same character, were presented to the piston-rod throughout the entire wear of the packing in the box.

It is remarked by Judge Nixon in his opinion, as a fact not to be overlooked and having much weight, that the Gately packing went at once into such an extensive public use, as almost to supersede all packings made under other methods; and that that fact was pregnant evidence of its novelty, value and usefulness. *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495, 496; *Loom Co.* v. *Higgins*, 105 U. S. 580, 591. It may also be added, that the evidence shows that the Gately packing was put upon the market at a price from 15 to 20 per cent higher than the old packings, although it cost 10 per cent less to produce it.

The decree of the Circuit Court is *Affirmed.*

The Chief Justice and Mr. Justice Gray did not hear the argument and took no part in the decision of this case.

GAGE *v.* BANI.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 20. Submitted January 29, 1891. — Decided October 26, 1891.

Where a tax deed in Illinois is relied on as evidence of paramount title, it is indispensable that it be supported by a valid judgment for the taxes, and a proper precept authorizing the sale.

It is well settled in that State that a tax title is purely technical, and depends upon a strict compliance with the statute; and that the giving of the particular notice required by the statute is an indispensable condition precedent to the right to make a deed to the purchaser or his assignee.

The owner of land in Illinois, sold for the non-payment of taxes, or of special assessments, is entitled to be informed in the statutory notice whether the sale was for the non-payment of a tax, or of such an assessment; and a notice which informs him that the sale was made "for taxes and special assessments, authorized by the laws of the State of Illinois" is a defective notice.

The right of an occupant of land in Illinois, sold for the non-payment of taxes or special assessments, to personal notice of the fact of sale, before the time of redemption expires, is expressly given by the Constitution of Illinois, and is fundamental: and upon a direct issue whether such notice was given, the owner testifying that he did not receive notice, the evidence should be clear and convincing that it was given as required by law, before the tax title can be held to be paramount.

THE court stated the case as follows:

The appellee Bani, claiming to be the owner in fee, and being in the actual possession, of lots 12 and 13 in block 2 of Lewis Heintz's subdivision of twenty-four acres in the town of Lake, Cook County, Illinois, brought this suit, December 6, 1883, for a decree setting aside and declaring void three several tax deeds, covering those lots, and which were held by the defendant Asahel Gage.

It was alleged in the bill that the plaintiff derived title by warranty deed from Peter Caldwell and wife, of date May 15, 1882, the consideration being $3000; that his purchase was without notice of any adverse claim or title; that from the

27th day of April, 1868, until such purchase, Caldwell was the owner in fee of the premises, with a complete title deducible of record, and in actual and continued possession, under claim and color of title, paying taxes thereon for a period of more than seven years; and that prior to his purchase, to wit, on the 27th of March, 1880, the plaintiff took possession, as Caldwell's tenant, and in that capacity occupied the premises up to the date of the deed to him, thereafter holding and occupying them as owner, under claim and color of title, paying all taxes and assessments legally made thereon.

The tax deeds held by Gage, against which the bill was particularly aimed, were dated, respectively, July 3, 1880, June 30, 1880 and July 6, 1880. The one of July 3, 1880, was based upon a judgment of the county court, at its July term, 1877, for the amount of the third instalment of a special assessment, warrant 36, assessed by authority of the town of Lake, which, with interest and costs, amounted to $6.98; the one of June 30, 1880, upon a judgment for the fifth instalment of South Park assessment for the year 1876, amounting, with interest and costs, to $3.38; and the one of July 6, 1880, upon a judgment for State, county and city taxes for 1876, amounting, with interest and costs, to $16.88.

The bill also alleged that the plaintiff having learned for the first time in March, 1883, of these tax deeds, immediately offered to pay any sum reasonably necessary to cover all expended by Gage for taxes, costs and disbursements, together with interest and penalties, if a quit-claim deed was made to him; and that Gage refused such offer, pretending that the lots belonged to him.

The plaintiff, after setting out numerous grounds upon which he assailed the validity of these tax sales and deeds, and renewing his offer to reimburse the defendant for all sums paid on account of taxes and assessments upon the property, with damages and penalties, prayed that the tax deeds, which were fair upon their face, be declared void, and decreed to be surrendered for cancellation.

The defendant pleaded in bar of the suit that on the 24th of July, 1876, the county clerk of Cook County, under the pro-

visions of chapter 120 of the Revised Statutes of Illinois, executed and delivered a tax deed conveying to him, his heirs and assigns forever, the title to the lots in the bill mentioned; and that afterwards, on the 3d day of August, 1876, that deed was filed for record and recorded in the proper office.

This plea was held to be insufficient; and the defendant, with leave of the court, filed an answer relying, in support of his claim to the lots, on the tax deed of July 24, 1876, as well as upon "divers other good and sufficient tax deeds, all of which are duly recorded in the recorder's office of Cook County aforesaid, and are matters of public record, each of which is based upon a valid judgment and precept." The answer made no express reference to the deeds of July 3, June 30, and July 6, 1880.

The plaintiff having paid into court the sum of $150 for the defendant on account of tax sales, costs and disbursements, taxes and interest, it was adjudged that he was the owner in fee of the lots in question, and that the tax sales and deeds, under which the defendant claimed title, were void.

By the statutes of Illinois, in force when the sales were made, upon which the tax deeds in question were based (Rev. Stats. 1889, title Revenue, pp. 1145, 1146) it was among other things, provided:

"SEC. 216. Hereafter no purchaser or assignee of such purchaser of any land, town or city lot, at any sale of lands or lots, for taxes or special assessments due either to the State or any county or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this State, shall be entitled to a deed for the lands or lots so purchased, until the following conditions have been complied with, to wit: Such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written and partly printed, notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he or she can be found in the county; also the owners of or parties interested in said land or lot, if they can, upon diligent inquiry, be found in the county, at least three months

before the expiration of the time of redemption on such sale; in which notice he shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire. If no person is in actual possession or occupancy of such land or lot, and the person in whose name the same was taxed or specially assessed, upon diligent inquiry, cannot be found in the county, then such person or his assignee shall publish such notice in some newspaper printed in such county, and if no newspaper is printed in the county, then in the newspaper that is published in this State nearest to the county seat of the county in which such land or lot is situated; which notice shall be inserted three times, the first time not more than five months, and the last time not less than three months before the time of redemption shall expire.

"Sec. 217. Every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance — which affidavit shall be delivered to the person authorized by law to execute such tax deed, and which shall by him be filed with the officer having custody of the record of the lands and lots sold for taxes and entries of redemption in the county where such lands or lots shall lie, to be by such officer entered upon the records of his office, and carefully preserved among the files of his office, and which record or affidavit shall be *prima facie* evidence that such notice has been given. Any person swearing falsely in such affidavit shall be deemed guilty of perjury, and punished accordingly."

"Sec. 219. At any time after the expiration of two years from date of sale of any real estate for taxes or special assessments, if the same shall not have been redeemed, the county clerk, on request, and on the production of the certificate of purchase, and upon compliance with the three preceding sections, shall execute and deliver to the purchaser, his heirs or assigns, a deed of conveyance for the real estate described in such certificate."

"SEC. 225. Unless the holder of the certificate for real estate purchased at any tax sale under this act takes out the deed, as entitled by law, and files the same for record, within one year from and after the time for redemption expires, the said certificate or deed, and the sale on which it is based, shall, from and after the expiration of such one year, be absolutely null. If the holder of such certificate shall be prevented from obtaining such deed by injunction or order of any court, or by the refusal of the clerk to execute the same, the time he is so prevented shall be excluded from the computation of such time. Certificates of purchase and deeds executed by the county clerk shall recite the qualifications required in this section."

These regulations were established in obedience to the 5th section of article 9 of the constitution of Illinois of 1870, providing: "The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the General Assembly shall provide by law for reasonable notice to be given to the owners and parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: *Provided*, That occupants shall in all cases be served with personal notice before the time of redemption expires."

Mr. Augustus N. Gage for appellant.

Mr. Levi Sprague for appellee.

MR. JUSTICE HARLAN, after stating the facts as above reported, delivered the opinion of the court.

It is not necessary to consider whether the defendant's plea was or was not sufficient; for the facts alleged in it, namely, the execution by the county clerk to Gage of the tax deed of July 24, 1876, and the recording of that deed, are restated and relied on in the answer; and no objection was made in

the court below to the answer upon the ground that it set up the same matter presented by the plea. Story's Eq. Pl. § 688.

In respect to that tax deed, it appears that the sale upon which it was based was made August 29, 1873. Did Gage serve or cause to be served upon Caldwell notice of that sale as required by the statute? The notice, presented to the county clerk at the time of the application for a deed, and which Gage claimed was served August 14, 1874, upon Caldwell, personally, was as follows: "To whom it may concern. This is to notify you that on the 29th day of August, 1873, Henry H. Gage purchased, and afterwards assigned the certificate of purchase to the undersigned, at a sale of lots and lands for taxes and special assessments authorized by the laws of the State of Illinois, the following-described real estate, taxed in the name of Peter Caldwell, to wit [Here follows a description of various lots, including those here in dispute] — said taxes and special assessments were levied for the year 1872 — and that the time of redemption thereof from said sale will expire on the 29th day of August, 1875. ASAHEL GAGE."

It is plain, upon the face of the statute, that a purchaser at a sale for taxes or special assessment is not entitled to a deed until the conditions prescribed by section 216 are met; one of those conditions being that the notice required to be served by the purchaser or his assignee on every person in actual possession or occupancy of the land or lot sold, and upon the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, "shall state when he purchased the land or lot, in whose name taxed, the description of the land or lot he has purchased, for what year taxed or specially assessed and when the time of redemption will expire." The notice that Gage claimed was served on Caldwell is radically defective in that it did not show whether the sale was for taxes or special assessments. It stated that the sale of 1873 was "for taxes *and* special assessments." This precise question has been determined by the Supreme Court of Illinois. In *Gage* v. *Waterman*, 121 Illinois, 115, 118, the court said: "It might be of consequence to the land owner to know whether his property was sold for a tax

or special assessment. This notice did not afford that information." In *Stillwell* v. *Brammell*, 124 Illinois, 338, 345, the notice was of a "sale of lands, town and city lots, made pursuant to law . . . for the delinquent taxes *and* special assessments levied for the year 1880." The court held this notice to be materially defective, saying: "There is a difference between a tax and a special assessment. The notice above quoted fails to inform the land owner whether his property was sold for a tax or a special assessment. It was, therefore, defective under the ruling made in *Gage* v. *Waterman*, 121 Illinois, 115. The title to be made under a tax deed is one *stricti juris*."

So in *Gage* v. *Davis*, 129 Illinois, 236, 239, where one of the questions was as to the validity of a notice given by the assignee of a purchaser "at a sale of lots and lands for taxes and special assessments, authorized by the laws of the State of Illinois . . . said taxes and assessments were levied for the year 1872," etc., the court said: "The notice above quoted fails to state whether the lots were taxed or specially assessed. It does not inform the owner whether his lots were sold for a tax or special assessment. It merely tells him that his lots were sold at a general sale of lots and lands for taxes and special assessments levied for the year 1872. The words, 'said taxes and assessments were levied for the year 1872,' refer back to and define the sale at which the lots in question were sold, but such words cannot be construed to mean that the lots were sold on September 13, 1872, for both taxes and special assessments."

This view is not at all affected by section 224 of the above statute, declaring that deeds executed by the county clerk shall be *prima facie* evidence in all controversies and suits in relation to the right of the purchaser, his heirs or assigns, of the following facts: That the real estate conveyed was subject to taxation at the time it was assessed, and had been listed and assessed at the time and in the manner required by law; that the taxes or special assessments were not paid before the sale; that the estate conveyed had not been redeemed at the date of the deed, was advertised for sale in the manner and

for the length of time required, and sold for taxes or special assessments, as stated in the deed; that the grantee was the purchaser or assignee of the purchaser; and that the sale was conducted in the manner required by law. It has been uniformly held, notwithstanding this section, that where a tax deed is relied on as evidence of paramount title, it is indispensable that it be supported by a valid judgment for the taxes and a proper precept authorizing the sale. *Holbrook* v. *Dickinson*, 46 Illinois, 285; *Gage* v. *Lightburn*, 93 Illinois, 248, 252; *Pardridge* v. *Village of Hyde Park*, 131 Illinois, 537, 541. So it must appear that the purchaser at the tax sale or his assignee made the affidavit required by section 217 as to the service of notice of the tax sale. *Smith* v. *Hutchinson*, 108 Illinois, 662, 667; *Gage* v. *Caraher*, 125 Illinois, 447, 454. And when the notice is produced, the question is necessarily open as to whether it was such as section 216 prescribed, before the purchaser is entitled to a deed from the county clerk. The settled doctrine of the Supreme Court of Illinois is that a tax title is purely technical, and depends upon a strict compliance with the statute. *Altes* v. *Hinckler*, 36 Illinois, 265, 267; *Marsh* v. *Chesnut*, 14 Illinois, 223; *Charles* v. *Waugh*, 35 Illinois, 315, 323; *Wisner* v. *Chamberlin*, 117 Illinois, 568, 580; *Chappell* v. *Spire*, 106 Illinois, 472, 475; *Stillwell* v. *Brammell*, 124 Illinois, 338, 345. It is as firmly settled that the giving of the particular notice required is an indispensable condition precedent to the right to make a deed to the purchaser or assignee. *Gage* v. *Bailey*, 100 Illinois, 530, 536; *Gage* v. *Schmidt*, 104 Illinois, 106, 109; *Gage* v. *Herrey*, 111 Illinois, 305, 308; *Gage* v. *Mayer*, 117 Illinois, 632, 636.

As the notice of the sale of 1873 was not in conformity with the statute, Gage was not entitled to the deed of July 24, 1876, and it is void.

The first of the deeds held by Gage which is referred to in the bill is that of July 3, 1880. One of the contentions of the plaintiff is that, even if there were a valid judgment and precept for the sale, that deed was issued without authority of law. The county clerk issued it upon the showing made by the following papers: 1. A notice of the tax sale, dated Chicago, April

21, 22 and 23, 1879, given by Asahel Gage, addressed "To the owners or parties interested in the following described lands and lots, and to the persons in whose names they were taxed or specially assessed, and to whom it may concern," and published in the Chicago Daily Evening Journal on those days. That document gave notice of the purchase by Asahel Gage of the lots here in dispute, on the 8th day of August, 1877, at a sale "for taxes *and* special assessments authorized by and levied *or* assessed in compliance with the laws of the State of Illinois," and "taxed *or* specially assessed for the year 1874 for the third instalment of special assessment number 36 of the town of Lake, and the time of redemption of said land or lots from said sale will expire on the 8th day of August, 1879." The fact of the publication of that notice is supported by the affidavit of the publisher of the paper referred to. 2. An affidavit of the agent and attorney of the purchaser, in which, after setting out the above notice and its publication in the newspaper, he states that "Asahel Gage served or caused to be served written or printed or partly written and partly printed notices of purchase at said tax sale, as in other affidavits hereto attached more fully set forth, on every person in actual possession or occupancy of such land or lots, and also the person in whose name the same were taxed or specially assessed, if upon diligent inquiry they could be found in said county, and a reasonable notice was given to the owners or parties interested in said land or lots at least three months before the expiration of the time of redemption on such sale, and that said notices stated when he purchased the land or lots, in whose names taxed, the description of the land or lots he has purchased, for what year taxed or specially assessed, and when the time of redemption will expire. And this affiant says that he has compared the affidavits hereto attached *with the original memoranda of service of the respective parties making the same*, and that the same are correct *according to the original memoranda of service as aforesaid.*" This affidavit states, generally, that Asahel Gage caused a reasonable notice to be given to the owners or parties interested, by publication *or* otherwise, of the fact of the sale of the property described in the notice

attached for the taxes or assessments therein described, and when the time of redemption would expire, and complied with all the provisions of the constitution and laws of the State of Illinois to entitle him to a deed or deeds of conveyance. 3. Affidavit of Charles P. Westerfield, made July 15th, 1879, in which he describes himself, as agent of Asahel Gage, and states that on the 5th day of December, 1878, he served upon Peter Caldwell and Ann Caldwell, his wife, "by handing the same to and leaving the same *with the said Ann Caldwell personally*," a copy of the notice annexed to his affidavit; that "the persons so served were the only persons in actual possession or occupancy of said land or lots [the premises in dispute] at least three months before the expiration of the time of redemption;" and that said lands or lots were taxed *or* specially assessed in the name of "P. Caldwell and Peter Caldwell." 4. Affidavit of one Bunker, made July 15th, 1879, describing himself and stating that he, as agent of Gage, "on the dates mentioned in the foregoing affidavit, accompanied, was present with and witnessed Charles P. Westerfield, on the dates and at the several places as mentioned in the foregoing affidavit, serve the notices above mentioned on the persons mentioned in the above affidavit," and that "a copy of the annexed notice was served upon the said persons at the times, places and in the manner and form as stated above." 5. Affidavit of Charles P. Westerfield, made July 15, 1879, describing himself as agent of Asahel Gage, and stating that, as such agent, he served, April 4, 1879, upon Peter Caldwell, personally, a copy of the notice which was annexed. 6. Affidavit of U. George Taylor, in the precise words of Bunker's affidavit, except that Taylor states the service which he, as agent of Gage, witnessed, occurred on the 4th of April, 1879. 7. One of the notices, annexed to the above affidavits, was addressed: "To whom it may concern," stated the purchase by Gage, on the 8th day of August, 1877, "at a sale of lots and lands for taxes *and* special assessments authorized by the laws of the State of Illinois, taxed in the name of P. Caldwell," of the lots in controversy "taxed *or* specially assessed for the year 1874 for the third instalment of special assessment number 36

of the town of Lake, and that the time of redemption thereof from said sale will expire on the 8th day of August, 1879." The other notice differed from the first one only in stating that the lots and lands sold were taxed in the names of P. Caldwell and Peter Caldwell. 8. Certificates of sale of the two lots in dispute to Asahel Gage.

In considering whether the purchaser was entitled, upon the showing made by him, to the deed of July 3, 1880, we give no weight to the notice published in the newspaper. The right of the purchaser or his assignee to give notice, in that mode, of the tax sale, existed only when no person was in actual possession or occupancy of the property sold, and the person in whose name it was taxed or specially assessed could not, upon diligent inquiry, be found in the county — a condition of things which is not pretended to have existed after 1868 up to the execution of the deeds in question. Nor do we attach any value to the affidavit of Westerfield, made July 15, 1879, as to the service on the 5th of December, 1878, because that service was upon Peter Caldwell, by handing the notice to his wife; and that is not stated to have been done in the presence of the husband. The statute provides for service upon every person in actual possession or occupancy of the land, and also upon the persons in whose name it is taxed. If it be proper or necessary, under any circumstances, to serve notice of the sale upon the wife where the husband owns and occupies the land, and it is taxed in his name, no such circumstances are disclosed in the present case.

As to the notice which Westerfield claimed to have served on Caldwell, April 4, 1879, it is doubtful, under the decisions above cited, whether the obscurity arising from the words, in each notice, "taxes *and* special assessments" and "taxed *or* specially assessed," is removed by the use of the words "for the third instalment of special assessment number 36 of the town of Lake." But waiving that question, we are not prepared to hold that the decree is erroneous so far as it sustains the plaintiff's contention that there was in fact no service on Caldwell of notice of the tax sale and of Gage's purchase. Caldwell testifies that he was not at any time, to his knowl-

edge, served with notice of the tax sales of these particular lots. The witness relied on to prove the contrary is Westerfield. He states in his deposition, taken November 29, 1884, but not in the presence of the plaintiff or of his attorney, and, so far as the record shows, without notice to either, that on the 4th day of April, 1879 — more than five years before he gave the deposition — he served a notice of the tax sale of this property personally on Peter Caldwell and wife. It is difficult to believe that he could have remembered, at the time he testified in November, 1884, the particular day in the spring of 1879 when he served such a notice, unless his memory was refreshed by some memorandum made at the time by him or in his presence. But he does not state that he made, or that he ever saw, any such memorandum. The deposition of Caldwell was given before that of Westerfield, and it behooved the defendant to show, if he could do so, that when Westerfield gave the 4th of April, 1879, as the date of the service of the notice on Caldwell he was not guessing or giving merely his impressions. But Westerfield was not asked whether he ever made, or saw, any memorandum of the date of service, nor did he state how he was able, apparently without hesitation or doubt, to fix the exact day of such service nearly six years before giving his deposition. It may be that Westerfield based his statement upon the affidavit made by him on the 15th day of July, 1879. But that affidavit was not made contemporaneously with the alleged service, and is one showing service only on Peter Caldwell; whereas in his deposition he testified that the service on the 4th of April, 1879, was on both Caldwell and wife.

In this connection there are some circumstances that are not without interest. Taylor made an affidavit in support of Gage's application for the deed, stating that he, also, was an agent of Gage, was present "on the date and at the place as mentioned" in Westerfield's affidavit, and witnessed the service of the notice upon Caldwell "in the manner and form" as stated by Westerfield. A witness so clear in his recollection, being one of the numerous agents whom Gage seemed to have had in this business, ought to have been required to give

his deposition, or some reason should have been given why he was not produced as a witness. Of course, the defendant knew that *ex parte* affidavits, filed to procure a deed, would not be conclusive evidence in a suit between the owner of the land and the holder of the tax title in respect to the notice of the tax sale.

There is another circumstance not without weight. The agent and attorney of Gage, in his affidavit in support of the application for a deed, stated that there were then in existence "the original memoranda of service of the respective parties making the same," and that the affidavits of Westerfield, Bunker and Taylor were correct according to such memoranda. He based that statement upon a comparison by himself of the affidavits with the memoranda. But he does not testify in the case as a witness, although he knew that Caldwell, under oath, had denied service of notice as to the sale of the particular lots here in dispute. And no such original memoranda appear upon the notice returned. If such memoranda were made by Westerfield, or in his presence contemporaneously with the service of the notice, and the court was informed by the record that the statements in his deposition were made, after his recollection had been refreshed by examining them, there would be ground to contend that Caldwell's statement was incorrect.

There is still another difficulty in the way of the defendant. Caldwell having testified that he did not receive any notice of the tax sale, and Westerfield being afterwards called as a witness to show notice, there was no distinct reference by the latter to the notice filed by Gage with the county clerk. Being asked whether "in the spring, on or about the 4th of April, 1879," he "served a notice of the tax sales of this property upon Peter Caldwell," he replied: "On the 4th day of April I served *a* notice personally on Peter Caldwell and wife." Now what notice was this? The statute required that the notice should state certain facts, and that the affidavit should state "particularly the facts relied on" as showing compliance with the statute. Did the notice to which Westerfield refers in his deposition meet these requirements? He

does not so state. Was that notice the same as the one referred to in his affidavit of July 15, 1879? We cannot tell from the record. In determining the weight to be given to Westerfield's deposition, upon the issue as to whether notice was in fact given to Caldwell, that deposition is not to be supplemented by his *ex parte* affidavit used in supporting Gage's application for a deed, and to which in his deposition he makes no reference whatever. So that upon the issue as to notice of the tax sale there is no proof whatever in this case in conflict with the statement of Caldwell, except the *prima facie* evidence furnished by the *ex parte* affidavit of Westerfield made July 15, 1879.

Under all the circumstances disclosed by the record, we are not prepared to say that the court below erred if it proceeded upon the ground, as it may well have done, that the proof failed to show satisfactorily, or with sufficient certainty, such notice by the purchaser, or his assignee, as the statute required before he could receive a deed. The right of an occupant of land, sold for the non-payment of taxes or special assessments, to personal notice of the fact of sale before the time of redemption expires, is expressly given by the constitution of Illinois, and is fundamental. And upon a direct issue as to whether such notice was given — the owner testifying that he did not receive notice — the evidence should be clear and convincing that it was given, as required by law, before the tax title is held to be paramount.

The case as to the deeds of June 30, 1880, and July 6, 1880, is substantially the same as that made in relation to the deed of July 3, 1880. What has been said in reference to the last-named deed applies to the other two.

Other questions involving the validity of the tax title have been discussed in the briefs of counsel. But, in view of the conclusions reached, they need not be examined.

Decree affirmed.

Syllabus.

UNITED STATES *v.* MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

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

No. 317. Argued March 10, 11, 1891. — Decided October 19, 1891.

Congress, March 3, 1863, granted to Kansas every alternate section of land, designated by *odd* numbers for ten sections in width on each side, in aid of the construction of the following roads and each branch thereof: *First*, a railroad and telegraph from the city of Leavenworth, Kansas, by the way of Lawrence and the Ohio City crossing of the Osage River, to the Southern line of the State in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Railroad, where that road intersects the Neosho River; *Second*, a railroad from the city of Atchison, Kansas, via Topeka, to the western line of that State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch where the latter road crosses the Neosho, down said Neosho Valley to the point where the road, first named, enters the Neosho Valley. The act provided that in the case of deficiencies in place limits, it should "be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, or parts of sections, designated by *odd* numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of preëmption or homestead settlements have attached." The act also provided that the "sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches" [that is, the *even*-numbered sections within the place or granted limits,] "shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: *Provided*, That actual and *bona fide* settlers, under the provisions of the preëmption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided, also*, That settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount

not exceeding eighty acres each, anything in this act to the contrary notwithstanding." By a subsequent act, July 16, 1866, for the benefit of the Union Pacific Railroad Company, Southern Branch, there was granted to the State for the use of that company, "every alternate section of land, or parts thereof, designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act." This last act provided also "That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road." The routes of the Leavenworth, Lawrence and Fort Gibson Railroad Company, which got the benefit of the first road named in the act of 1863, and the Union Pacific Railroad Company, Southern Branch, now the Missouri, Kansas and Texas Railroad Company, which succeeded also to the rights of the Atchison company in respect to the road down the Neosho Valley, crossed each other in the valley, so that some of the *even*-numbered sections within the original place limits of the first-named road were within the indemnity limits of the latter road, and some *even*-numbered sections were within the common indemnity limits of both roads: *Held*, (1) That the *even*-numbered sections within the place limits of the Leavenworth, Lawrence and Fort Gibson Railroad were reserved to the United States by the act of 1863, and, therefore were excepted from the grant in the act of 1866 and could not be patented to the Missouri, Kansas and Texas Railway Company to supply deficiencies in its place limits; (2) The *even*-numbered sections that were within the common indemnity limits of both roads could be used to supply deficiencies in the place limits of the Missouri, Kansas and Texas

Railway Company, saving the rights acquired under the preëmption and homestead laws before the selection of such lands for purposes of indemnity.

The principle reaffirmed that title to indemnity lands does not vest in a railroad company, for the benefit of which they are contingently granted, but remains in the United States until they are actually selected and set apart under the direction of the Secretary of the Interior specifically for indemnity purposes.

Where a patent has been fraudulently obtained, and such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent. These principles equally apply where patents have been issued by mistake, and they are especially applicable where a multiplicity of suits, each one depending upon the same facts and the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice.

Kansas City, Lawrence &c. Railroad v. *The Attorney General*, 118 U. S. 682 distinguished, and held to decide only the right of the Missouri, Kansas and Texas Company to indemnity from the *odd*-numbered sections within the overlapping indemnity limits of that company and the Leavenworth, Lawrence and Fort Gibson Company.

In equity. Defendants demurred to the bill, and the demurrer was sustained and the bill dismissed. Plaintiffs appealed. The case is stated in the opinion.

Mr. Assistant Attorney General Maury for appellants.

Mr. A. B. Browne, *Mr. A. L. Williams* and *Mr. Simon Sterne*, (with whom on the brief were *Mr. A. T. Britton* and *Mr. James Hagerman*,) for the Missouri, Kansas and Texas Railway Company, appellee.

Mr. William Lawrence, on behalf of settlers, for appellants.

Mr. Justice Harlan delivered the opinion of the court.

This is a suit in equity by the United States for the cancellation of certain patents for lands in Allen County, Kansas, of date respectively November 3, 1873, March 19, 1875, August

17, 1876, and April 23, 1877, and alleged to have been issued to the Missouri, Kansas and Texas Railway Company without authority of law.

The institution of such a suit as this was recommended by the Secretary of the Interior in a communication addressed to the Attorney General under date of June 10, 1886. 4 Land Decisions, 573, 578; 5 Land Decisions, 280, 481. The present suit was not, however, brought until after the passage of the act of Congress of March 3, 1887, requiring the immediate adjustment by the Secretary of the Interior, in accordance with the decisions of this court, of all unadjusted land grants made by Congress to aid in the construction of railroads. 24 Stat. 556, c. 376. That act made it the duty of the Attorney General to commence and prosecute suits for the cancellation of all patents, certification or other evidence of title issued for public lands, and to restore the title to the United States in all cases of lands appearing — upon the completion of such adjustments or sooner — to have been "erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad," if such company neglected or failed, upon demand by the Secretary of the Interior, to relinquish or reconvey to the United States all such lands, whether within granted or indemnity limits. (Sections 1 and 2.)

The act also provided that a *bona fide* settler whose homestead or preëmption entry had been erroneously cancelled on account of any railroad grant, or the withdrawal of public lands from market, should, upon application, be reinstated in all his rights and allowed to perfect his entry, by complying with the public land laws, provided he had not located another entry in lieu of the one so erroneously cancelled, or voluntarily abandoned his original entry; and if a settler did not, within a reasonable time to be fixed by the Secretary of the Interior, make his application to be reinstated, all such unclaimed lands were required to be disposed of under the public land laws, with priority of right to *bona fide* purchasers, if any; then to *bona fide* settlers residing thereon. (Section 3.)

In respect to lands, except those last mentioned, found to have been erroneously certified or patented, and to have been sold by the grantee company to citizens of the United States, or to persons who had declared their intention to become such, it was provided that "the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands;" the right of the purchaser of the lands so erroneously withdrawn, certified or patented to recover the purchase-money therefor from the grantee company, less the amount paid to the United States by such company, being saved; and no mortgage or pledge of the lands by the company to be considered as a sale for the purpose of the act. (Section 4.)

It was further provided that where a company had sold to citizens of the United States, or to persons who had declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for its use, such lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of the road, and where the lands so sold were excepted from the operation of the grant to the company, it should be lawful for the *bona fide* purchaser thereof from the company to make payment to the United States at the ordinary Government price for like lands, and thereupon patents should issue therefor to him, his heirs or assigns. All lands were excepted from these provisions which at the date of such sales were in the *bona fide* occupation of adverse claimants under the preëmption or homestead laws of the United States, and whose claims and occupation had not since been voluntarily abandoned; as to which excepted lands

the said preëmption and homestead claimants were permitted to perfect their proofs and entries and receive patents. These last provisions do not apply "to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases." (Section 5.)

Demurrers to the bill having been sustained, 37 Fed. Rep. 68, and the suit dismissed, the United States prosecuted the present appeal.

The lands in dispute are of two classes: 1. *Even*-numbered sections that are within the original ten-mile or place limits of the Leavenworth, Lawrence and Fort Gibson Railroad Company, subsequently named the Leavenworth, Lawrence and Galveston Railroad Company, and to be hereafter, in this opinion, referred to as the Leavenworth Company. Those sections are also within the indemnity limits of the Missouri, Kansas and Texas Railroad Company, originally named the Union Pacific Railroad Company, Southern Branch, and to be hereafter referred to as the Missouri-Kansas Company. 2. *Even*-numbered sections within the common indemnity limits of both roads.

No question is presented in this case as to the *odd*-numbered sections within either the place or the indemnity limits of the Leavenworth road.

In respect to each of the above classes of lands, the bill alleges that rights had attached under the homestead and preëmption laws in favor of settlers; some, before the passage of the act, to be presently referred to, under which the Missouri-Kansas Company claims, and others after that date, but before the selection of such lands, by the direction of the Secretary of the Interior, as indemnity lands for that company.

But the principal question raised by the demurrer is whether the Missouri-Kansas Company was entitled, under any circumstances whatever, to make up losses or deficiencies, occurring in *its* place limits, from *even*-numbered sections within either the place or indemnity limits of the Leavenworth road. This

question depends upon the construction of three acts of Congress, passed, respectively, March 3, 1863, July 1, 1864, and July 26, 1866, granting lands to the State of Kansas to aid in the construction of these railroads.

The grant made by the act of March 3, 1863, was of every alternate section of land, designated by *odd* numbers for ten sections in width on each side, in aid of the construction of the following roads and each branch thereof: *First*, a railroad and telegraph from the city of Leavenworth, Kansas, by the way of Lawrence and the Ohio City crossing of the Osage River, to the southern line of the State in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Railroad, where that road intersects the Neosho River; *Second*, a railroad from the city of Atchison, Kansas, via Topeka, to the western line of that State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch where the latter road crosses the Neosho, down said Neosho Valley to the point where the road, first named, (the Leavenworth road,) enters the Neosho Valley. In respect to each road and branches, it was provided that "in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States, for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, or parts of sections, designated by *odd* numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of preëmption or homestead settlements, have attached as aforesaid; which lands thus indicated by *odd* numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no

case, be located further than twenty miles from the lines of said road and branches: *Provided, further*, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided. . . ." 12 Stat. 772, c. 98, § 1.

The second section of the act provided that "the sections and parts of sections of land which, *by such grant*, shall *remain to the United States*, within *ten* miles on each side of said road and branches," [that is, the *even*-numbered sections within the place or granted limits,] "shall not be sold *for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: Provided*, That actual and *bona fide* settlers, under the provisions of the preëmption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation and occupation, as now provided by law, purchase the same *at the increased minimum price, aforesaid: And provided, also*, that settlers on any of said *reserved sections*, under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding."

The State of Kansas, by an act approved February 9, 1864, accepted the above grant, upon the terms and conditions prescribed by Congress; and gave the benefit of it, in respect to the railroad and telegraph first mentioned in the act of 1863, to the Leavenworth Company; and in respect to the other railroad and telegraph, to the Atchison, Topeka and Santa Fé Railroad Company, formerly the Atchison and Topeka Railroad Company, to be hereafter referred to as the Atchison Company.

By the act of July 1, 1864, Congress granted to Kansas, to

aid in the construction of a railroad and telegraph line from Emporia by the way of Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in that State, "every alternate section of land designated by odd numbers for ten sections in width on each side of said road," subject to the provisions, restrictions, limitations and conditions prescribed in the above act of March 3, 1863; and also changed the branch railroad and telegraph line from Lawrence by the valley of the Wakarusa River to a point on the Atchison, Topeka and Santa Fé Railroad, where that road intersects the Neosho River, so as to run from Lawrence to Emporia, and thus changed, to have the grant of lands made by the act of 1863. 13 Stat. 339, c. 198.

The above acts of Congress of 1863 and 1864 were accepted; and thereafter, by writing, of date March 19, 1866, the Atchison Company sold, assigned and transferred to the Union Pacific Railroad Company, Southern Branch, a corporation of Kansas — the Missouri-Kansas Company — all the rights, titles, interests, franchises, privileges, immunities and liabilities held, acquired, possessed and enjoyed for constructing, maintaining, operating and enjoying a railroad, from a point at or near Fort Riley down the Neosho Valley to where the Leavenworth road might enter the Neosho Valley; "which rights, titles, interests, franchises, authorities, immunities and liabilities accrued to and became vested" in the assignor company "by virtue of its acceptance of the provisions of the act of the legislature of the State of Kansas;" the assignee company agreeing to perform all the duties, and to meet all the obligations and liabilities, assumed by the other company in respect to the said road. This assignment was ratified by a joint resolution of the legislature of Kansas passed February 27, 1867.

The act of July 26, 1866, provided, among other things, that for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, [the Missouri-Kansas Company,] a corporation organized under the laws of the State of Kansas, "to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of

the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by *odd* numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile: but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, *from the public lands of the United States nearest to the sections above specified*, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or preëmption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That *any* and *all* lands *heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever*, be, and the same are hereby, *reserved and excepted from the operation of this act*, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road." 14 Stat. 289, c. 270.

The contention of the government is, that the lands in dispute — the *even*-numbered sections within both the place limits

and the indemnity limits of the Leavenworth road — had been "reserved to the United States" by the act of 1863, and, therefore, were excluded from the operation of the act of 1866; consequently they could not be taken for or patented to the Missouri-Kansas Company. If the premise of this contention be true the conclusion just stated would necessarily follow; because, although by the first section of the act of 1866 that company was entitled to indemnity from "the public lands of the United States nearest to the sections" within its granted or place limits, and within twenty miles of its line, for all granted sections or parts of granted sections, which, at the time of the definite location of its road appeared to have been sold by the United States, or to which the right of preëmption or homestead settlement had attached, or which had been reserved to the United States for any purpose whatever, the first proviso of the same section reserved and excepted *from the operation of the act* all lands *reserved to the United States* by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever. Of course, lands so reserved and excepted from the operation of the act could not be selected as indemnity lands for the road in aid of the construction of which the grant of 1866 was made. The important inquiry, therefore, is, whether, within the meaning of the act of 1866, the lands in dispute, or any of them, were reserved to the United States by the act of 1863.

A reservation clause, such as the one in the act of 1866, first appeared in the act of Congress of September 20, 1850, granting lands to the State of Illinois in aid of the construction of what is now the Illinois Central Railroad. 4 Land Decisions, 575. Congress, by an act passed March 2, 1827, had made a similar grant in aid of the construction of the Illinois and Michigan Canal, with a reservation of each alternate section to the United States. In order that the canal might have the full benefit of the lands covered by the grant of 1827, the following clause was inserted in the act of 1850: "*And provided further*, That any and all lands reserved to the United States by the act entitled 'An act to grant a quantity of land to the

State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan,' approved March 2, 1827, be, and the same are hereby, reserved to the United States from the operations of this act." 9 Stat. 466, c. 61; Cong. Globe, vol. 21, p. 900. The policy indicated by this reservation was pursued in all subsequent acts granting lands to aid in the construction of railroads; the only difference between the reservation clause in the act of 1850, and those inserted in subsequent acts, being that the former was special in its application to a particular previous grant, while each one of the latter class was general in its application to prior grants of every kind. The manifest object of the general proviso was to exclude from the particular grant all lands previously reserved to the United States for any specific object whatever, and, thereby, enable the Government to accomplish those objects without confusion or conflict in the administration of the public domain, and thus keep faith with those to or for whose benefit prior grants were made. *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, 687; *Homestead Co.* v. *Valley Railroad Co.*, 17 Wall. 153; *Wolsey* v. *Chapman*, 101 U. S. 755; *Litchfield* v. *Webster County*, 101 U. S. 773; *Dubuque &c. Railroad* v. *Des Moines Valley Railroad Co.*, 109 U. S. 329; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Bullard* v. *Des Moines &c. Railroad*, 122 U. S. 167, 176; *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357.

Having regard to the words and the conceded object of the reservation clause, we are of opinion that the position of the Government, in respect to the *even*-numbered sections, within the *ten-mile* or *place* limits of the Leavenworth road, is well taken. The grant, in the act of 1863, was of every alternate section of land designated by *odd* numbers, for ten sections in width on each side of the road, with the right, in case of loss of lands, within the place limits, from any of the specified causes, to select indemnity lands (not, generally, from the public lands of the United States, but) from "the public lands of the United States nearest *to tiers* of sections above specified," that is, nearest to the tiers of sections in place limits, and

within twenty miles of the road — the lands, thus selected for indemnity, to be *odd*-numbered sections. It is too obvious to require argument to show that, as losses to the Leavenworth road in its place limits were required to be made up from *odd*-numbered sections inside of the exterior line of its indemnity limits, the *even*-numbered sections in its place limits could not be used to supply such deficiencies. Such *even*-numbered sections in the place limits were, therefore, referred to in the second section of the act of 1863, as "reserved sections" that "remain to the United States."

The defendants insist, however, that they were not "reserved to the United States" within the meaning of the act of 1866. It is true, they were not reserved to aid in the construction of the Leavenworth road, or for any specified object of internal improvement. But the act of 1866 does not restrict the objects of the reservation to works of internal improvement. If the reservation in question was by Congress, or other competent authority, *for any purpose whatever*, then the lands so reserved were excluded from the operation of the act of 1866. Now, it is clear that the *even*-numbered sections, within the place limits of the Leavenworth road, were reserved by the act of 1863, for purposes distinctly declared by Congress, and which might be wholly defeated if the Missouri-Kansas Company were permitted to take them as indemnity lands under the act of 1866. The requirement in the second section of the act of 1863, that the "reserved sections" which "remain to the United States," within ten miles on each side of the Leavenworth road, "shall not be sold for less than double the minimum price of the public lands when sold," nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual *bona fide* settlers, under the preëmption and homestead laws, to purchase *those lands* at the increased minimum price, after due proof of settlement, improvement, cultivation and occupancy; and the right accorded to settlers on such sections under the homestead laws, improving, occupying and cultivating the same, to have patents for not exceeding eighty acres each, are inconsistent

with the theory that the *even*-numbered sections, so remaining to the United States, within the place limits of the Leavenworth road could be taken as *indemnity* lands for a railroad corporation.

As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relating to the public domain. But, in order that the government might get the benefit of such increased value, and thereby reimburse itself to some extent for the lands granted — the title to which vested in the State or the company upon the definite location of the line of the road, and, by relation, as of the date of the grant, — the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes expressly declared, segregated them from the body of the public lands of the United States. Being thus devoted to specified objects, they were reserved to the United States, and could not be selected by the State either under the act of 1863 or under that of 1866 for other and different objects. They could not be selected as indemnity lands under the act of 1863, because the lands to be selected under that act were restricted to *odd*-numbered sections; nor under the act of 1866, because, at the date of its passage they were reserved for the special purposes indicated in the second section of the act of 1863.

It follows that the Missouri, Kansas and Texas Railroad Company was not entitled, in virtue of the act of 1866, to have indemnity lands from the *even*-numbered sections within the *place* limits of the Leavenworth road. The issuing of patents to it for such lands was unauthorized by law.

But we are of opinion that, in respect to the *even*-numbered sections within the *indemnity* limits of the Leavenworth road, that is, outside of ten and within twenty miles of its line, the case stands upon wholly different grounds. We cannot assent to the suggestion that they also were reserved by the act of 1863, and excluded from the operation of the act of 1866.

The utmost that could be claimed, in respect to lands within the indemnity limits of the Leavenworth road, is, that the *odd*-numbered sections in those limits being designated by the act of 1863 as the source from which to supply losses in the place limits of that road, were excluded from the operation of the act of 1866. Whether such a claim could be sustained or not, we need not now inquire; but that contention, if sound, does not meet the exigencies of the present case. We are dealing here with the *even*-numbered sections in the indemnity limits of the Leavenworth road, which were not devoted by the act of 1863 to any specified purpose, but were left under the general laws regulating the disposal of the public lands. No provision was made, as in the case of the even-numbered or reserved sections within the place limits, for their sale at not less than double the minimum price of the public lands when sold, nor were any restrictions placed upon their sale or disposition different from those applicable to the public lands generally. Settlers under the preëmption and homestead laws were accorded by the act of 1863 no more rights and privileges in respect to the *even*-numbered sections within the *indemnity* limits of the Leavenworth road than they had in other public lands of the United States wherever situated. They were reserved to the United States only in the sense that all the public lands of the United States, not set apart for some declared object, are reserved to be disposed of under the general laws relating to the public domain. But a reservation of that general character is not what was meant by the act of 1866. That act excluded from its operation only such lands as had been reserved by Congress or other competent authority for some distinct, defined purpose.

This conclusion finds support in the peculiar language of the act of 1866 allowing selections by the Missouri-Kansas Company of indemnity lands within twenty miles of its road, to be made from "the public lands of the United States nearest to the sections above specified," that is, nearest to the *odd*-numbered sections within the place limits. Many acts of Congress, making grants of public lands in aid of the construction of railroads, have restricted the selection of indem-

nity lands simply to alternate sections or parts of sections nearest or most contiguous to the tier of sections in the place limits; thus apparently leaving it to the Secretary of the Interior — subject, it may be, to the requirement as to alternation — to approve as he might think best, the selection of odd-numbered or even-numbered sections within the prescribed indemnity limits.[1] In many other acts the selection of indemnity lands was restricted to the *odd*-numbered sections, as was the case in the above act of 1863.[2] The two classes of acts are to be found in the legislation of Congress, at the session when the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, was passed. The grants to Missouri and Minnesota of July 4, 1866; to Kansas of July 23, 1866; to the California and Oregon Railroad Company of July 25, 1866; and to the Atlantic and Pacific Railroad Company of July 27, 1866, all, in terms, provided for the selection of *odd*-numbered sections for purposes of indemnity; while the grant to Kansas of July 25, 1866, to aid in the construction of the Kansas and Neosho Valley Railroad Company, and the grant of July 26, 1866, to the same State, for the benefit of the Missouri-Kansas Company, contained no such restriction, and only required that indemnity lands be selected from the public lands of the United States nearest to the tier of granted sections within the place limits of the respective roads. 14 Stat. 83, c. 165; Id. 87, c. 168; Id. 210, c. 212; Id. 239, c. 242; Id. 293, 295, c. 278; Id. 236, c. 241; Id. 289, c. 270. This difference in land grant acts was not unusual, as will be seen from the vari-

---

[1] Illinois (1850), 9 Stat. 466; Missouri (1852), 10 Stat. 8; Arkansas and Missouri (1853), 10 Stat. 155; Iowa (1856), 11 Stat. 9; Florida (1856), 11 Stat. 15; Alabama (1856), 11 Stat. 17; Louisiana (1856), 11 Stat. 18; Michigan (1856), 11 Stat. 21; Wisconsin (1856), 11 Stat. 20; Mississippi (1856), 11 Stat. 30; Minnesota and Alabama (1857), 11 Stat. 195; Minnesota (1864), 13 Stat. 64; Wisconsin (1864), 13 Stat. 66.

[2] Kansas (1863), 12 Stat. 772; Iowa (1864), 13 Stat. 72; Northern Pacific Railroad (1864), 13 Stat. 365; Minnesota (1866), 14 Stat. 87; Kansas (1866), 14 Stat. 210; California and Oregon Railroad (1866), 14 Stat. 239; Atlantic and Pacific, and Southern Pacific Railroads (1866), 14 Stat. 292; Oregon Central Railroad (1870), 16 Stat. 94; Texas Pacific Railroad (1871), 16 Stat. 573.

ous statutes cited in the margin. We do not feel at liberty to hold that this difference was unintentional upon the part of Congress. It is too well defined in its legislation to justify any such interpretation. The words in the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, indicating the source from which indemnity lands were to be obtained, namely, "from the public lands of the United States nearest to sections above specified," cannot well be held to mean the same thing as the words, in other acts, "from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections *designated by odd numbers*." In one case the selection, for purposes of indemnity, may be from any of the public lands of the United States nearest to the tier of sections in the place limits; in the other, the selection is restricted to odd-numbered sections within the indemnity limits; in neither case, however, could lands be selected that had been previously withdrawn by competent authority from location, sale or entry, or had been appropriated or sold by the United States, or to which preëmption or homestead rights had attached.

In our judgment — omitting for the present any consideration of the rights alleged to have been acquired by individuals under the homestead and preëmption laws in the lands in dispute, and looking at the case only as between the United States and the Missouri-Kansas Company — there is no escape from the conclusion that the *even*-numbered sections within the indemnity limits of the Leavenworth road, not being set apart by the act of 1863 for any specific purpose, and being also nearest to the granted sections within the place limits of the Missouri-Kansas Company, were not, by that act, reserved to the United States within the meaning of the act of 1866, and, therefore, — if no rights had attached to them before their selection with the approval of the Secretary of the Interior — could have been legally selected as indemnity lands for that company.

We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indem-

nity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes. It was so held in *Kansas Pacific Railroad* v. *Atchison Railroad*, 112 U. S. 414, 421, in which the court, referring to the above act of 1863, said in reference to the lands in the indemnity limits: "Until selection was made the title remained in the government, subject to its disposal at its pleasure. . . . The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection." The same principle was announced in *Barney* v. *Winona & St. Peter Railroad*, 117 U. S. 228, 232, where the court said: "In the construction of land grant acts in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection." So in *Sioux City &c. Railroad* v. *Chicago, Milwaukee &c. Railway*, 117 U. S. 406, 408: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior." But the fullest and most recent expression of opinion upon this question by this court is in *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496, 511, where it was said: "He [the Secretary] was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for

those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the Government, or whether any preëmption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. . . . Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts." To the same effect were the previous cases of *Grinnell* v. *Railroad Co.*, 103 U. S. 739; *St. Paul &c. Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720, 731; *Cedar Rapids & Missouri River Railroad* v. *Herring*, 110 U. S. 27. As to the exception to this rule noticed in *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 19, it is sufficient to say that it has no application to the facts of this case. In respect, therefore, of even-numbered sections within the indemnity limits of the Leavenworth road, preëmption and homestead rights may have legally attached before their final selection as indemnity lands for the Missouri-Kansas Company. And rights thus attaching would not be displaced by subsequent selection, and by issuing patents to the railroad company.

For the reasons stated, we adjudge that the selection of *even*-numbered sections within the indemnity limits of the Leavenworth road, to which rights of homestead and preëmption laws had not attached, to indemnify the Missouri-Kansas Company for losses in its place limits, and the issuing to it of patents therefor, was not without authority of law.

We have indicated, however, that the question as to the right of the Missouri-Kansas Company, for purposes of indem-

nity, to select *even*-numbered sections within the indemnity limits of the Leavenworth road, may, according to the averments of the bill — which the demurrer admits to be true — have some connection with the rights acquired by individuals under the homestead and preëmption laws. These averments are: That prior to July 26, 1866, and prior to the selection of indemnity lands for the Missouri-Kansas Company, by the Secretary of the Interior — which selections, it is alleged, were partially made on each of the respective days of August 20, 1872, July 29, 1874 and May 10, July 12 and December 26, 1876 — a large number of actual and *bona fide* settlers over the age of twenty-one years, and citizens of the United States, each thus and otherwise having all the qualifications required by the homestead and preëmption laws of the United States, to obtain patents from the United States, each for a half quarter section of said lands within ten miles of the located line of the Leavenworth road, and each for one quarter section of said lands outside of said ten-mile limits, but within twenty miles of said line of road, claimed the right under those laws to take the necessary proceedings and do the acts requisite to obtain title, respectively, to such tracts of land, including most of the lands in the patents mentioned; that for this purpose sundry of such persons prior to July 26, 1866, and prior to such selections, entered upon, occupied and improved, as required by said laws, a half quarter section of land, within said ten-mile limits, and others each entered upon, occupied and improved, as required by the same laws, some each one-half quarter section of land, and others each a quarter section of such lands; that sundry of such persons did each do all the acts required by, and in all respects complied with, the homestead and preëmption laws in due time to be entitled to occupy said tracts of half-quarter and quarter sections, respectively, and to receive patents therefor from the United States; that said persons have ever since been, and still are, each entitled to receive a patent conveying to them respectively said tracts of land so by each occupied and improved, including most of the lands in said patents mentioned: that said persons have, respectively, ever since so entering upon said lands continued

to occupy and hold them, and are ready and willing, and offer to do whatever may be required to procure a patent from the United States; and that the defendants and those under whom they claim title always well knew these facts, and none of them ever took or had possession of any of said lands, but all of them have been in the occupancy and possession of other persons as aforesaid, claiming the right to obtain title thereto from the United States.

The bill, after stating that the Government was unable, at the commencement of the suit, to specify what portions and tracts of land have been settled upon and occupied by actual *bona fide* settlers, as aforesaid, for which patents should be issued, and asking permission to make proof thereof, proceeds to allege that the Missouri-Kansas Company on the —— day of March, 1867, filed its map of definite location in the Department of the Interior; that the Commissoner of the General Land Office, by letter under date of March 19, 1867, directed the receiver and register of the local land office at Humboldt, Kansas, where the above-mentioned lands were subject to be taken under the homestead and preëmption laws, to reserve from sale, location or entry of any kind, all the land outside of a line ten miles from the line of location of the said Missouri-Kansas Company; and on and after April 3, 1867, the date of the receipt of the above order at the local office, said lands were by them thereafter unlawfully reserved from sale, location or entry; that the lands so withdrawn from sale, location and entry, include numerous tracts described in the patents in question; and that on and after April 3, 1867, said register and receiver each unlawfully proclaimed and made known their refusal to permit any citizen or settler to do any act to procure any title to any of such lands under any law, and they each refused to do or permit to be done by any citizen or settler any act requiring their official action or sanction to procure a right or title to them.

Notwithstanding this — the bill further alleges — a large number of citizens of the United States, each over the age of twenty-one years, and otherwise having all the qualifications required by said homestead and preëmption laws, both prior

to and on and after April 3, 1867, and prior to any selection of such lands by or in favor of the railroad company, each went upon, occupied and improved half quarter and quarter sections of land as aforesaid, and some of them each complied with the homestead and preëmption laws, and did every act necessary to procure patents for the lands so occupied by them, respectively, except only that the receiver and register would not permit any act to be done with or by them officially for the purpose of procuring title; that said persons, who have made large and valuable improvements upon the lands so occupied by them, have continued ever since to occupy and claim them and a right to perfect their respective titles, and have always been and are ready and willing to do all acts required to entitle them to patents; and that the Missouri-Kansas Company has sold or agreed to sell to various persons, named as defendants herein, the lands so described, which are claimed by such defendants in fee or under such agreement, or under mortgages, but with notice of the rights of the United States and of said claimants under the homestead and preëmption laws.

If the facts are as thus alleged, it is clear that the Missouri-Kansas Company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to *bona fide* settlers who acquired rights under the homestead and preëmption laws, which were not lost by reason of the Land Department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company. The case made by the above admitted averments of the bill is one of sheer spoliation upon the part of the company of the rights of settlers, at least of those whose rights attached prior to the withdrawal of 1867; whether of others, it is not necessary, at this time, to determine. It is true that the bill is not as full as it might have been in respect to the persons who are alleged to have acquired superior rights under the homestead and preëmption law, or as to the particular tracts of land they claimed or occupied, or as to the dates when such homestead and preëmption rights respectively accrued. And if application had been made for a bill of par-

ticulars, it should have been granted. But there was no specific objection to the bill upon that ground. The defendants rested the case upon a general demurrer for want of equity, and it must be determined, in its present shape, upon the theory that the facts are as alleged in the bill. The argument on this branch of the case, by counsel for the railroad company, proceeds, in part, upon the assumption that there was no such compliance with the homestead and preëmption laws as would give any of the settlers, referred to in the bill, the rights claimed for them in this suit. Indeed, one of the counsel insists that such settlers have no existence except in the bill filed by the Government. And many other suggestions are made that depend upon matters of which we cannot, upon this record, take cognizance. We must take the case to be that which is presented by the bill, and give judgment accordingly. The defendants, by their demurrers, admit that the settlers, referred to in the bill, did all that the laws of the United States required in order to give them the rights which, the bill alleges, belong to them, and in disregard of which the patents in question were issued. If the railroad company chose to invite a decision upon such a case, it must abide the consequences.

That the case, as now presented, is one of equitable cognizance, we do not doubt. This question must be determined with reference to the equity jurisdiction of the courts of the United States, and not by reference to the remedies given by the local law. As to some of the lands, so far as we can judge by the averments of the bill, the United States has a direct interest in them. As to others, it is under an obligation to claimants under the homestead and preëmption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title, by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the Government owed as well to the

public as to the individuals who acquired rights, which the patents, if allowed to stand, may defeat or embarrass.

In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 286, which was a suit by the United States to set aside a patent alleged to have been improperly issued, and in which the right of the Attorney General to bring such a suit was denied, this court held that such an action could be maintained where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own. In the recent case of *United States* v. *Beebe*, 127 U. S. 338, 342, it was said: "And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked. . . . Even if it had not been thus authoritatively settled, it would have been difficult, upon principle, to reach any other conclusion. The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and, under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the Government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institute judicial proceedings to vacate such patent.

In the case before us, the bill avers that the patents, whose cancellation is asked for, were obtained by fraud and imposition on the part of the patentee, Beebe. It asserts that there exists, on the part of the United States, an obligation to issue patents to the rightful owners of the lands described in the bill; that they cannot perform this obligation until these fraudulent patents are annulled, and that they therefore bring this suit to annul these fraudulent instruments, whose existence renders the United States incapable of fulfilling their said prior obligation." These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice.

Much was said at the bar as to the bearing upon the present case of the decision in *Kansas City &c. Railroad* v. *The Attorney General*, 118 U. S. 682. That was a suit by the United States to cancel certain patents issued to the Missouri-Kansas Company for lands selected, under the direction of the Secretary of the Interior, to indemnify that company for losses by reason of previous appropriations or sales of lands in place limits. It appears from the record of that case that the lands, so selected and patented, were *odd*-numbered sections within the *overlapping indemnity* limits of the grants made by the above acts of 1863 and 1866. As the Atchison and Leavenworth Companies were equally entitled, under the act of 1863, to obtain indemnity from the *odd*-numbered sections, within their respective *overlapping indemnity* limits; as the Atchison Company assigned its rights, under the acts of 1863 and 1864, to the Missouri-Kansas Company; and as it was shown that the Leavenworth Company had relinquished its right, title and interest in the lands involved in that suit, to the Missouri-Kansas Company; nothing, it would seem, stood in the way of the selection of the above *odd*-numbered sections as indemnity lands for the latter company; provided, the assignment by the Atchison Company to the Missouri-Kansas

Company was valid for the purposes for which it was made, and provided, also, the acts of 1863, 1864 and 1866 were to be construed as *in pari materia*, and having a single object, namely, the building of one road down the Neosho Valley to the point of intersection with the Leavenworth road. The court held that the acts were to be so construed, and that the assignment by the Atchison Company, being approved by the State of Kansas and by Congress in the passage of the act of 1866, was valid. The right of the Missouri-Kansas Company to indemnity from the *odd*-numbered sections within the overlapping indemnity limits of that company and of the Leavenworth Company was, therefore, upheld. There is nothing in that decision to sustain the proposition that the Missouri-Kansas Company could obtain indemnity from the *even*-numbered sections within the *place* limits of the Leavenworth road, which, as we have seen, were reserved to the United States by the act of 1863 for specific purposes, and, therefore, were excluded from the operation of the act of 1866. Nor does that case determine the question as to the right of the Missouri-Kansas Company to indemnity from the *even*-numbered sections within the common indemnity limits of that and the Leavenworth road to which claims of settlers had not attached before their actual selection by proper authority for that company. That right is sustained upon the grounds heretofore stated in this opinion, which are entirely apart from those upon which is based the decision in the other case in reference to the *odd*-numbered sections there in dispute.

Only one other matter, referred to in the bill, is of sufficient consequence to require notice. The demurrers were general for the want of equity; and as what we have said leads to a reversal of the decree, it is unnecessary to express an opinion as to that part of the bill alleging that the Missouri-Kansas Company had, before the bringing of this suit, December 5, 1887, received patents for 252,929.14 acres, more or less, in excess of what it was or is entitled to receive. We adopt this course because the paragraph of the bill relating to this alleged excess is not sufficiently full and explicit to justify a consideration, at this time, of the question it attempts to raise. Besides,

the act of March 3, 1887, required an immediate adjustment by the Secretary of the Interior of all unadjusted land grants made in aid of the construction of railroads. 24 Stat. 556, c. 376. We are informed by the brief of one of the defendants' counsel, that there has been a final adjustment of the grants made for the benefit of the Missouri-Kansas Company, and that such adjustment shows that there is a very large deficiency in lands due to that company. Whether the lands already patented to the railroad company are in excess of what it was entitled to receive, and what effect such a fact, if established, will have upon the present suit, are questions which can be better determined after the issues between the parties are fully made up and the evidence all taken.

The decree is reversed and the cause remanded with directions to overrule the several demurrers to the bill, and to require answers from the defendants, and for other proceedings not inconsistent with this opinion.

FOWLER *v.* EQUITABLE TRUST COMPANY.

EQUITABLE TRUST COMPANY *v.* FOWLER.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Nos. 32, 33. Argued April 16, 17, 1891. — Decided October 26, 1891.

Upon the rendition of a decree, a petition and motion for a rehearing was filed. At the succeeding term of the court an order was entered, granting a rehearing, which order was entered as of a previous term. The record contained no order showing the continuance of the motion and the petition for rehearing to the succeeding term. *Held*, that the presumption must be indulged, in support of the action of a court having jurisdiction of the parties and the subject matter — nothing to the contrary affirmatively appearing — that the facts existed which justified its action; and, therefore, that the court granted the application for a rehearing at the previous term.

The question of usury, in a loan made in 1873 to a citizen of Illinois by a Connecticut corporation — the loan being evidenced by notes of the

Statement of the Case.

borrower payable in New York, and secured by mortgage upon real estate in Illinois, is to be determined by the laws of the latter State pursuant to its statute providing, in substance, that where any contract or loan shall be made in Illinois, or between citizens of that State and any other State or country, at a rate legal under the laws of Illinois, it shall be lawful to make the principal and interest payable in any other State or Territory, or in London, in which cases the contract or loan shall be governed by the laws of Illinois, unaffected by the laws of the State or country where the same shall be made payable.

It is settled doctrine in Illinois that the mere taking of interest in advance does not bring a loan within the prohibition against usury: but whether that doctrine would apply where the loan was for such period that the exaction by the lender of interest in advance would, at the outset, absorb so much of the principal as to leave the borrower very little of the amount agreed to be loaned to him is not decided.

A contract for the loan or forbearance of money at the highest legal rate is not usury in Illinois, merely because the broker who obtains a loan — but who has no legal or established connection with the lender as agent and no arrangement with the lender in respect to compensation for his services — exacts and receives, in addition to the interest to be paid to the lender, commissions from the borrower.

If a corporation of another State, through one of its local agents in Illinois, negotiates a loan of money to a citizen of the latter State, at the highest rate allowed by its laws, and the agent charges the borrower, in addition, commissions for his services pursuant to a general arrangement made with the company, at the time he became agent, that he was to get pay for his services as agent in commissions from borrowers, such loan is usurious under the law of Illinois, although the company was not informed, in the particular case, that the agent exacted and received commissions from the borrower.

In Illinois, when the contract of loan is usurious, the lender, suing the borrower for the balance due, can only recover the principal sum, diminished by applying as credits thereon all payments made on account of interest. In such cases, whatever the borrower pays on account of the loan goes as a credit on the principal sum.

A trust deed, covering real estate, provided that in the case of a sale by the trustee, at public auction, upon advertisement, all costs, charges and expenses of such advertisement, sale and conveyance, including commissions, such as were at the time of the sale allowed by the laws of Illinois to sheriffs on sale of real estate on execution, should be paid out of the proceeds. *Held*, (1) that this provision did not impose upon the borrower the burden of paying to a lender a solicitor's fee where a suit was brought for foreclosure: (2) that the commissions referred to in the deed are allowed only where the property is sold, upon advertisement, by the trustee, without suit.

The court stated the case as follows:

Statement of the Case.

By deed, bearing date November 1, 1873, and acknowledged and filed for record February 23, 1874, Edwin S. Fowler — his wife, Sophie Fowler, uniting with him — conveyed to Jonathan Edwards, in fee simple, certain real estate in the city of Springfield, Illinois, in trust to secure the payment of the principal and interest of nine bonds, of one thousand dollars each, executed by Fowler to the Equitable Trust Company, a Connecticut corporation, and payable, principal and interest, at its office in the city of New York; the principal, five years after date, and the interest, semi-annually, at the rate of seven per cent per annum.

The deed recited that the bonds were given to secure a loan of nine thousand dollars, payable five years after date thereof, with interest at ten per cent per annum, of which seven per cent per annum was secured by the deed of trust, and was to be paid as in the bond provided, and the balance, to wit, three per cent per annum, was "discounted," and paid at the time of the execution of the deed. In case of default in paying the principal or interest as each matured, or of failure to keep and perform the covenants of the deed or any of them, the trustee was authorized to sell, at public auction, after advertisement, to the highest bidder for cash, and with or without previous entry upon the premises, the right and equity of redemption of the grantors, and out of the proceeds of sale to pay the costs, charges and expenses of the advertisement, sale and conveyance, "including commissions such as are, at the time of such sale, allowed by the laws of Illinois to sheriffs on sale of real estate on execution," all sums paid by the trustee for insurance and taxes, with ten per cent interest thereon from time of payment, the principal and the accrued interest remaining unpaid at the time of sale, and to Fowler any balance remaining.

The present suit was brought, October 26, 1882, to foreclose the defendants' right and equity of redemption, and for a sale of the mortgaged property to raise such sum as might be due the mortgagee.

Fowler, by his answer, put the plaintiff upon proof of the averments of the bill, and made defence upon several grounds.

But the original answer is important only as alleging that the loan was usurious, and was consummated in the manner it was with intent to evade the statutes of Illinois relating to interest.

The plaintiff filed a general replication; and subsequently, the defendants, by leave of the court, amended their answer, stating more fully the grounds upon which they based the defence of usury. They also alleged that the contract of loan was and is a New York contract, and that by the statutes of that State it was usurious, in that the interest contracted to be received by the plaintiff, having regard to the amount actually advanced by it, was in excess of seven per cent per annum, the rate established by the laws of New York. Of those statutes they claimed the benefit.

[The facts proved, and which were relied upon to establish that the contract was usurious under the laws of New York, are stated in the opinion of the court, *post* pages 397–399.]

By a decree passed October 20, 1884, the court below found the amount due from Fowler to be only $2980.67 on the bonds, and $270.94, insurance and taxes paid by the plaintiff with interest thereon; in all, $3251.61. At the foot of that decree were these orders:

"And thereupon the complainant entered its motion for a rehearing before a full bench.

"Whereupon, on said 20th day of October, of the year last aforesaid [1884] came the complainant, by its solicitor, and filed in the clerk's office of said court its motion and petition for a rehearing in this cause, which motion and petition are as follows," etc.

Following the above, in the transcript, are the written motion and petition for rehearing.

On the 8th of June, 1885, the succeeding term, the cause was set for hearing on the 29th of that month before what is called a full bench. Then appears an order, under date of June 30, 1885, entered as of October 31, 1884, granting the rehearing asked. To that order the defendants excepted.

By the final decree of January 11, 1887, the sum of $8150.79 was adjudged to be due the Trust Company, of which $7809.69 was found to be the sum actually advanced by it to Fowler,

and $341.10 was the amount of insurance and taxes on the property paid by the company, with interest on each sum, from the date of the decree, at the rate of six per cent per annum. The mortgaged property was ordered to be sold to raise the above aggregate amount found to be due, with such interest and the costs of the suit. From that decree each party has prosecuted an appeal; the defendants insisting that no decree, for any amount, should have gone against them, while the plaintiff insists that the decree should have been for a larger amount.

Mr. William L. Gross,[1] for the Equitable Trust Company, argued as to the defence of usury:

I. Usury is a local question. It is the *lex loci contractus* which governs in respect of usury. *De Wolf* v. *Johnson*, 10 Wheat. 367; *Andrews* v. *Pond*, 13 Pet. 64; *Cromwell* v. *County of Sac*, 96 U. S. 51, 62; *Call* v. *Palmer*, 116 U. S. 98; *Latrobe* v. *Hulbert*, 6 Fed. Rep. 209.

II. *Allegata et Probata.* The rule is general, and without exception, that an averment or plea of usury, must be proved as laid. *Ewing* v. *Howard*, 7 Wall. 499; *Drake* v. *Watson*, 4 Day, 37; *Wilmot* v. *Monson*, 4 Day, 114; *Brown* v. *Mortgage Co.*, 110 Illinois, 235; *Kihlholz* v. *Wolf*, 103 Illinois, 362; *Phillips* v. *Roberts*, 90 Illinois, 492; *Telford* v. *Garrels*, 132 Illinois, 550; *Beach* v. *Fulton Bank*, 3 Wend. 573; *Smith* v. *Brush*, 8 Johns. 84. And if the defendant fails in proving the usurious contract in the way and manner in which he has charged it in his plea or answer, the defence must fail. *Vroom* v. *Ditmas*, 4 Paige, 526.

III. Intent is an essential ingredient. If the transaction, says the court, in *Bank* v. *Owens*, 2 Pet. 527, was in violation of the restriction in the bank's charter limiting its power to "take" more than 6 per cent interest, "it could only have been upon the ground of an *intention*" to evade the statute. So also: "In construing the usury laws, the uniform construc-

[1] This case was argued with *Fowler* v. *Equitable Trust Co.*, *post* 408, and *Fowler* v. *Equitable Trust Co.*, *post* 411.

tion in England has been, (and it is equally applicable here,) that to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent; *res ipsa loquitur*. But where the contract, on its face, is for legal interest only, there it must be proved that there was some corrupt agreement or device, or shift, to cover usury; and that it was in the full contemplation of the parties. . . . The *quo animo* is, therefore, an essential ingredient in all cases of this sort." *United States Bank* v. *Waggener*, 9 Pet. 378, 399. See also *Hotel Co.* v. *Wade*, 97 U. S. 13, 23; *Lloyd* v. *Scott*, 4 Pet. 205; *Palmer* v. *Call*, 7 Fed. Rep. 737.

IV. *Commissions by agent or broker.* When an agent, authorized to loan money at lawful interest, exacts for his own benefit more than the lawful rate, without the knowledge or authority of his principal, the loan is not thereby rendered usurious. The loaner of the money must not only be a party to the usurious contract, but he must take the usury. *Call* v. *Palmer*, 116 U. S. 98. And when the evidence fails to show that the commission was paid to the loaner, the defence of usury, based thereon, will not be sustained. *Grant* v. *Phœnix Life Ins. Co.*, 121 U. S. 105, 117.

Agent's commissions, as an element in usury defences, has often been before the Supreme Court of Illinois:

Ballinger v. *Bourland*, 87 Illinois, 513. There the agent procured a loan and charged a commission and expenses to borrower, but without the lender's knowledge and not for the lender's benefit, and the court said it was not usury. See also *Colehour* v. *State Sav. Ins.*, 90 Illinois, 152; *Boylston* v. *Bain*, 90 Illinois, 283; *Phillips* v. *Roberts*, 90 Illinois, 492.

Payne v. *Newcomb*, 100 Illinois, 611. There the loan agent was required to learn the situation of the property offered as security, to examine and ascertain the title, and became per-

sonally liable to the lender for any loss sustained through defective title or overvaluation of the security, and the court found he was the agent of the lender and his taking a commission from the borrower in excess of the legal rate rendered the contract usurious. But in *Hoyt* v. *Pawtucket Institution for Savings*, 110 Illinois, on page 394, it is expressly said that *Payne* v. *Newcomb* was not intended to decide that a broker loaning the money of others, could not take a commission from the borrower without rendering the loan usurious. See also *Kihlholz* v. *Wolf*, 103 Illinois, 362; *Meers* v. *Stevens*, 106 Illinois, 549; *McGovern* v. *Union Mutual Insurance Co.*, 109 Illinois, 151.

Hoyt v. *Pawtucket Institution for Savings*, 110 Illinois, 390. Taylor was a loan broker in Chicago. Hoyt made application to the Institution for Savings for a loan of $5000 at 10 per cent, which being forwarded by Taylor to the Institution, at its residence in Rhode Island, was there accepted, and the loan was paid by the Institution, (less $250, one half-year's interest, deducted in advance,) by a draft to the order of Hoyt himself. Taylor charged Hoyt $250 for commissions for securing the loan, which was paid. This commission, and the agreement therefor, was without the knowledge of the lender, and the Institution got no part thereof, and received no more than 10 per cent on the money loaned, as evidenced by the note given therefor. The court held: 1. Taking interest in advance was not usurious; and 2. That the commissions charged by Taylor did not make the transaction usurious, saying: "The Institution for Savings has never received, or agreed to receive, more than the legal rate of interest upon this loan, and whatever in addition thereto Hoyt has paid Taylor, has been in compensation for services of Taylor in procuring the loan for Hoyt, which was something entirely between themselves, independent of the Institution for Savings, with which the latter had no connection. We fail to discover anything of usury in the transaction."

Brown v. *Mortgage Co.*, 110 Illinois, 235. Hale & Co., of Chicago, procured a loan from capitalists in Scotland, for Brown, of $4500 for 5 years at 9 per cent, and the latter gave

his note therefor. Brown paid Hale & Co., or the latter deducted from the sum loaned, a commission of $225, and this, it was charged, rendered the loan usurious. The evidence, the court said, did not show Hale & Co. to have been the agents of the lender, adding: "If they were not the company's agents, but were the agents of Brown, in that transaction, although he might have paid them an amount which, added to the current interest upon the note, largely exceeded legal interest, it would not prove usury in the loan. It cannot concern the lender what the borrower pays to his own agents. *Kihlholz* v. *Wolf*, 103 Illinois, 362; *Phillips* v. *Roberts*, 90 Illinois, 492. The burden of proving a transaction usurious rests upon the party alleging it. *Boylston* v. *Bain*, 90 Illinois, 283; *Kihlholz* v. *Wolf*, *supra*. In the next place, at the time this loan was made, it was lawful to exact 10 per cent per annum interest on money loaned. The note given bears interest only at the rate of 9 per cent per annum, and runs for 5 years. It has been held that it is not usurious to exact the payment of interest in advance. *Mitchell* v. *Lyman*, 77 Illinois, 525; *Goodrich* v. *Reynolds*, 31 Illinois, 490; *S. C.* 83 Am. Dec. 240; *McGill* v. *Ware*, 4 Scammon, 21. One per cent on $4500 (the amount borrowed) for 5 years makes just $225; and so in any view, interest has not been exacted beyond the rate of 10 per cent per annum — the then legal rate. *McGovern* v. *Union Mutual Life Ins. Co.*, 109 Illinois, 151." See also *Ammondson* v. *Ryan*, 111 Illinois, 506; *Cox* v. *Mass. Mutual Life Ins. Co.*, 113 Illinois, 382; *Haldeman* v. *Mass. Mutual Life Ins. Co.*, 120 Illinois, 390; *Mass. Mutual Life Ins. Co.* v. *Boggs*, 121 Illinois, 119; *Telford* v. *Garrels*, 132 Illinois, 550; *Sanford* v. *Kane*, 133 Illinois, 199; *Ryan* v. *Sanford*, 133 Illinois, 291.

Mr. Robert G. Ingersoll and *Mr. William Ritchie* for Fowler argued as to the law which was to govern the construction of the contract:

These are all New York contracts, to be governed by the New York statutes, and the securities are, consequently, void.

In 1873, 1874, and 1876 the statutes of New York provided as follows:

SECTION 1. The rate of interest upon the loan or forbearance of any money, goods or things in action shall continue to be seven dollars upon one hundred dollars for one year, and at that rate for a greater or less sum, or for a longer or shorter time.

SEC. 2. No person or corporation shall, directly or indirectly, take or receive any money, goods or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods or things in action, than is above prescribed.

SEC. 5. All bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, . . . whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

SEC. 8. Whenever any borrower of any money, goods or things in action shall file a bill in chancery for the discovery of the money, goods or things in action taken or received in violation of either of the foregoing provisions, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned; nor shall any court of equity require or compel the payment or deposit of the principal sum or any part thereof as a condition of granting relief to the borrower in any case of a usurious loan forbidden by this chapter. Rev. Stats. N. Y. (Banks & Bros.) 6th ed. vol. 2, pp. 1164–6.

This is a suit to enforce a security. If the debt or contract for the performance of which that security was given be void, it is plain the security fails likewise and cannot be enforced. In Illinois, as elsewhere, the debt or contract is the principal while the mortgage is the mere incident. A contract void in the place where it is made and to be performed, is void everywhere. If this is a New York contract and is void under the laws of New York, it cannot be enforced in any court in Illinois, notwithstanding it may be in strict accord with the laws

of the latter state. As to the intent of the parties, with respect to which set of laws should govern the contract, we have here no express or explicit declaration from either. We must resort entirely to circumstantial evidence and inference to ascertain what that intent was. Upon this point we note the fact that the rate of interest adopted is not the Illinois rate but the New York rate. Now, a security bearing only 7 per cent could not have been meant for use in Illinois, where 10 per cent securities were at that time not only lawful, but common. The funds loaned were at New York, being obtained by draft on New York. The trustee in the trust deeds was a resident of New York. There is no evidence whatever that the money when obtained was to be used in Illinois.

Complainant's charter permitted it to "have such officer and agencies in other States as may be necessary for the transaction of its legitimate business," and accordingly it maintains an agent in Illinois, *but only the officers in New York have power to make binding contracts for loans.*

A security intended for negotiation and use, as such, at a certain place should be governed by the laws of that place. These bonds received their final shape and character in New York and were intended evidently for circulation there. These facts have always been deemed most significant in determining the *locus* of a contract. *Dickinson* v. *Edwards*, 77 N. Y. 573; *Wayne County Savings Bank* v. *Low*, 81 N. Y. 566; *Merchants' Bank* v. *Southwick*, 67 How. Pr. 324; *Tilden* v. *Blair*, 21 Wall. 241; *Gay* v. *Rainey*, 89 Illinois, 221.

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

1. The appellant Fowler contends that as no order was made at the term when the first decree was entered, continuing until the succeeding term the motion and petition for rehearing, the decree of October 20, 1884, became final, and, consequently, the order at the June term, 1885, entered as of October 31, 1884, which granted a rehearing, as well as the decree of January 11, 1887, are to be treated as improvidently made, or as

nullities. We do not concur in this view. It is not disputed that if, in October, 1884, a rehearing was granted and the clerk omitted to enter an order to that effect, it would have been within the power of the court, at the succeeding term, by an order *nunc pro tunc*, to make the record speak the truth. But as the order granting a rehearing was entered under date of October 31, 1884, the presumption must be indulged, in support of the action of a court having jurisdiction of the parties and the subject matter — nothing to the contrary affirmatively appearing — that the facts existed which justified its action; and, therefore, that the court granted the application for a rehearing at the term at which the first decree was rendered. *Stockton* v. *Bishop*, 4 How. 155, 167; *Townsend* v. *Jemison*, 7 How. 706, 718. Besides, the exception taken by the defendants to the proceedings of June 30, 1885, was not, in terms, that the order, then formally made, was directed to be entered as of October 31, 1884, but that it granted a rehearing. If they intended to deny that the rehearing had been, in fact, ordered at the previous term of the court, the point should have been distinctly made upon the record.

2. The appellants Fowler and wife also contend that the contract of loan was a New York contract, and void under the laws of that State; and that neither the debt thus created, nor the mortgage given to secure the bonds, can be recognized, nor any recovery thereon had, in Illinois or elsewhere, for principal or interest. This contention rests upon the statute of New York, in force when the debt was created, providing that all bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than at the rate of seven per cent per annum, shall be void. 1 Rev. Stats. N. Y. part 2, c. 4, title 3, § 5; vol. 2, 6th ed. (Banks & Brothers) 1164–6. The suggestion that by the contract of loan a rate of interest was reserved in excess of that allowed by the laws of New York, is based upon the ground that, although the bonds in suit call only for seven per cent interest,

a much larger rate was, in fact, exacted and secured by the company, taking into consideration the amount of the loan, and the sum actually received under the contract.

By the thirteenth section of a statute of Illinois, in force on and after February 12, 1857, entitled "An act to amend the interest laws of this State," it was provided: "Where any contract or loan shall be made in this state, or between citizens of this state and any other state or country, bearing interest at any rate which was or shall be lawful according to any law of the state of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other state or territory of the United States, or in the city of London, England; and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the state of Illinois, and shall not be affected by the laws of the state or country where the same shall be made payable." Gross's Stats. Illinois, 1869, 371, c. 54, § 13.

And by another act, in force on and after February 16, 1857, entitled "An act for the encouragement and security of loans of money," it was provided: "§ 14. It shall be lawful for any person or corporation borrowing money in this state, to make notes, bonds, bills, drafts, acceptances, mortgages or other securities, for the payment of principal or interest, at the rates authorized by the laws of this state, payable at any place where the parties may agree; although the legal rate of interest in such place may be less than in this state; and such notes, bonds, bills, drafts, acceptances, mortgages or other securities shall not be regarded or held to be usurious; nor shall any securities taken for the same, or upon such loans, be invalidated in consequence of the rate of interest of the state, kingdom or country where the paper is made payable being less than in this state, nor of any usury or penal law therein. § 15. No plea of usury nor defence founded upon an allegation of usury shall be sustained in any court in this state, nor shall any security be held invalid on an allegation of usury where the rate of interest reserved, discounted or taken does not exceed that allowed by the laws of this state, in consequence

of such security being payable in a state, kingdom or country where such rate of interest is not allowed. § 16. It shall be lawful for all parties loaning money in this state, to take, reserve or discount interest upon any note, bond, bill, draft, acceptance or other commercial paper, mortgage or other security, at any rate authorized by the laws of this state, whether such paper or securities for principal or interest be payable in this state, or in any other state, kingdom or country, without regard to the laws of any other state, kingdom or country; and all such notes, bonds, bills, drafts, acceptances or other commercial paper, mortgages or other security, shall be held valid in this state, whether the parties to the same reside in this state or elsewhere." Gross's Stats. Illinois, 1869, 372, c. 54.

These statutory provisions were in force at the time of the contract of loan involved in this case. And although the above acts of February 12, 1857, and February 16, 1857, were repealed by the act approved March 31, 1874, in force July 1, 1874, they remained in full force and effect as to rights acquired or causes of action existing under them, and before the repealing act went into operation. Rev. Stats. Illinois, 1874, pp. 1012, 1023, 1046, c. 131, § 5, paragraphs 297 and 299, and § 6. And by the act approved March 25, 1874, in force July 1, 1874, entitled "An act to revise the law in relation to the rate of interest," this provision of former acts was reënacted and preserved: "When any bond, bill, draft, acceptance, mortgage or other contract shall have been or shall be made in this state, or between citizens of this state, or a citizen of this state and any other state, territory or country, bearing interest at a rate lawful by the laws of this state, may be made payable in any other state, territory or country, such contracts shall be governed by the laws of this state." Rev. Stats. Illinois, 1874, 615, c. 74, § 8.

The contract of loan in question having been made between a citizen of Illinois and a corporation of another State, and the bonds having been executed in Illinois and secured by mortgage upon real estate there situated, the defence of usury, in a court of the United States sitting in and administering the

laws of Illinois, cannot be sustained upon the ground simply that the rate of interest, exacted or reserved, was in excess of that allowed by the law of the State in which the bonds are made payable.

3. We come now to consider whether, according to the law of Illinois, there was usury in this loan.

The statutes of Illinois, in force when this loan was made, fixed six per cent per annum as the rate of interest upon the loan or forbearance of any money, goods or things in action, with liberty to parties to stipulate or agree that ten per cent per annum be taken and paid. But it was provided that if any person or corporation in that State should contract to receive a greater rate of interest or discount than ten per cent upon any contract, verbal or written, such person or corporation should forfeit the whole of the interest contracted to be received, and should be entitled only to recover the principal sum due to such person or corporation. Gross's Stats. Illinois, 1869, 2d ed. pp. 370–1, c. 54; Rev. Stats. Illinois, 1874, p. 614, c. 74.

The contract was for a loan to Fowler of $9000, at ten per cent interest per annum. Seven per cent of the interest was evidenced by coupons attached to the nine bonds of $1000 each, and secured with the bonds by the deed of trust. The remaining three per cent, according to the testimony of Johnston, the company's local agent at Springfield through whom the loan was made, was "discounted" at the time the loan was finally negotiated. The amount received by Fowler in cash from the company was $7809.69. It was paid by a draft of Johnston on the company in favor of Fowler of date February 23, 1874.

In addition to the interest exacted for the loan, Fowler paid Johnston, as his commissions, the sum of $100. In reference to these commissions, and the relations held by him with the Trust Company, Johnston testified: "I had an agreement with the defendant that upon the completion of this loan he was to pay me a commission of one hundred dollars. After the loan was completed and after the draft exhibited had been delivered to the defendant, he paid me this one hundred dollars. The draft for $7809.69 exhibited herein was for the full

value of this $9000 loan on the day it was negotiated and closed, as before stated and shown, and no deduction from said full value of this loan on that day was made by me on account of my said commission or on any other account whatever. The agreement under which this commission was paid me by the defendant was unknown to the complainant, and no part of said $100 belonged to or was paid to the complainant. The expense of the abstract of title furnished by the defendant, and the acknowledging and recording of the trust deed, was of course paid by the defendant, but no deduction on account therefor was made from the present value of this loan on the day named. . . . In the negotiation of this loan, from its inception to its completion, I acted as the medium of communication between the complainant and the defendant. I was not authorized, neither did I attempt to accept or reject the defendant's application for this loan — I did, however, recommend its acceptance by the complainant — nor did I pass on the question of title to the real estate, all these matters having been submitted to and decided by the complainant in New York, nor for what I did in connection with this loan was I paid by the complainant anything, nor was I authorized by the complainant to do anything in connection with this loan more than I did and as I have shown."

On cross-examination Johnston said: "This was the first loan I made for complainant. Afterwards I made other loans, not only to these parties, but to others. *I had an understanding with the complainant company a short time before this loan was made. This loan and all other loans I made were in pursuance of this understanding.* The complainant furnished me with the blank 'Exhibit F' [the application for the loan] in this case and blank 'Exhibit D,' [the report of the loan as negotiated with the borrower,] and gave me instructions as to how they should be filled up, which I accordingly followed in filling up such blanks. When I procured an application in this way I forwarded the same to the company for their consideration, acceptance or rejection. In my endorsement on this application recommending the loan, in signing my name as agent, I understood myself *as agent of the company in this*

matter. Complainant acted through me in making this loan. *In my arrangement with complainant for making these loans it was the understanding that complainant was to pay me nothing whatever for my services, and that I was to procure whatever pay I had from the borrower.*"

In reference to Johnston's agency for the Trust Company, it further appears that before this loan was made, one Rockwell, an officer or agent of the Trust Company, went to Springfield, Illinois, to get some one to act as its agent at that place. He asked Fowler to suggest some one to loan money for the company on real estate. Fowler recommended Johnston, who, upon being introduced to Rockwell by Fowler, was appointed. To the written application for the loan, the following was appended: "I have examined the within application, believe the statements to be correct, and recommend a loan to applicant of $10,000 on the security offered. R. P. Johnston, Agent."

The bonds having been executed by Fowler, they were transmitted by Johnston to the company, at their New York office, in a communication headed "Agency of Equitable Trust Company, Springfield, Ills., Feb. 23, 1874," and signed by him as "Agent."

It is to be observed that out of the principal sum loaned the Trust Company retained, by way of discount, what was claimed to be the present value of such amount as would pay, in advance, three per cent of the stipulated interest for the whole period of the loan, five years. In view of this feature in the case there was much discussion at the bar as to whether it was permissible, in Illinois, for the lender to exact and receive interest in advance upon a loan made at the highest rate allowed by its laws. In view of numerous decisions of the Supreme Court of that State, it is not necessary to examine this question upon principle; for it is the settled doctrine of that court that the mere taking of interest in advance does not bring a loan within the prohibition of usury. In *Goodrich* v. *Reynolds*, 31 Illinois, 490, 498, it was said: "The remaining plea sets up usury in this, that the interest was made payable semi-annually. It has long been settled, such reserva-

tion is not usurious. The whole interest may be lawfully reserved in advance." *McGill* v. *Ware*, 4 Scammon, 21, 28; *Mitchell* v. *Lyman*, 77 Illinois, 525, 529, 530; *Brown* v. *Scottish-American Mortgage Co.*, 110 Illinois, 235, 239; *Hoyt* v. *Pawtucket Inst. for Savings*, 110 Illinois, 390, 394; *Telford* v. *Garrels*, 132 Illinois, 550, 554.

Whether that doctrine would apply where the loan was for such period that the exaction by the lender of interest in advance would, at the outset, absorb so much of the principal as to leave the borrower very little of the amount agreed to be loaned to him, we need not say. The present case does not require any expression of opinion upon such a point, for the interest reserved in advance on the loan to Fowler was only of three per cent out of ten per cent, and a reservation to that extent, it would seem, is protected by the decisions of the state court. The defence of usury, so far as it rests upon the fact that three per cent of the stipulated interest was taken in advance by the lender, must, therefore, be overruled.

But, in view of other decisions of the Supreme Court of Illinois, must not that defence be sustained, in respect to this loan, upon the ground that the borrower was in effect required, as a condition of the loan, and, in addition to the highest legal rate of interest, to pay $100, under the guise of commissions, to the lender's agent for procuring the loan? It is not the case simply of a borrower employing a broker — who has no regular or established connection with the lender as agent and no arrangement with the lender in respect to compensation for his services — to effect a loan, and agreeing to pay him commissions. With the agreements of the latter kind the courts have no concern, and they are not permitted to affect the rights of the lender, where he does nothing more than lend his money at such rate of interest as the statute permits. Such is the rule in Illinois. *Hoyt* v. *Pawtucket Inst. for Savings*, 110 Illinois, 390, 394; *Telford* v. *Garrels*, 132 Illinois, 550, 554; *Sanford* v. *Kane*, 133 Illinois, 199, 205.

These authorities, however, have no application to the case before us. The Trust Company established an agency at Springfield, Illinois, for the purpose of securing loans upon

real estate, and to that end constituted Johnston as its agent. It made him a medium of communication between it and those in that locality who might wish to borrow money. It supplied him with the necessary blank forms, and expected him to make a report as to the sufficiency of the security offered. Of course it knew that no one would regularly perform the duties of such a position without reasonable compensation. That the agent might receive such compensation, the company came to an understanding with him at the outset that he must make the borrower pay for his services. With such an arrangement between it and its agent, the company need not be informed in any particular case of the amount the latter would exact from the borrower as compensation for effecting a loan. But it must be held to have known that the agent would not devote his energies and time to its business gratuitously, and would not forward to it an application for a loan, unless the borrower agreed to compensate him for his services. The services performed by Johnston, as its regular local agent, charged with the duty of receiving and forwarding applications for loans, with his opinion as to the sufficiency of the security offered, were of substantial value to the company, as much so as if they had been performed under an arrangement that the company should, out of the money loaned, retain for him the amount which, by previous agreement with the borrower, he was to receive as his compensation. And the services performed by him were just what they would have been had he accepted the agency under such a specific arrangement as that just suggested.

Under all the circumstances, was not this transaction tainted with usury? Should not the $100 paid to the company's agent be regarded as part of the amount which Fowler was required to pay for the use of the money borrowed? These questions are answered by the Supreme Court of Illinois. In *Payne* v. *Newcomb*, 100 Illinois, 611, 616, the inquiry was whether the commissions paid by the borrower to the person through whom a loan, at the highest legal rate, was effected, were to be taken into account in determining whether the transaction was usurious. That case is so directly in point

that we feel justified in making extracts from the opinion of the court. It was said: "Did Stevens [the lender] know that Newcomb [the broker] was charging for his services, and collecting it from the borrower? Newcomb says that it was the understanding he was to get it of the borrower, and that establishes the fact beyond all cavil. Were these payments of commissions of benefit or profit to Stevens? They unquestionably were, as they paid his agent for long-continued and valuable services rendered by Newcomb for him. No one will believe that Newcomb thus incurred liability to Stevens, and rendered skilful and valuable services for him for more than twenty years as a mere gratuity. It was not so understood. Newcomb says he was to get his pay from the borrower. Stevens then paid what he owed to Newcomb by requiring the agent to impose it on the persons to whom loans were made. The arrangement amounted to no more or less than requiring the agent to loan for a per cent sufficiently high to yield Stevens the highest rate of interest allowed by the law, and to pay the agent for his responsibility, labor, skill and trouble. In effect, the transaction is the same as had the loan been made at fifteen per cent, and ten had been paid to Stevens and five to Newcomb. This was the result which was by the parties intended before the inception of the transaction. It was in pursuance of an arrangement of the lender and his agent. . . . It is, however, claimed that Stevens is not liable for what Newcomb retained and charged for what is called commissions — that he had the right to charge any sum he chose, and that would not render the loan usurious. Had Stevens not known that Newcomb was making such charges, it may be that he would not have been affected by them. But here it was agreed between Stevens and Newcomb that the latter should charge a commission to the borrower to pay him for his services. Stevens obtained the services of Newcomb. They were of value to him, and no one will pretend that Newcomb rendered them as a gratuity. They were rendered for Stevens, and they were paid for by him by indirectly charging the amount to and requiring the borrower to pay it, and this, too, by the express authority of

Stevens. Had he directed Newcomb to loan at fifteen per cent for the first year, and ten per cent for each succeeding year, and to retain five per cent on the loan for the first year, and two and a half per cent for renewals and extensions, and to retain the extra per cent above ten per cent as compensation for his services, would any one say that was not usury? And in what does the transaction differ by the form given it by the agreement of the parties? In each case, Stevens would get Newcomb's services, and compel the borrower to pay them." And the court adds: "There is no more familiar rule in the law than that the usury laws cannot be evaded by mere pretences, shifts or evasions. This rule runs through all of the books, and requires the citation of no authority in its support. The policy of the statute is to protect the weak and necessitous from the oppression of the strong, and to sanction such transactions as this would be to defeat that policy. Courts have no right to judge of the policy, but must enforce the law as they find it. Whenever deemed proper, the General Assembly will change the policy by modifying or repealing the statute, but until so modified or repealed we have no power to alter or change its provisions."

In the previous case of *Peddicord* v. *Connard*, 85 Illinois, 102, 103, the court said: "It is first urged that although there may have been a greater rate of interest retained than is permitted by the law, still, it was not usury, unless it was agreed and so understood when the transaction occurred, and that there was no such understanding or agreement in this case. Such seems to be the ruling of the courts in Great Britain and the various States of the Union in which the entire debt is forfeited or heavy penalties are imposed when the transaction is tainted with usury. The law does not favor forfeitures, and in such cases the courts hold to a rigid and strict compliance with the law imposing the penalty. It is, therefore, probable that those courts would not give so strict a construction if the only loss were, as it is with us, the interest on the debt for the money loaned or forborne. Reason does not require it, as it does where the debt and interest are lost by reason of taking or contracting for a trifle more than is sanctioned by the law.

Hence we are not prepared to adopt so rigid a construction. If an usurious contract is made, whether express or implied, at the time of or subsequent to the entering into the agreement, to take or reserve more than lawful interest, it is such an agreement as is within the purview of the statute." And, in a subsequent case: "The statute cannot be avoided by any shift or device which may be resorted to by the parties. The form of the transaction is not material, but whenever it clearly appears that more than the legal rate of interest has been exacted, the contract will be held to be usurious." *Leonard* v. *Patton*, 106 Illinois, 99, 104.

We do not find that the principles announced in *Payne* v. *Newcomb* have been overruled or modified by the state court. On the contrary, that case has been frequently referred to and its doctrines recognized. In *Hoyt* v. *Pawtucket Inst. for Savings*, 110 Illinois, 390, 394, it appears that Taylor, a loan broker of Chicago, sent to the Pawtucket Institution for Savings, in Rhode Island, an application by Hoyt for a loan, which was accepted. The lender retained $250 out of the $5000 loaned, to pay a half year's interest in advance. The broker charged the borrower $250 as his commission, and the latter received only $4500. The court said: "This commission received by Taylor was not *from any arrangement with the Institution for Savings or with its knowledge.* It got no part of the commission, and received no more than ten per cent interest on the money loaned. Brokers negotiating loans of other people's money may charge the borrower commissions, without thereby making a loan at the full rate of legal interest usurious. *Ballinger* v. *Bourland*, 87 Illinois, 513; *Phillips* v. *Roberts*, 90 Illinois, 492; *Boylston* v. *Bain*, 90 Illinois, 283. *Payne* v. *Newcomb*, 100 Illinois, 611, was not intended to decide anything to the contrary, as seems to be supposed by counsel for plaintiffs in error. In the latter case there was an *express understanding between Stevens, the lender, and Newcomb, his agent, that Newcomb should get his commissions from the borrower.*" In *Cox* v. *Life Ins. Co.*, 113 Illinois, 382, 385, the court, after observing that the fact that an agent, *without the authority, consent or knowledge of his principal,* upon

loaning the money of the latter, exacts from the borrower a sum in excess of lawful interest does not make the loan usurious, said of *Payne* v. *Newcomb*, 100 Illinois, 611, that it was "quite another case than the one before us, and does not apply to the facts of the present case. There, services were rendered by the loan agent for the lender of the money, and the commission paid by the borrower to the agent was paid *under a pre-arrangement made between the lender and the agent* that the latter should get his compensation for the services rendered by him to the lender, *by charging commissions to the borrower*." See also *Ballinger* v. *Bourland*, 87 Illinois, 513, 516; *Kihlholz* v. *Wolf*, 103 Illinois, 362, 366; *Meers* v. *Stevens*, 106 Illinois, 549, 552; *Ammondson* v. *Ryan*, 111 Illinois, 506, 510; *Mass. Mut. Life Ins. Co.* v. *Boggs*, 121 Illinois, 119, 127.

This case cannot be distinguished from *Payne* v. *Newcomb*. In view of the decisions of the Supreme Court of Illinois, and the manifest policy of the law of that State relating to usury, we cannot adjudge that a loan, under a fixed arrangement between the lender and an individual that the latter will act as the agent of the former at a particular place, and obtain compensation for his services by way of commissions exacted from the borrower, is to be governed by the same principles that apply in the case of one who holds no relations of agency with the lender, but is a mere broker getting his commissions from the borrower without the knowledge, authority or assent of the lender. It is not consistent with the law of Illinois, as declared by its highest court, that the lender, when taking the highest rate of interest, shall impose upon borrowers the expense of maintaining agencies in different parts of the State through which loans may be obtained. We, therefore, hold that the exaction by the Trust Company's agent, pursuant to his general arrangement with it, of commissions over and above the ten per cent interest stipulated to be paid by the borrower, rendered this loan usurious.

The result is that the recovery must be limited to the principal sum due the company. The statute declares, in respect to an usurious contract, that the lender shall only recover the principal sum due; in other words, that judgment shall be rendered only for that sum.

But what are the rules for the guidance of the court in determining the principal sum due? In Illinois it is settled that a party making application to a court of equity for affirmative relief against an usurious contract is entitled to such relief only upon the condition that he shall pay, or offer to pay, the principal sum with legal interest. *Clarke* v. *Finlon*, 90 Illinois, 245, 248; *Sanner* v. *Smith*, 89 Illinois, 123, 125; *Carter* v. *Moses*, 39 Illinois, 539, 542; *Henderson* v. *Bellew*, 45 Illinois, 322, 324; and *Tooke* v. *Newman*, 75 Illinois, 215, 217. It is equally well settled there that one who has voluntarily paid usurious interest cannot recover it back in an action at law. *Riddle* v. *Rosenfeld*, 103 Illinois, 600, 603; *Hadden* v. *Innes*, 24 Illinois, 381, 384; *Town* v. *Wood*, 37 Illinois, 512, 516; *Carter* v. *Moses*, 39 Illinois, 539, 542; *Tompkins* v. *Hill*, 28 Illinois, 519. But it is the established doctrine of the Supreme Court of that State that these rules have no application where the transaction has not been settled and the lender sues to recover a balance due on the principal sum. In such a case the borrower, being sued, may have all payments made by him on account of interest applied in diminution of such part of the principal as remains unpaid. *Harris* v. *Bressler*, 119 Illinois, 467, 472; *Payne* v. *Newcomb*, 100 Illinois, 611, 623; *Hamill* v. *Mason*, 51 Illinois, 488; *Heffner* v. *Vandolah*, 62 Illinois, 483, 486; *Saylor* v. *Daniels*, 37 Illinois, 331; *Mitchell* v. *Lyman*, 77 Illinois, 525. Such is the uniform construction of the statute, which, in the case of usury in a loan, forfeits the whole of the interest contracted to be received, and permits a recovery only for the principal sum due. As there is no interest really due, if the transaction be usurious — the right to recover interest being forfeited at the moment the contract of loan is consummated — whatever the borrower pays *on account of the loan* must go as credit on the principal sum; otherwise, the usurer would get the benefit of his illegal contract, and the statute be rendered inoperative.

The court below proceeded upon the ground that the Trust Company was entitled to a judgment for the amount actually received by Fowler, in cash, with interest at six per cent from the date of the decree, and no credit was given on the prin-

cipal sum for numerous payments made by the borrower on account of interest. Under the settled course of decisions in the Supreme Court of Illinois, this decree must be held erroneous. Fowler paid off all the interest represented by the coupons, and made payments after the debt became due. And as the company retained out of the $9000 an amount equal to the present value of three per cent of the ten per cent stipulated to be paid, Fowler must be regarded as having paid that amount on the principal debt. Within the meaning of the statute, the amount due the company, at the date of the decree below, was: 1. The principal sum, $9000, diminished by all payments made by Fowler at any time on account of the debt. 2. The sums paid by the company for insurance, taxes and assessments, with interest at ten per cent on each from date of payment until the rendition of the decree, that being the rate fixed in the deed of trust in respect of sums paid by the mortgagee for insurance, taxes and assessments on the property which the mortgagors should have paid. The decree should have been only for the aggregate amount due on these two accounts, ascertained in the mode just indicated, with interest from its rendition at six per cent per annum, the rate allowed on judgments by the statute of Illinois.

The Trust Company insists that the decree should have made to it an allowance for solicitor's fees. There is no foundation for this claim. The trust deed provides that in the case of a sale by the trustee, at public auction, upon advertisement, all costs, charges and expenses of such advertisement, sale and conveyance, including commissions, such as were at the time of sale allowed by the laws of Illinois to sheriffs on sale of real estate on execution, should be paid out of the proceeds. This provision does not impose upon the borrower the burden of paying to the lender a solicitor's fee where a suit is brought for foreclosure. The commissions referred to in the deed are allowed only where the property is sold, upon advertisement, by the trustee, without suit. The trust deed made no provision for a solicitor's fee to the company in the event suit was brought. That a suit became necessary because of the refusal

of the trustee to act, is no reason for taxing such a fee against the mortgagor.

The decree is reversed, and the cause remanded with directions to modify the decree in accordance with the principles of this opinion.

FOWLER *v.* EQUITABLE TRUST COMPANY. (2)

EQUITABLE TRUST COMPANY *v.* FOWLER. (2)

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Nos. 34, 35. Argued April 16, 17, 1891. — Decided October 26, 1891.

The decision below in these cases is reversed on the authority of *Fowler* v. *Equitable Trust Company*, *ante*, 384.

THE court stated the case as follows:

The Trust Company made a loan to Rose H. Fowler, a citizen of Illinois, of the sum of $6000, for five years, with interest at the rate of ten per cent per annum, payable semi-annually. The latter executed to the company six coupon bonds of $1000 each, dated May 1, 1874, payable May 1, 1879, with interest semi-annually at the rate of seven per cent per annum; the principal and interest payable at the office of the company in New York. As security for the payment of the bonds and the interest thereon, the borrower conveyed to Jonathan Edwards, trustee, a lot in Springfield, Illinois, with the appurtenances thereon. The deed was similar in its provisions to the one given in the preceding cases, Nos. 32 and 33.

The present suit was brought October 27, 1882, to foreclose the grantor's right and equity of redemption, and for a sale in satisfaction of the amount found, upon an accounting, to be due the Trust Company. Sophie Fowler was made a defendant upon the ground that she claimed some interest in the mortgaged property. She filed an answer and cross-bill, to which

the company filed a replication and answer. By a decree entered October 20, 1884, it was adjudged by the court that the plaintiff was entitled to recover $2162.48 as the balance of the principal actually received by the defendants, $23.12 for insurance paid; in all, $2185.60. When this decree was entered the defendants filed a written motion and petition for rehearing, in respect to which the same proceedings were had as in the preceding cases. A formal order for rehearing was made June 30, 1885, and entered as of October 31, 1884; and there was a final decree, January 11, 1887, in favor of plaintiff for $5411.23, of which $5381.83 was found to be the principal sum actually received by the defendants, and $29.40 to have been paid for insurance. From that decree both parties appealed.

In reference to the loan in question, Johnston, the local agent of the company at Springfield, through whom the loan was obtained, testified: "The trust deed and bonds were executed and delivered to me about the 22d day of June, 1874, as complete. This was a loan of six thousand at ten per cent. Seven per cent of the interest was evidenced by the interest coupons attached to the six one-thousand dollar bonds, and the remaining three per cent was discounted for the five years and deducted from the $6000. The trust deeds and bonds in this case bear date the 1st day of May, 1874, and the interest which accrued on them from May 1, 1874, to June 23, 1874, was paid to the defendant.

Par value of bonds was	$6,000 00
Discount, 3 %, 5 years, was	694 80
Leaving the sum of	$5,305 20
To this was added accrued interest	76 63
Making the total	$5,381 83

For that amount Johnston executed and delivered to the defendant his sight draft on the Trust Company, which was negotiated by her. Pursuant to a previous agreement with him, she paid him a commission of $150. The evidence as to

the circumstances under which the loan was made, and commissions paid, and of Johnston's relations to the Trust Company, was the same as in the other cases.

[This case was argued with *Fowler* v. *Equitable Trust Company*, *ante*, 384.]

Mr. William L. Gross for the Equitable Trust Company.

Mr. Robert G. Ingersoll and *Mr. William Ritchie* for Fowler.

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

These appeals are from the same decree. The cases arise under the usury laws of Illinois. They do not differ materially from Nos. 32 and 33, except as to the amount of the loan. The answer raises the same questions as were raised in those cases. The decree gave no credit on the principal sum for payments on account of interest, but was for the amount actually received by the borrower in cash, and the sum paid by the mortgagee for insurance, with interest on the aggregate amount at six per cent from the date of its rendition. Under the statute of Illinois relating to interest upon the loan or forbearance of money, and for the reasons given in the opinion in cases Nos. 32 and 33, the loan in question must be held to have been usurious, and the decree should have been in conformity with the principles announced in those cases.

The decree is

Reversed with costs, and the cause is remanded with instructions to make such modifications in the decree as will be consistent with this opinion.

FOWLER *v.* EQUITABLE TRUST COMPANY. (3)

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

No. 36. Argued April 16, 17, 1891. — Decided October 26, 1891.

A Connecticut corporation made in 1876 a loan of ten thousand dollars for five years at nine per cent to a citizen of Illinois, the loan being evidenced by note, secured by deed of trust on real estate in the latter State, providing that nothing contained in it should be so construed as to prevent a foreclosure by legal process, and that upon any foreclosure, the corporation should recover in addition to the principal, interest and ordinary costs, a reasonable attorney's or solicitor's fee, not exceeding five per cent for the collection thereof. It was also stipulated in the deed, that the decree or order for foreclosure should direct and require that the expenses of such foreclosure and sale, including the fees of solicitor and counsel, be taxed by the court at a reasonable amount, and paid out of the proceeds of the sale. The highest rate allowed by the laws of Illinois at the time of the loan was ten per cent. The borrower paid the agent of the company a commission of $150 under such an arrangement as that referred to in the case of *Fowler* v. *Equitable Trust Co.*, *ante*, 384. *Held*,

(1) That the payment of these commissions to the company's agent did not make the contract usurious, because if that sum was added to the nine per cent stipulated to be paid, the total amount of the interest exacted was less than the highest rate then allowed by law;

(2) The stipulation in the deed of trust providing for the payment by the borrower, in addition to ordinary costs, of a reasonable solicitor's fee, not exceeding five per cent, for collection in the event of a suit to foreclose, did not make the contract usurious under the law of Illinois.

THE court stated the case as follows:

The Trust Company, upon the written application of Sophie Fowler, a citizen of Illinois, agreed to lend her the sum of $10,000, for five years, at nine per cent per annum. She and her husband executed to the company, for the principal of the loan, ten coupon bonds of one thousand dollars each, dated February 1, 1876, and payable on the 1st day of February, 1881, with interest, semi-annually, at the rate of seven

per cent per annum. They executed at the same time ten promissory notes of $100 each for the remaining two per cent, the first one being payable August 1, 1876, and the others, respectively, on the first days of February and August, 1877 to 1881, inclusive. To secure payment of the bonds, they conveyed to Jonathan Edwards, trustee, certain real estate in Springfield, and to secure the ten promissory notes of $100 each, they conveyed the same property to the same trustee, subject, however, to the other trust deed. These deeds do not differ in any respect material to this case from the deeds in the preceding cases, except that the deed given to secure the bonds here involved, aggregating $10,000, provides that nothing contained in it shall be so construed "as to prevent a foreclosure of the same by process of the law or in chancery," and that the trustee, or his successor or successors, shall, "upon any foreclosure of this trust deed, recover, in addition to principal, interest and ordinary costs, a reasonable attorney's or solicitor's fee, not exceeding five per cent for the collection thereof, all to be collected without relief from valuation or appraisement laws. And in case of any such foreclosure it is hereby stipulated that the decree or order for foreclosure shall direct and require that the expenses of such foreclosure and sale, including the fees of solicitor and counsel, to be taxed by the court at a reasonable amount, shall be paid out of the proceeds of the sale," etc. This suit was brought to foreclose the defendant's equity of redemption, and to have the mortgaged property sold to pay the amount due the company. The answer in the case raised the same questions that are presented in the four preceding cases.

By a decree entered October 20, 1884, the court adjudged that the company recover $5125.42 as the balance of the principal sum actually received by the defendants, $614.72 for insurance and taxes paid by it, with interest thereon, and $287 as solicitor's fee; in all, $6027.14. When this decree was entered the plaintiff filed a written motion and petition for rehearing, in respect to which the same proceedings were had as in the preceding cases, and like motions and petitions for rehearing were filed. A rehearing having been granted, the

order for which was entered as of October 31, 1884, a final decree was entered January 11, 1887, adjudging that there was due the plaintiff for the principal and interest of the loan $15,296.60, $3173.26 for insurance, taxes and special assessments paid by it, and a reasonable attorney's fee, which was fixed at $923.49; in all, $19,393.35, and costs. From that decree the defendants appealed.

[This case was argued with Nos. 32, 33, *ante*, 384, and Nos. 34, 35, *ante*, 408.]

Mr. William L. Gross for the Equitable Trust Company.

Mr. Robert G. Ingersoll and *Mr. William Ritchie* for Fowler.

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

For the reasons given in the opinion in Nos. 32 and 33, *ante*, 384, the question of usury raised must be determined by the law of Illinois. But what was there said in reference to usury, commissions paid to the company's agent by the borrower and the application to the principal sum of payments made has no application to this case. This was a loan of $10,000 for five years at nine per cent. The borrower received the whole amount agreed to be loaned to her. There was not even a reservation of interest in advance. She only gave notes for two per cent of the interest payable when the interest under the contract would become due. The payment of $150 to the broker, as his commission, did not make that contract usurious; for, if that sum be added to the nine per cent interest stipulated to be paid, the total amount of interest exacted would be less than ten per cent, the highest rate allowed by law. In *Brown* v. *Scottish-American Mortgage Co.*, 110 Illinois, 235, 239, the court said: "In the next place, at the time this loan was made (July 15, 1875) it was lawful to exact ten per cent per annum interest on money loaned. The note given bears interest only at the rate of nine per cent

per annum, and runs for five years. It has been held, and is the well-settled law of this court, that it is not usurious to exact the payment of interest in advance. *Mitchell* v. *Lyman*, 77 Illinois, 525; *Goodrich* v. *Reynolds*, 31 Illinois, 490; *McGill* v. *Ware*, 4 Scammon, 21. One per cent on $4500 (the amount borrowed) for five years makes just $225; and so, in any view, interest has not been exacted beyond the rate of ten per cent per annum — the then legal rate." So in *McGovern* v. *Union Mutual Life Ins. Co.*, 109 Illinois, 151, 156: "When this loan was made the legal rate of interest was ten per cent per annum, when the contract provided for this amount. The loan in this case was for three years at nine per cent interest. Now the three per cent commissions only amounted to one per cent per annum, so that if the commissions are regarded as interest, and added to the interest at nine per cent provided for in the note, the rate would still be only ten per cent, and not usurious."

The loan was not, therefore, infected with usury, unless the provision in the trust deed providing for the payment by the borrower, in addition to ordinary costs, of a reasonable solicitor's fee, not exceeding five per cent, for collection, in the event of a suit to foreclose. But it is the law of Illinois that a provision of that character does not, of itself, make the contract usurious. In *Barton* v. *Farmers' & Merchants' Nat. Bank*, 122 Illinois, 352, 355, it was said: "If enforcing this promise to pay an attorney's fee would directly or indirectly have the effect of giving the payee, or of requiring the payor to pay, a greater compensation for the loan, use or forbearance of the money than is allowed by law, then, unquestionably, the contract would be usurious. The law will not tolerate any shift or device to evade its provisions. . . . By the statute, all penalties, whether as additional interest or as compensation for the use of the money, are prohibited; but where, as here, no additional or new compensation is provided for, and the contract is only for such sum as the payee would be obliged to expend in compelling the maker to perform his undertaking, the statute contains no inhibition upon the power of the parties to contract that the same shall be paid by the

party whose default occasions the necessity for the expenditure." Again: "Upon the question whether contracts of this nature are void as against public policy, this court as well as those of other States is also fully committed. . . . The right of the parties to thus contract has been expressly recognized, and when the contract has been for such reasonable attorney's fees only as would indemnify and preserve the payee from loss, and was due at the time of suit brought, this court has in every case sustained the plaintiff's right of recovery. Nor do we see anything in the section of the statute quoted that would change the rule." See also *Clawson* v. *Munson*, 55 Illinois, 394, 397; *Haldeman* v. *Mass. Mutual Life Ins. Co.*, 120 Illinois, 390, 393; *Telford* v. *Garrels*, 132 Illinois, 550, 555; *McIntire* v. *Yates*, 104 Illinois, 491, 503.

The only question of any difficulty is whether the fee stipulated was not excessive. But as the character and extent of the services performed by the plaintiff's attorney were best known to the court below, and in the absence of any evidence as to whether the fee was reasonable, considering the amount involved, and the nature of the services rendered, we are not prepared to reverse the decree because of the allowance to the plaintiff of an attorney's fee which does not exceed the highest sum fixed in the deed of trust.

We find no error in the decree to the prejudice of the appellants, and it is

Affirmed.

HICKMAN *v.* FORT SCOTT.

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

No. 10. Argued October 13, 1891. — Decided October 26, 1891.

An application by petition to a court of law, after its judgment has been reversed and a different judgment directed to be entered, to so change the record of the original judgment as to make a case materially different from that presented to the court of review, — there being no clerical mistake, and nothing having been omitted from the record of the original action which the court intended to make a matter of record — was

properly denied. Such a case does not come within the rule that a court, after the expiration of the term, may, by an order, *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court.

The court stated the case as follows:

Hickman brought suit, July 1, 1880, in the Circuit Court of the United States for the District of Kansas, against the city of Fort Scott, a municipal corporation of that State, to recover the amount of twenty-seven bonds of $500 each, issued by that city. The action was tried by the court without a jury. One of the issues was whether the suit was barred by the Kansas statute of limitations, declaring that an action on an agreement, contract or promise in writing could be brought within five years after the cause of action accrued, and not afterwards, but providing that "in any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby." Gen. Stats. Kansas, c. 80, art. 3, pp. 633–4–5. That issue depended upon the inquiry whether the city had made such an acknowledgment of its liability on the bonds as took the case out of the limitation of five years.

The court made a special finding of facts, and gave judgment in favor of Hickman for $26,385.23. Upon writ of error to this court that judgment was reversed, November 3, 1884, and the cause was remanded with direction to enter a judgment for the plaintiff on one bond, No. 78, for $500, with proper interest, less a credit paid of $200, November 8, 1875, and, in respect to all the other bonds in suit, to enter judgment for the city with costs. *Fort Scott* v. *Hickman*, 112 U. S. 150, 160, 165.

A petition for rehearing was filed in this court, asking a reconsideration of its judgment to the extent, at least, of order-

Counsel for Plaintiff in Error.

ing a *venire de novo* or a reargument of the case. That petition was overruled.

On the 3d of February 1885, the present proceeding was instituted by a petition filed in the court below by Hickman against the city of Fort Scott. Its general object was to obtain "a new trial on account of gross and vital errors in the finding of facts," and also to have the record amended "by allowing certain findings of fact to appear, some of which findings were unavoidably and others accidentally omitted." The petition, among other things, stated: "It is desired only that the record should be so amended as to state as well as import the truth, and that the plaintiff should have an opportunity of having the actual facts of the controversy taken into consideration by this court, and, if necessary, by the Supreme Court before the matter finally passes in *rem judicatam*. The decision of the Supreme Court was based upon an imperfect and erroneous report of the cause, and all that the plaintiff now desires to do is to have the record placed in such shape that the truth may be judicially ascertained before final judgment against him."

The petition set forth the particular facts which, it is alleged, do not sufficiently appear in the findings, and prayed that the plaintiff might be allowed to make proof of them, "and that the omissions and mistakes in the findings of fact hereinbefore stated be supplied and corrected, to the end that the record of said cause may be a true record before judgment is entered in pursuance of said mandate; or, if such judgment is first entered, then that such judgment may be opened and a new trial ordered."

The mandate of this court was issued February 19, 1885, and was filed in the court below. A judgment in conformity with it was entered by the Circuit Court on the 2d of March, 1885. Subsequently, the application to amend the record, as prayed for in the petition, was overruled, and an order to that effect was entered. From that order the present writ of error was prosecuted.

Mr. A. J. Wintersteen for plaintiff in error. *Mr. Wayne MacVeagh* was with him on the brief.

Mr. J. D. McCleverty for defendant in error.

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

In the original action upon the bonds held by Hickman, a jury having been waived by written stipulation of the parties, the Circuit Court proceeded to final judgment upon a special finding of facts. The judgment was the one the court intended to enter, and the facts found were those only which the court intended to find. There is here no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of record. The case, therefore, does not come within the rule, that a court, after the expiration of the term, may, by an order *nunc pro tunc*, amend the record by inserting what had been omitted by the act of the clerk or of the court. *In re Wight, Petitioner*, 134 U. S. 136, 144; *Fowler* v. *Equitable Trust Co.* (1), *ante*, 384; *Galloway* v. *McKeithen*, 5 Iredell (Law), 12; *Hyde* v. *Curling*, 10 Missouri, 227. Nor is this a suit in equity to set aside or vacate the judgment upon any of the grounds on which courts of equity interfere to prevent the enforcement of judgments at law. It is simply an application by petition to a court of law, after its judgment has been reversed, and a different judgment directed to be entered, to so change the record of the original judgment as to make a case materially different from that presented to the court of review. The application derives no strength from the fact that it was by petition, and not by motion supported by affidavits.

We know of no precedent for such a proceeding as this, nor is there any principle of law upon which it could be based. In *Bronson* v. *Schulten*, 104 U. S. 410, 415, the court, after adverting to the general rule that the judgments, decrees or other orders of a court, however conclusive in their character, are under its control during the term at which they are rendered, and may be set aside, vacated, modified or annulled by it, said: "It is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond

its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been applied by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." The same principles had been announced in *Sibbald* v. *United States*, 12 Pet. 488, 492. The exceptions to the general rule, such as suits in equity, and writs of error *coram vobis* at law, do not embrace the present application. See also *Phillips* v. *Negley*, 117 U. S. 665, 674, 675; *Cameron* v. *McRoberts*, 3 Wheat. 591; *McMicken* v. *Perin*, 18 How. 507, 511.

Judgment affirmed.

The Chief Justice and Mr. Justice Gray did not hear the argument, and took no part in the decision of this case.

McCLAIN *v.* ORTMAYER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 44. Argued October 20, 21, 1891. — Decided November 2, 1891.

If a patentee describes and claims only a part of his invention he is presumed to have abandoned the residue to the public.

Where a claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention: but if the language of the specification and claim shows clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not fall within the terms which the patentee has himself chosen to express his invention.

The first claim in letters patent No. 259,700, issued June 20, 1882, to Edward L. McClain for a pad for horse-collars, when construed in accordance with these principles, is not infringed by the manufacture and sale of

sweat pads for horse-collars under letters patent No. 331,813, issued December 8, 1885.

Whether a variation from a previous state of an art involves anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition.

The doctrine which prevails to some extent in England that the utility of a device is conclusively proven by the extent to which it has gone into general use cannot be applied here so as to control that language of the statute which limits the benefit of the patent laws to things which are new as well as useful.

In a doubtful case the fact that a patented article has gone into general use is evidence of its utility; but not conclusive of that, and still less of its patentable novelty.

Letters patent No. 267,011, issued May 13, 1884, to McClain for a pad fastening are void for want of novelty in the alleged invention.

THE court stated the case as follows:

This was a bill in equity for the infringement of two letters patent granted to appellant McClain, viz. patent No. 259,700, issued June 20, 1882, for a "pad for horse-collars," and patent No. 267,011, issued November 7, 1882, for an improvement upon the same. Another patent, numbered 298,626, issued May 13, 1884, to J. Scherling for a "pad fastening," and assigned to the appellant, was originally included in the suit, but was abandoned upon the argument in this court.

In the specification of the first patent, No. 259,700, the patentee stated that his invention related "to that class of horse-collar pads which are placed between the collar and the horse's shoulders, and are adjustably attached to the collar and known as 'sweat pads,'" the object of the invention being "to produce a sweat pad for a horse-collar which can be easily and readily attached to or taken from the collar, and which can be fitted to collars varying in size."

He further stated that the pad proper was "made so as to form an intermediate cushion between the collar and the horse's shoulders and of a size such as to entirely isolate the collar from all portions of the horse's shoulders. . . . The sweat pad, as just described, is not claimed as a new invention. My improvements consist in the addition of springs *s s* and choke-strap billet loop *b*. The top ends of the pads or bodies

are adjacent [to] the withers of the neck, and are provided with elastic springs — steel — which are so made as to be capable of being opened and then clasped around the body of the sides of the collar. Thus one end of a spring is so curved as to partly encircle the fore wale or small roll of the collar and to hug it so closely as to keep out of the way of the hame, and the other end is so curved as to similarly partly encircle and hug the after wale or body side of the collar and yet not interfere with the hame. Such construction will enable the pad to be easily and readily attached at its top ends to the top ends of the collar, and also will permit of attachment at variable positions along the sides of the collar, so that it can be easily fitted to collars of different sizes."

His claim was —

"1. As attachments to a sweat or other horse-collar pad, the elastic springs *s s*, substantially as described, and for the purposes set forth."

There was a second claim, which, however, became immaterial.

Patent No. 267,011 was for an improvement upon the prior patent, and consisted in discarding that portion of the spring of such patent as embraced the after roll of a collar, and in using the fore roll only. In this connection the patentee stated "that said spring S differs materially from the spring in my previous patent. First, this spring has but one curved portion, intended for the fore roll only of the collar, instead of a curved portion for the fore roll and one for the back roll. The single-roll spring is applicable where the two-roll spring could not be used, and is preferable and cheaper even where the latter can be used. . . . It is therefore seen that the two-roll springs are much more cumbersome to use than single-roll springs, while when the curves of the two-roll springs are repeatedly and much bent they lose their elasticity, and consequently their usefulness. . . . A great feature possessed by pads having the single curved springs is that they can be easily and speedily removed from or attached to a collar, and therefore can be separated from the collar when it is removed from a horse's neck. As an article of manufacture the single-roll spring can be made and attached to a pad at much less

Counsel for Parties.

expense than a two-roll spring. First, it does not require so much material; second, it is easier to form and may not require tempering, as the tempered steel in the market may answer where it has been found that such steel will not do for a two-roll spring; third, it is more convenient to attach by riveting by hand or by machinery, for riveting machinery now in use can be used on a single-roll spring, but not on a two-roll one, since the curved ends of the latter project over the rivets."

The claims of this patent were:

"1. As an attachment to a horse-collar pad or other harness pad, and as a means of adjustably attaching a pad to a horse-collar or other part of harness, the elastic single-roll or single-curved spring S, constructed, arranged, attached and operating substantially in the manner shown or described, and for or with the purposes set forth.

"2. The combination, with a horse-collar pad, of elastic single-roll or single-curve spring S, substantially in the manner shown or described, and for the purposes set forth."

The answer of defendants denied that the invention relied upon was novel, or that the alleged inventors were the first or original inventors thereof, and also denied that the said improvements contained any invention when compared with the prior art. To the charge of infringement the defendants answered as follows: "These defendants, on their own understanding of the scope and meaning of said several letters patent, and on the advice of counsel in relation thereto, deny that they have ever, in any way, infringed upon the same or upon any of them or upon any claim thereof."

Plaintiff's bill was dismissed by the Circuit Court upon the ground that the first patent was not infringed, and that the second patent, in view of the first, and of the other devices offered in evidence, was void for want of novelty. The opinion of the court is reported in 33 Fed. Rep. 284.

Mr. James Moore and *Mr. Edmund Wetmore* for appellant.

Mr. Thomas A. Banning (with whom was *Mr. Ephraim Banning* on the brief) for appellees.

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

(1) The defence to the first patent was rested principally upon the question of the infringement. Defendants in their answer admitted that they had, as a corporation and individually, manufactured and sold sweat pads for horse-collars under letters patent issued to defendant Ortmayer; "that is to say, sweat pads adapted to be fastened or secured to the collar by a simple hook made of wire, arranged to clasp the front roll of the collar, but not in any way having or employing the pretended inventions and improvements described and claimed in said several letters patent, or either of them."

This patent to Ortmayer, numbered 331,813, exhibits a horse-collar, a sweat pad, a hook made of wire, "its curved or hooked portion being so bent or formed as to clasp the outer or exposed part of the front roll of the collar, and so as to have a broad bearing thereon." The hook is connected to the pad in such a manner as to be joined or hinged thereto so as to be capable of being turned in the fold of the leather. Says the patentee: "To apply the pad to the collar it is only necessary to arrange it underneath the collar in the usual manner, first raising the hooks DD, and then pushing them downward, so that they will clasp the front roll of the collar."

It is evident from this patent and from the entire testimony that the defendants made use of a single hook D, embracing the front roll of the collar only, while the appellant McClain has limited himself, perhaps unnecessarily, to the elastic springs *s s*, which the drawings and the whole tenor of the specification show to be double and intended to be clasped around both the fore and after wales of the collar. While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court, to construe such claims to include more than their language fairly imports. Nothing is better settled in the law of patents than that the patentee may claim the whole or only a part of

his invention, and that if he only describe and claim a part, he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery," is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it. Thus in *Keystone Bridge Company* v. *Phœnix Iron Company*, 95 U. S. 274, 278, the manufacture of round bars, flattened and drilled at the eye, for use in the lower chords of iron bridges, was held not to be an infringement of a patent for an improvement in such bridges where the claim in the specification described the patented invention as consisting in the use of wide and thin drilled eye bars applied on edge. In delivering the opinion of the court, Mr. Justice Bradley observed: "It is plain, therefore, that the defendant company, which does not make said bars at all," (that is, wide and thin bars,) "but round or cylindrical bars, does not infringe this claim of the patent. When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. . . . But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct, (as they always should be,) the patentee, in a suit brought upon the patent, is bound by it. . . . He can claim nothing beyond it."

Similar language is used in *Railroad Company* v. *Mellon*, 104 U. S. 112, in reference to a patented locomotive wheel. In *Masury* v. *Anderson*, 11 Blatchford, 162, 165, it was said by Mr. Justice Blatchford: "The rights of the plaintiff depend upon the claim in his patent, according to its proper construction, and not upon what he may erroneously suppose it

covers. If at one time he insists on too much, and at another on too little, he does not thereby work any prejudice to the rights actually secured to him." Other cases to the same effect are *Merrill* v. *Yeomans*, 94 U. S. 568; *Burns* v. *Meyer*, 100 U. S. 671; and *Sutter* v. *Robinson*, 119 U. S. 530.

It is true that, in a case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention; but if the language of the specification and claim shows clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention. The principle announced by this court in *Vance* v. *Campbell*, 1 Black, 427, that, where a patentee declares upon a combination of elements which he asserts constitute the novelty of his invention, he cannot in his proofs abandon a part of such combination and maintain his claim to the rest, is applicable to a case of this kind where a patentee has claimed more than is necessary to the successful working of his device.

Applying these familiar principles to the case under consideration, we are forced to the conclusion that the curved hook of the defendant is not an infringement of the double spring described in the plaintiff's specification and claim. While a single spring or hook embracing the fore wale of a collar may be equally as efficacious, the patentee is no more at liberty to say that the spring encircling the after wale is immaterial and useless than was the patentee in *Vance* v. *Campbell* to discard one of the elements of his combination upon the same ground. This was evidently the theory of the patentee himself, since, a little more than two months after this patent was issued, in a letter to the Patent Office of September 2, 1882, in which he made application for his second patent, covering the single-roll spring, he stated that "the single-roll spring must be conceded to be a structure positively and unequivocally different from the two-roll spring." There being no infringement of this patent, there can be no recovery upon it.

(2) The second patent was principally contested upon the ground of want of invention. In his specification the patentee

states it to be an improvement upon his prior patent, but differing materially from it in the fact that "this spring has but one curved portion, intended for the fore roll only of the collar, instead of a curved portion for the fore roll and one for the back roll." It seems from his letter to the Patent Office of September 2, 1882, to which reference has already been made, that in endeavoring to practice the invention in his prior patent, he found that the two-roll spring was not generally applicable to collars of different sizes, as it had been supposed it would be; as the rolls in collars of different sizes and of different make varied so much that, while it would make a pad applicable to collars of different sizes for light work, the same pad could not be used on collars for heavy work, and hence the invention proved to be imperfect. This resulted in the invention of the single-roll spring of his second application.

Practically, the only novelty consists in cutting the double-roll spring in two and using the fore roll only. While this enables the pad to be located on the collar more readily than when two springs were used, the roll performs the same function as in the prior patent, and the patent can only be sustained upon the theory that the discarding of the after roll involved invention. What shall be construed as invention within the meaning of the patent laws has been made the subject of a great amount of discussion in the authorities, and a large number of cases, particularly in the more recent volumes of reports, turn solely upon the question of novelty. By some, invention is described as the contriving or constructing of that which had not before existed; and by another, giving a construction to the patent law, as "the finding out, contriving, devising or creating something new and useful, which did not exist before, by an operation of the intellect." To say that the act of invention is the production of something new and useful does not solve the difficulty of giving an accurate definition, since the question of what is new as distinguished from that which is a colorable variation of what is old, is usually the very question in issue. To say that it involves an operation of the intellect, is a product of intuition,

or of something akin to genius, as distinguished from mere mechanical skill, draws one somewhat nearer to an appreciation of the true distinction, but it does not adequately express the idea. The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition.

Counsel for the plaintiff in the case under consideration has argued most earnestly that the only practical test of invention is the effect of the device upon the useful arts — in other words, that utility is the sole test of invention, and, inferentially at least, that the utility of a device is conclusively proven by the extent to which it has gone into general use. He cited in this connection certain English cases which go far to support his contention. These cases, however, must not be construed in such way as to control the language of our statute, which limits the benefits of patent laws to things which are new as well as useful. By the common law of England, an importer — the person who introduced into the kingdom from any foreign country any useful manufacture — was as much entitled to a monopoly as if he had invented it. Thus in *Darcy* v. *Allin*, Noy, 173, it is stated that "where any man, by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before . . . the king may grant to him a monopoly patent . . . in consideration of the good that he doth bring by his invention to the commonwealth," citing several instances of skill imported from foreign countries. In *Edgebury* v. *Stephens*, 1 Webster's Pat. Cas. 35,

it was said: "The act [of monopolies] intended to encourage new devices useful to the kingdom, and whether learned by travel or by study it is the same thing."

It is evident that these principles have no application to the patent system of the United States, whose beneficence is strictly limited to the invention of what is new and useful, and that the English cases construing even their more recent acts, must be received with some qualification. That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market and large commissions to dealers, as by the intrinsic merit of the articles themselves. The popularity of a proprietary medicine, for instance, would be an unsafe criterion of its real value, since it is a notorious fact that the extent to which such preparations are sold is very largely dependent upon the liberality with which they are advertised, and the attractive manner in which they are put up and exposed to the eye of the purchaser. If the generality of sales were made the test of patentability, it would result that a person by securing a patent upon some trifling variation from previously known methods might, by energy in pushing sales or by superiority in finishing or decorating his goods, drive competitors out of the market and secure a practical monopoly, without in fact having made the slightest contribution of value to the useful arts. The very case under consideration is not barren of testimony that the great success of the McClain pads and clasping hooks, a large demand for which seems to have arisen and increased year by year, is due, partly at least, to the fact that he was the only one who made the manufacture of sweat pads a specialty, that he made them of a superior quality, advertised them in the most extensive and attractive manner, and adopted means of pushing them upon the market, and thereby largely increased the extent of their sales. Indeed it is impossible from this testimony to say how far the large sales of these pads is due to their superiority to others, or to the energy with which they were forced upon the market.

Syllabus.

While this court has held in a number of cases, even so late as *Magowan* v. *The New York Belting and Packing Co. ante*, 332, decided at the present term, that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that — much less of its patentable novelty.

In no view that we have been able to take of the case can we sustain the second McClain patent. We do not care to inquire how far it was anticipated by the various devices put in evidence, showing the use of a similar spring for analogous purposes, since we are satisfied that a mere severance of the double spring does not involve invention, at least in the absence of conclusive evidence that the single spring performs some new and important function not performed by it in the prior patent. The evidence upon this point is far from satisfactory, and the decree of the Circuit Court must, therefore, be

Affirmed.

The Chief Justice and Mr. Justice Gray did not hear the argument and took no part in the decision of this case.

McLEAN *v.* CLAPP.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 31. Argued October 15, 16, 1891. — Decided November 2, 1891.

Grymes v. *Sanders*, 93 U. S. 55, affirmed and applied to the point that where a party desires to rescind a contract upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose and adhere to it, and that if he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.

A holder of the legal title to real estate who has no equitable interest therein, cannot, by his act done without the knowledge or consent of the holder of the equitable title, who is in possession of and residing on the premises claiming title, rescind a completed settlement of a mortgage

debt on the premises so as to bind the holder of the equitable title, and prevent him from setting up defences which would otherwise be open to him.

In equity. Decree dismissing the bill. The plaintiffs appealed. The case is stated in the opinion.

Mr. Edwin B. Smith for appellants.

Mr. Solomon H. Bethea and *Mr. Sherwood Dixon* for appellees.

Mr. Justice Brewer delivered the opinion of the court.

In December, 1855, Edwin W. McLean, owning a store and stock of goods in Amboy, Illinois, sold the same to Ruggles W. Clapp, in payment for which he received four notes, amounting in the aggregate to five thousand nine hundred and eighteen and sixty-six one-hundredths dollars, drawing ten per cent interest, and secured by mortgage on four hundred and eighty acres of land. The first of these notes, for five hundred dollars, due in twenty-five days, was paid; the others were not. The last of the notes became due in May, 1857. Soon thereafter suit was commenced in the state court on them, and to foreclose the mortgage. In this suit the defence of usury was pleaded. A settlement was made with Clapp, in pursuance of which the three unpaid notes were surrendered; and in lieu thereof there was taken a draft for one thousand dollars, drawn on his brother, Alfred Clapp, of New York City; and eleven notes, five for two hundred dollars each, dated June 10, 1857, made by William Jones to Ruggles W. Clapp, three made by Cyrus Craig, November 29, 1856, to Ruggles W. Clapp, two for one thousand dollars each and one for fourteen hundred dollars; and three made by Curtis Cannon, August 1, 1857, to Ruggles W. Clapp, for four hundred and thirty-three and thirty-three one-hundredths dollars each. These notes were all endorsed "without recourse," and were nominally, at least, secured by conveyances of real estate. Also, to secure the draft, on which only $250 was ever paid, a conveyance was made of a lot and building in the

town of Amboy. There was no formal release of the mortgage; but the suit to foreclose was dismissed. This settlement was consummated some time in the latter part of 1857, or the fore part of 1858; and was consummated on the part of McLean by W. E. Ives, his attorney at Amboy, McLean himself having moved after the sale of the store to Great Barrington, Massachusetts, though it is claimed by the defendants that the terms of the settlement were agreed upon between McLean and Clapp in the summer of 1857, when McLean was on a visit to Amboy. In the summer of 1861 McLean, dissatisfied with the conduct of Ives as his attorney, discharged him and placed his business in the hands of one M. L. Arnold. While Arnold testified that in the same summer he notified Clapp that McLean repudiated the settlement, nothing was in fact done looking toward a repudiation until May, 1872, when this suit was commenced in the Circuit Court of the United States, by McLean, to set aside the settlement, and foreclose the mortgage, as though it still remained security for the original notes. Answers were filed, and some preliminary steps taken in the case during one year, and up to May, 1873. From that time no order was made or proceedings had in the case until July, 1882, when it was dismissed for want of prosecution. In the November following the order of dismissal was set aside and the case reinstated, and leave given to file a bill of revivor in the name of the widow and heirs of McLean, who had died in 1875. The case thereafter proceeded regularly till May, 1887, when, upon final hearing, the bill was dismissed.

The contentions of defendants are substantially — first, that McLean himself arranged the terms of the settlement of 1857; that he did this understandingly and without any fraud or misrepresentations on the part of Clapp, and hence cannot now repudiate it; secondly, that if he did not himself arrange such terms, he was in 1861 fully informed of the character and value of the paper and securities received by his agent in the settlement, and that with such full information he thereafter acquiesced in and ratified it; and, thirdly, that his laches and delay in asserting his rights forbid any recovery against

the present holders of the property conveyed by the original mortgage.

We notice only the second of these contentions. If the settlement by which the original notes were surrendered was made under such circumstances that McLean had a right to repudiate it, it was his duty to do so as soon as advised of all the circumstances justifying such repudiation; and he also must have repudiated it *in toto*. The settlement was a new contract between him and Clapp, and the law is clear that he cannot take the benefits of that contract and repudiate its burdens. The rule is thus stated by this court in the case of *Grymes* v. *Sanders*, 93 U. S. 55, 62: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. *Thomas* v. *Bartow*, 48 N. Y. 200; *Flint* v. *Wood*, 9 Hare, 622; *Jennings* v. *Broughton*, 5 DeG. M. & G. 139; *Lloyd* v. *Brewster*, 4 Paige, 537; *Saratoga & S. R. R. Co.* v. *Rowe*, 24 Wend. 74; *Minturn* v. *Main*, 3 Seld. 220; 7 Rob. Prac. c. 25, sect. 2, p. 432; *Campbell* v. *Fleming*, 1 Ad. & El. 41; Sugd. Vend. (14th ed.) 335; *Diman* v. *Providence W. & B. R. R. Co.*, 5 R. I. 130."

If McLean did not himself arrange the terms of this settlement, if he was not at the time it was made fully informed of the character and value of the securities taken in exchange, he did become so fully informed in 1861, when he visited Amboy, and, discharging Ives, transferred his affairs to the control of Arnold. This appears distinctly from his own testimony. Now, if he desired to rescind his contract, his duty was at once to return what he had received, and repudiate wholly and forever the transaction. So far from doing this,

he did exactly the contrary; he retained all the notes and securities received under the settlement, and has never yet returned one of them. He took and held possession of all the real estate. As late as March 12, 1868, he conveyed a part of it to Cephas Clapp for eight hundred and fifty dollars. In November, 1867, he deeded to his agent Arnold another tract for one hundred and fifty dollars. It is true that Arnold testifies that he was to have this land to help him pay the expense of prosecuting this suit if unsuccessful, and that he was to hold it so as to tender it back to the defendants if successful. The letters, however, which accompanied this transaction indicate that it was an absolute sale, with no such conditions; and it appears, also, that a note of one hundred and fifty dollars was sent by Arnold to McLean in payment for the land. Further, he collected rent for the building in Amboy, which was conveyed to him as security for the draft, until it burned down in 1865. He also paid taxes on other tracts of land conveyed in this settlement, and collected rents therefrom — some rent being collected by Mr. Arnold for the benefit of the present complainants, as late as 1881 and 1882 — after McLean's death and the commencement of this suit. So even if we credit the testimony of his agent, that in 1861 he notified Clapp of an intent to rescind, (and Mr. Arnold's integrity as a witness is strongly impeached by many witnesses,) still the conduct of McLean in reference to the property for a series of years, long after 1861, is at variance with the idea of rescission, and was plainly a ratification of that settlement; and brings the case clearly within the rule laid down by this court, in the case just cited. He acted as owner, and assumed all the rights and burdens of ownership. He became owner only through that settlement. His conduct, after full knowledge, ratified and affirmed the settlement, and by it the original notes were paid, and the lien of the mortgage in fact discharged.

Were this all that appeared in the case, there would be nothing rising to the dignity of a question. But it is said, and this is the strong point made by the complainants in this respect, that in 1863 Ruggles W. Clapp consented to a rescis-

sion, and directed McLean to do just what he did in reference to this property; that at that time Lot Chadwick, the ancestor of those defendants who are making the contest, had acquired no interest in the realty, but the title stood as it did when the mortgage was given; that the mortgagor and mortgagee had a right to rescind that settlement, and authorize the latter to do just what he did with the property conveyed in the settlement without prejudice to the continuance of the lien of the mortgage; and that, as the latter was never in form released, Chadwick purchased with full notice. The consent of Ruggles W. Clapp to this arrangement is evidenced, as is claimed, by two letters, as follows:

"New York City, *May 15th*, 1863.

"M. L. Arnold, Amboy, Ill.

"*Dear Sir:* Your letter of 20th ult. is received and contents noted. About those notes and securities left in your hands by McLean you write that they are worthless or nearly so. I think something can be made off from them. You sell them and make the most you can; apply on mortgage I gave McLean. Any arrangement you can make with my brother Henry to compromise the matter will be satisfactory to me. I have some land in Whiteside County which I would like to let you have. I cannot now say when I will be in Amboy; will try and see you when I am there again. If you compromise the matter with Henry, have McLean release the mortgage from record.

"Yours truly, R. W. Clapp."

"Fountain Hotel, Eighth Street,

"Baltimore, Md. *June 20th*, 1863.

"M. L. Arnold.

"*Dear Sir:* Your favor of 10th inst. I received at Washington. In reply I would say that I wrote you from New York about the middle of last month, giving you full particulars how to proceed. I think it would be well to sell the Craig property, get the most you can, and apply on the McLean mortgage. The notes you say are worthless, or nearly so,

except what can be made off the Craig property. I see no other way for you to do in the case but to make what you can out of the securities and apply on mortgage and fall back on the land to make up deficiency. I think it would be well for you to see my brother Henry again, and see if you can in any way effect a compromise. He has written to me recently stating that you had been to see him and had offered to settle for fifty cents on the dollar, but that you had effected no settlement, although he thought he would be able to do so. As I wrote in my last, do the best you can, and any compromise you can make with Henry will be satisfactory to me. I want the matter closed up.

"I remain respectfully yours, R. W. CLAPP."

It is urged by defendants that these letters were not written on the dates they bear, but long after Lot Chadwick had acquired his interest in the realty, and for the purposes of bolstering up this suit; and there is some reason to believe that their contention is correct. But we do not deem it necessary to rest upon this, and for reasons which will become apparent when other facts disclosed by the record are stated. Preliminary thereto it may be well to notice that these letters do not in terms either propose or assent to a rescission of the settlement. It is true that may be implied from the direction to sell the securities and apply on the mortgage; but each letter refers the matter of settlement to his brother Henry — suggests compromise with him — and in advance assents to any arrangement that may be made with Henry. If Ruggles W. Clapp were the only party interested in the property mortgaged, the letters might fairly be construed as a consent to the rescission and a reinstatement of full liability under the original mortgage; but the language is that of one who felt that he had no interest in the property, and was willing that the mortgagee should do whatever he could to secure full payment, with all the time a clear reference to his brother Henry as the party really interested. Now it appears from the record, that in 1852 or 1853 Henry Clapp bought these lands from the government — built a house thereon and en-

tered into occupation of them — and remained in open and notorious occupation of them until 1869, the time he sold them to Lot Chadwick. Because he was in some financial embarrassment, and because he had borrowed money of Edwin and Jason Clapp, he caused the patents to be issued in their name, they holding the legal title as security for the money they had advanced. In 1855 Ruggles W. Clapp proposed to purchase the store and stock of goods referred to from McLean, for the joint benefit of himself and his brother Henry, and in order to furnish security for this purchase, Henry caused Jason and Edwin to deed the lands to Ruggles, in order that he might execute this mortgage to McLean. Prior to this conveyance the claim of Edwin and Jason had been paid, so that the legal title was placed in Ruggles simply for the purpose of the mortgage, the equitable title remaining in Henry; and as he was living on the place, and in full, exclusive and open possession, notice of his equitable interest in the property was thereby given to McLean, as to every one else. *Landes* v. *Brant*, 10 How. 348; *Lea* v. *Polk County Copper Co.*, 21 How. 493; *Noyes* v. *Hall*, 97 U. S. 34; the latter an Illinois case. Ruggles never had any equitable interest in the property. He took the legal title simply as a conduit, through which the mortgage lien might pass. When, therefore, by the settlement the notes were paid and surrendered, Ruggles held only the naked legal title, with no power to further incumber the land for any purpose. These letters of Ruggles, if written on the dates they bear, were not written until two years after McLean had full knowledge of the character and value of the securities, and when, by his conduct in retaining possession, paying taxes and receiving rents, he had ratified and approved the settlement. Ruggles W. Clapp could not then, even if he were ever so much disposed, by any arrangement with McLean, replace an incumbrance on the real estate. He might bind himself, but he could not bind Henry, nor burden Henry's full, unincumbered, though only equitable, title to the property. In January, 1861, Ruggles W. Clapp quit-claimed the land to Henry, and in March, 1869, Henry deeded to Lot Chadwick, whose heirs are the real defendants here, and in whom the legal title now rests.

Summing up this matter, it appears that this alleged rescission by consent was made five or six years after the settlement and two years after McLean had been fully informed of all the circumstances which justified a rescission; and after he, with full knowledge, had ratified and affirmed it. Under those circumstances, though binding upon Ruggles W. Clapp, the party consenting thereto, it was not binding upon others who did not consent; and especially not on Henry Clapp, the owner of the full equitable title, who neither knew of nor consented to this rescission. After the lien had once been discharged, under such circumstances that it was beyond the recall of the mortgagee, no act or consent of Ruggles W. Clapp, the mortgagor, could renew the incumbrance upon the lands. Henry Clapp's full equitable title was, therefore, not disturbed or incumbered by this alleged voluntary rescission.

Our conclusion, therefore, is that the decree of the Circuit Court was right and must be affirmed. It may also be a question whether the delay and laches in bringing this suit would not bar a recovery; but we do not care to enter into any consideration of this question, as the equity of the matter we have considered is clear.

Decree affirmed.

The Chief Justice, Mr. Justice Bradley and Mr. Justice Gray did not hear the argument nor take part in the decision of this case.

KNEELAND *v.* LUCE.

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

No. 38. Argued October 16, 19, 1891. — Decided November 2, 1891.

In a suit in equity for the foreclosure of a railroad mortgage this court holds, on appeal by the purchaser at the foreclosure sale from a decree declaring the claim of an intervenor to be a lien upon the property, that the record is too meagre for it to determine whether there was any error in the decree.

A stipulation in this case that "testimony heretofore taken and filed in this cause" "may be used in any future litigation touching" the subject of the controversy in the suit is *held* not to import into the suit testimony from other records in this court; it not appearing by this record that such testimony was used by the appellant in the hearing below, or that the appellees were parties to the stipulation.

IN EQUITY. The case is stated in the opinion.

Mr. John M. Butler and *Mr. Robert G. Ingersoll* for appellant.

Mr. Charles Pratt for appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

This is an appeal from a decree in favor of Newton and Luce, as intervenors in the foreclosure case of *The Central Trust Company of New York and others* v. *The Toledo, Delphos and Burlington Railroad Company and others*, entered in the Circuit Court of the United States for the District of Indiana, Kneeland, the appellant, being the purchaser at the foreclosure sale.

The facts disclosed by the record (and by this record the case must be determined) are these: The foreclosure decree was entered on November 12, 1885. On January 8, 1886, intervenors filed in the office of the clerk of the Circuit Court their claim, in the shape of a decree entered December 12, 1885, by the Circuit Court of the United States for the Northern District of Ohio, in a case entitled *The Central Trust Company of New York and others* v. *The Toledo, Delphos and Burlington Railroad Company and others*, which decree finds that there is due to intervenors the sum of eight thousand and twenty-eight dollars and ninety-six cents, for land sold to the railroad company, and which amount thus found to be due is a lien upon the property mortgaged by the railroad company prior to that mortgage. This claim, with many others, was referred to masters, who reported in favor of its allowance and priority, which report was approved by the court and a decree entered accordingly, from which decree this appeal has been taken.

Opinion of the Court.

It appears from the statements of counsel, and impliedly from the record, that the principal foreclosure proceedings were had in the Indiana court; but that ancillary proceedings were had in the Circuit Court of the United States for the Northern District of Ohio, and in these ancillary proceedings the decree of December 12, 1885, was entered.

Without noticing other questions which were discussed by counsel, it is enough to say that this record is too meagre for us to determine whether there was any error in this decree. The testimony taken before the masters is not preserved, nor do we find even the final report of the masters made March 10, 1887, and upon which the decree was entered. While two prior reports of the masters, made separately, are partially preserved in the record, yet in them is simply a reference to the claim of intervenors, and a statement that it is based upon the decree rendered in the Ohio court. As the final report is omitted, we know not what showing of facts it contained, and as the testimony presented to the masters for consideration and afterward to the court is not preserved, how can it be adjudged that there was any error in the decree? So far as respects the decree of December 12, 1885, in the Ohio court, it discloses a *prima facie* claim at least in favor of the intervenors; for while it finds that no deed had been delivered, it also finds that the railroad company purchased and held the land under a contract set forth in paragraph three of the answer. But the answer is not in the record, nor that contract; so we know nothing of its terms or what liabilities it cast upon the railroad company. The decree also finds that the property thus purchased and held by the railroad company was a part of that covered by the mortgage being foreclosed; and that such mortgage was a lien on the property, but a lien subordinate to the claim of intervenors. And it further finds, that the lands so purchased and held were a part of the right of way of the railroad company. As the final decree of foreclosure and sale entered in the Indiana court directed a sale of the entire right of way, these lands were apparently included in the property purchased by Kneeland. So far then as the facts are disclosed by this record, the ruling of the Circuit

Court was right in directing the payment of the balance due on the purchase of these lands.

Counsel for appellant, however, referred us to the records in other cases which have come to this court; and insisted that by the facts appearing in them it is clear that the intervenors were not entitled to priority. It is enough to say that those facts are not before us. It is true, that in this record after the entry of the final decree of foreclosure, of November 12, 1885, there is found this stipulation: "It is hereby stipulated that the testimony heretofore taken and filed in this cause, under the reference to A. J. Ricks, special master, may be used in any future litigation touching Toledo terminal property, with the same effect as though originally taken therein, each party to such future litigation reserving the right to take additional testimony if so advised; and the purchaser at foreclosure sale shall take subject to this provision, and shall be deemed to have assented thereto." But that stipulation does not bring into this record all the testimony referred to; and which, as counsel say, may be found in the other records. What part of such testimony was used in the hearing of this intervention is not disclosed; nor whether any additional testimony was taken. The stipulation only gives permission to use such testimony. But how do we know that any of it was used? But, further, it is signed by no one, and in terms names no one, and so could of course be binding only upon the parties to the record, and those who in fact assented to it. While Luce and Newton, the intervenors, were named in the amended bill of complaint in the Indiana court as parties defendant, there is nothing to show that they were ever served with process, or ever appeared or answered. More than that, by the final decree of foreclosure, entered November 12, 1885, Luce and Newton, with others, were dismissed from the case as parties defendant. So, summing this up, there is nothing to show that Luce and Newton were ever in fact parties to the litigation in the Indiana court. It appears affirmatively that if they ever were served with process or appeared, they were dismissed before this stipulation was entered into, and that they did not sign it. Hence, it was not binding upon them,

nor could it be invoked as against them by Kneeland, the purchaser. The case then is one of a claim apparently good, sustained by the decree of the trial court, and brought here for review without any of the testimony introduced in the trial court, and upon which its decree was based. Of course on such a record no error can be adjudged.

The decree is

Affirmed.

The CHIEF JUSTICE, MR. JUSTICE BRADLEY and MR. JUSTICE GRAY did not hear the argument nor take part in the decision of this case.

CROSBY STEAM GAGE & VALVE COMPANY *v.* CONSOLIDATED SAFETY VALVE COMPANY.

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

No. 999. Argued October 22, 1891. — Decided November 2, 1891.

On an accounting as to profits and damages, on a bill for the infringement of letters patent No. 58,294, granted to George W. Richardson, September 25, 1866, for an improvement in steam safety-valves, the Circuit Court, confirming the report of the master, allowed to the plaintiff the entire profit made by the defendant from making and selling safety-valves containing the patented improvement, and this court affirmed the decree, on the ground that the entire commercial value of the defendant's valves was to be attributed to the patented improvement of Richardson.

It was held that the plaintiff's valves of commerce all of them contained the improvements covered by the patent of Richardson, and that, as the master had reported no damages, in addition to profits, the amount of profits could not be affected by the question whether the plaintiff did or did not use the patented invention.

It was proper not to make any allowance to the defendant for the value of improvements covered by subsequent patents owned and used by the defendant.

It was also proper not to allow to the defendant for valves made by the defendant and destroyed by it before sale, or after a sale and in exchange for other valves, which did not appear in the account on either side.

It was also proper not to allow a credit for the destroyed valves against the profits realized by the defendant on other valves.

Interest from the date of the master's report was properly allowed on the amount of profits reported by the master and decreed by the court.

Opinion of the Court.

In equity. The case is stated in the opinion.

Mr. Edmund Wetmore for appellant. *Mr. Joshua H. Millett* was with him on the brief.

Mr. Thomas William Clarke for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

On the 27th of May, 1879, the Consolidated Safety Valve Company, a Connecticut corporation, brought a suit in equity in the Circuit Court of the United States for the District of Massachusetts, against the Crosby Steam Gage and Valve Company, a Massachusetts corporation, for the infringement of letters patent No. 58,294, granted to George W. Richardson, September 25, 1866, for an improvement in steam safety-valves. The claim of that patent was as follows: "What I claim as my improvement, and desire to secure by letters patent, is — A safety-valve with the circular or annular flange or lip *c c*, constructed in the manner, or substantially in the manner, shown, so as to operate as and for the purpose herein described."

On the 2d of June, 1879, the same plaintiff brought a suit in equity in the same court against the same defendant, for the infringement of letters patent No. 85,963, granted to the same George W. Richardson, January 19, 1869, for an improvement in safety-valves for steam boilers or generators. The claim of that patent was as follows: "What I claim as new, and desire to secure by letters patent, is the combination of the surface beyond the seat of the safety-valve, with the means herein described for regulating or adjusting the area of the passage for the escape of steam, substantially as and for the purpose described."

In the answers in the two suits, the defence of want of novelty was set up, and alleged anticipating patents were referred to; infringement was denied; and it was averred that the valves made and sold by the defendant were the inventions of George H. Crosby, and were described in two patents granted to him and owned by the defendant, one, No. 159,157,

dated January 26, 1875, and the other, No. 160,167, dated February 23, 1875.

The same proofs were taken in the two suits, and they were heard together in the Circuit Court; in each suit a decree was made dismissing the bill (7 Fed. Rep. 768); and from each decree the plaintiff appealed to this court. Non-infringement was found by the Circuit Court. This court (113 U. S. 157) reversed the decree in each case, and directed the Circuit Court to enter a decree in each case sustaining the validity of the patent, decreeing infringement and awarding an account of profits and damages.

On receiving the mandate of this court in the suit on the patent of 1866, the Circuit Court, on the 18th of May, 1885, entered a decree in conformity therewith and for a recovery by the plaintiff of profits and damages from February 15, 1879, and ordered a reference to a master to take an account of such profits and damages. A like decree was made on the mandate in the suit on the patent of 1869. The date of February 15, 1879, was taken because that was the time when the title to each of the patents became vested in the plaintiff.

The master took voluminous proofs, and filed his report on the 5th of August, 1889, covering both of the suits. The report of the master found that the total profits which the defendant had derived from its manufacture and sale of steam safety-valves containing the improvement described and claimed in the patent of 1866, from February 15, 1879, to September 25, 1883, the date of the expiration of the patent, amounted to $40,344.59. Both parties filed exceptions to the report; and on the 11th of October, 1890, the Circuit Court entered a decree overruling both sets of exceptions and awarding to the plaintiff a recovery for the $40,344.59, with interest thereon from August 5, 1889, the date of the filing of the master's report, and the costs of the suit. From this decree the defendant has appealed. The opinion of the Circuit Court is reported in 44 Fed. Rep. 66.

The master says, in his report in the case, in respect to the patent of 1866, which he calls No. 1184, that, for the period from February 15, 1879, to September 25, 1883, he attributes

the entire commercial value of the valves manufactured and sold by the defendant to the improvement covered by the patent of 1866. He adds: "Richardson's invention, as described and claimed in that patent, revolutionized the art of relieving steam-boilers from steam pressure rapidly approaching the dangerous point. It made effective for that purpose — rapidly, and with comparatively small loss of steam — apparatus described in other patents, which very nearly embodied Richardson's invention, but did not actually contain it. The Supreme Court in these cases has defined this invention, and has declared it to be a vital one — a life-giving principle to structures very nearly approaching, but not quite containing an embodiment of, Richardson's discovery." The master also says in his report: "It was contended before me that none of the complainant's valves of commerce contained this invention of Richardson, but, upon the whole evidence, with specimens of all the different valves put on the market by the complainants before me, I find that they all contained Richardson's improvement of 1866. The Supreme Court has decided in these cases that the defendant's valves contain this invention, and it is under this decision that the accounting in No. 1184 is before me. Eliminate this invention from the defendant's valves and they would be commercially worthless. No substitute for this invention has been suggested to me, and I know of none which the defendants could have used in its place to have made their valves of commercial value. The defendants claim that some of the profits which they have made are due to the peculiar form of their valves, but the form which they used in making their valves was the form in which they clothed the Richardson invention, the life of their valves, and without that life the Crosby form is worthless."

The specifications and drawings of the two patents of Richardson are set forth at length in the report of the cases in 113 U. S. 157. The opinion of this court said (p. 178): "There is one structural difference between the two valves, which is now to be mentioned. In the Richardson valve, all the steam which escapes into the open air escapes from the huddling chamber, through a stricture which is smaller than the aper-

ture at the ground joint. In the defendant's valve, the valve proper has two ground joints, one at the inner periphery of the annulus and the other at its outer periphery, and only a part of the steam, namely, that which passes through one of the ground joints passes into the huddling chamber and then through the stricture, the other part of the steam passing directly from the boiler into the air, through the other ground joint. But all of that part of the steam which passes into the huddling chamber and under the extended surface, passes through the constriction at the extremity of such chamber, in both valves, the difference being one only of degree, but with the same mode of operation."

In respect to this point, one of the briefs for the appellant, now submitted, says: "The appellant's valve, in this case, known as the Crosby valve and made in accordance with the Crosby patents, is so constructed that it has two ground joints. When the valve rises, by reason of increased pressure, part of the steam escapes through one ground joint directly into the open air, and part of the steam escapes through the other ground joint into a huddling chamber, and thence into the air through orifices which form an aperture less than the ground joint orifice through which it enters said huddling chamber. Although the relief to the boiler caused by the blowing off of the valve was, in consequence of this double mode of escape for the steam, due to the combined effect of its escape through the huddling chamber and its escape through the second ground joint, yet, as all that part of the steam which entered the huddling chamber passed through the strictured opening, the court held that the valve contained the Richardson device, and was, therefore, an infringement."

The master further says, in his report: "The defendants claimed before me that the complainants, in the accounting in 1184, which relates only to the Richardson patent of 1866, should prove specifically the value of the invention secured to them under that patent as used by the defendants, and that, as it was claimed by complainants (and the Supreme Court has so decided) that defendants used also Richardson's invention of 1869, the value of the invention secured to the com-

plainants by the 1869 patent must be determined, and not made an element in the recovery to be had under the accounting in 1184. I have no means of determining the value of that invention as used by the defendants from February 15, 1879, to September 25, 1883, or of stating in dollars and cents how much of the profits of the defendants during that period is due to that invention. The complainants claimed that during that period all the profits of the defendants were due to the Richardson invention of 1866, and, as the Richardson invention of 1869 belonged also to the complainants, and as the complainants and defendants were respectively the same in each case, 1184 relating to the said invention of 1866 and 1199 relating to the invention of 1869, and as the said period from February 15, 1879, to September 25, 1883, was included within the period to be covered by the accounting in each case, no injustice is done the defendants in acceding to the complainant's claim in this regard; and this is especially so in view of the fact that the defendants claimed that the adjustable device as shown in the Richardson patent of 1869 is worthless as such, and that the cost of the Crosby valve is less without the said so-called adjustable ring and is a better and more useful safety appliance."

The master also found that the plaintiff had suffered no damages in addition to the profits to be assessed against the defendant, in regard to the patent of 1866.

The defendant's exceptions to the master's report cover the following points: (1) The disallowance to the defendant of the sum of $1978.34; (2) the finding that the Richardson valve sold by the plaintiff contained the invention set forth in the patent of 1866; (3) the finding that the entire commercial value of the valves made and sold by the defendant, between February 15, 1879, and September 25, 1883, was due to the improvement covered by the patent of 1866; (4) the failure to find that the plaintiff was entitled to recover only for the ascertained value of the improvements covered by the two patents over and above the value of previous safety-valves known to the art and open to be used by the defendant; (5) the failure to require the plaintiff to show what in fact was

the value attributable to the improvement of 1866; (6) the failure to require the plaintiff to show what was the value of the improvement of 1866, in comparison with the value of safety-valves previously known to the art and free to the defendant to be used; (7) the failure to find that the defendant was liable to account to the plaintiff for only a nominal sum; (8) to the same purport as exception 7; (9) the failure to ascertain what part of the profits of the defendant was due to the two patented improvements of Crosby; and (10) the failure to ascertain what part of the profits was due to the employment of the improvement covered by the patent of 1869.

The Circuit Court, held by Judge Colt, says in its opinion: "In judging of the correctness of the method pursued by the master in his estimation of defendants' profits, the construction put upon the Richardson 1866 patent, and the language used in respect thereto, as embodied in the opinion of the Supreme Court, cannot be disregarded. It was clearly the duty of the master in his findings, as it is also the duty of the court at the present time, to give full force and effect to the opinion of the Supreme Court. If the contention of the defendants is sound, that the Supreme Court, in their interpretation of the Richardson 1866 patent, gave too much prominence to the feature known as the 'huddling chamber with a strictured orifice,' it is for them, upon appeal, to obtain some modification of that opinion; but so long as it stands as the opinion of that court, the views therein expressed should be strictly carried out. The position, therefore, taken by the defendants, that the complainants are only entitled to nominal damages, because, as they say, the Richardson valve of commerce does not contain the huddling chamber with a strictured orifice, or, in other words, a huddling chamber with an aperture for the exit of the steam into the open air which is of smaller area than the aperture at the ground joint, I cannot regard as sound, in view of the opinion of the Supreme Court. That court construed the Richardson patents, and it held that defendants' valve was within those patents, and it gave a broad construction to the Richardson 1866 patent."

The opinion then says that the court approves and adopts

the conclusions reached by the master in the paragraphs before quoted from his report.

In the former opinion of this court, at 113 U. S. 170, it was said: "In the present case the defendant has introduced in evidence the before-named English patents to Ritchie, Webster and Hartley, and the English patent to William Naylor, No. 1830, granted July 1, 1863; and also letters patent of the United States, No. 10,243, granted to Henry Waterman, November 15, 1853, and the reissue of the same, No. 2675, granted to him July 9, 1867. In view of all these patents, and of the state of the art, it appears that Richardson was the first person who described and introduced into use a safety-valve which, while it automatically relieved the pressure of steam in the boiler, did not, in effecting that result, reduce the pressure to such an extent as to make the use of the relieving apparatus practically impossible, because of the expenditure of time and fuel necessary to bring up the steam again to the proper working standard. His valve, while it automatically gives relief before the pressure becomes dangerously great, according to the point at which the valve is set to blow off, operates so as to automatically arrest with promptness the reduction of pressure when the boiler is relieved. His patent of 1866 gave a moderate range of pressure, as the result of the proportions there specified, and his patent of 1869 furnished a means of regulating that range of pressure, by a screw-ring, within those narrow limits which are essential in the use of so subtle an agent as steam. In regard to all the above patents adduced against Richardson's patent of 1866, it may be generally said that they never were, in their day, and before the date of that patent, or of Richardson's invention, known or recognized as producing any such result as his apparatus of that patent produces, as above defined. Likenesses in them, in physical structure, to the apparatus of Richardson, in important particulars, may be pointed out, but it is only as the anatomy of a corpse resembles that of the living being. The prior structures never effected the kind of result attained by Richardson's apparatus, because they lacked the thing which gave success. They did not have the retarding stric-

ture which gave the lifting opportunity to the huddled steam, combined with the quick falling of the valve after relief had come. Taught by Richardson, and by the use of his apparatus, it is not difficult for skilled mechanics to take the prior structures and so arrange and use them as to produce more or less of the beneficial results first made known by Richardson; but, prior to 1866, though these old patents and their descriptions were accessible, no valve was made producing any such results. Richardson's patent of 1866 states that the addition to the head of the valve terminates in an annular lip, which fits loosely around the valve-seat, and is separated from it by about $\frac{1}{64}$th of an inch for an ordinary spring, and a less space for a strong spring, and a greater space for a weak spring, forming an annular chamber, and regulating the escape of the steam; that the steam, when the valve is lifted, passes beyond the valve-seat, and into the annular chamber, and acts against the increased surface of the valve-head, and thus overcomes the increasing resistance of the spring due to its compression, and lifts the valve higher, and the steam escapes freely into the open air, until the pressure is sufficiently reduced, when the spring immediately closes the valve. It is not shown that, before 1866, any known valve produced this result."

The opinion also said: "It appears to have been easy enough to make a safety-valve which would relieve the boiler, but the problem was to make one which, while it opened with increasing power in the steam against the increasing resistance of a spring, would close suddenly and not gradually by the pressure of the same spring against the steam. This was a problem of the reconciliation of antagonisms, which so often occurs in mechanics, and without which practically successful results are not attained. What was needed was a narrow stricture to hold back the escaping steam, and secure its expansive force inside of the lip, and thus aid the direct pressure of the steam from the boiler in lifting the valve against the increasing tension of the spring, with the result that, after only a small, but a sufficient, reduction in the boiler pressure, the compressed spring would, by its very compression, obtain the mastery and close the valve quickly. This problem was

solved by Richardson, and never before. His patent of 1869 describes the arrangement and operation of the whole apparatus, with the adjustable ring, thus: When the pressure of the steam lifts the valve, the steam acts against the surface of an annular space between the bevel of the valve-seat and the downward-projecting flange of the cap-plate, to assist in holding up the valve against the increasing resistance of the spring. The aperture between the valve and its seat is always greater than that between the flange and the upward-projecting rim, and thus the steam in the annular space assists in holding up the valve till the boiler pressure falls below that at which the valve opened. The difference between the closing pressure and the opening pressure depends on the distance between the flange and the rim. There is a central aperture in the cap, through which the steam escapes when the valve is lifted, which is surrounded by a projecting cylindrical flange, threaded on the outside, to which is fitted a threaded ring, which can be turned up or down and secured by a set-screw. By this means, the area of the aperture for the escape of steam beyond the valve-seat is adjustable, the space being largest when the ring is down, and smallest when the ring is up."

The opinion then considers the prior patents of Ritchie, Webster and Hartley, and holds that they did not anticipate Richardson's invention of 1866. In regard to the Webster patent, it says: "The Webster patent shows a huddling chamber and a stricture. But the evidence shows that valves made with the proportions shown in the drawing of Webster work with so large a loss of boiler pressure, before closing, as to be practically and economically worthless. Webster's patent describes a means of making the area for the escape of steam adjustable, consisting in adjusting up and down, on a smooth valve-stem, a sliding collar or flange, and fixing it in place by a set-screw. But it does not show the screw-ring of Richardson, with its minute delicacy of adjustment and action." Further it says: "Richardson is, therefore, entitled to cover, by the claim of his patent of 1866, under the language, 'a safety-valve with the circular or annular flange or lip *c c*, constructed in the manner, or substantially in the manner, shown,

so as to operate as and for the purpose herein described,' a valve in which are combined an initial area, an additional area, a huddling chamber beneath the additional area, and a strictured orifice leading from the huddling chamber to the open air, the orifice being proportioned to the strength of the spring, as directed. The direction given in the patent is, that the flange or lip is to be separated from the valve-seat by about $\frac{1}{64}$th of an inch for an ordinary spring, with less space for a strong spring, and more space for a weak spring, to regulate the escape of the steam, as required." "The Richardson patents have a disc valve, an annular huddling chamber, an annular stricture at the outer extremity of the radii from the centre of the valve, an additional area which is radially beyond the disc valve, and a cylindrical steam way. But, before 1866, an annular form of safety-valve was well known. Such a valve necessarily requires an annular steam way. In the defendant's valve, complainant's Exhibit A, the same effects, in operation, are produced as in the Richardson valve, by the means described in Richardson's claims. In both structures the valve is held to its seat by a spring, so compressed as to keep the valve there until the pressure inside of the boiler is sufficient to move the valve against the pressure of the spring, so that the steam escapes through the ground joint into a chamber covered by an extension of the valve, in which chamber the steam acts expansively against the extended surface, and increases the pressure in opposition to the increasing pressure of the spring, and assists in opening the valve wider; this chamber, in the defendant's valve, has, at its termination, substantially the same construction as Richardson's valve, namely, a stricture which causes the steam to act, by expansive force, against the extended surface of the valve; and in both valves, after the pressure of the steam has been somewhat reduced in the boiler, the closing movement is quickened, as the valve nears its seat, in consequence of the reduced pressure of the steam on the extended surface, and the valve comes suddenly to its seat. In the Richardson valve, the valve proper is a disc, and the extended surface is an annulus surrounding the disc, while, in the defendant's

valve, the valve proper is an annulus, and the extended surface is a disc inside of the annulus. But this is a mere interchange of form between the valve proper and the extended surface, within the skill of an ordinary mechanic."

It is contended by the defendant that the proof shows that a valve made in the required proportions of the patent of 1866 and in accordance with its drawing and description, without the improvement of 1869, and with the area of escape at the outlet smaller than the area of entrance at the ground joint, is not as economical or as good in action as the earlier Webster valve; that a valve constructed in accordance with the patent of 1866 is not an economical valve, but operates with a large loss of steam; that the valves sold by the plaintiff as Richardson valves, being the same in pattern as those sold by it since it began business, are not constructed so that the area of escape from the huddling chamber is smaller than the area of entrance from the ground joint, but on the contrary, it is about twice as large; and that the plaintiff has never put a valve on the market with the orifice of escape from the huddling chamber smaller than the orifice of entrance into that chamber.

We see no reason, in the record, for disturbing the conclusions of the master and the Circuit Court, that the entire commercial value of the valves made and sold by the defendant was due to the improvement covered by the patent of 1866, and that the plaintiff's valves of commerce all of them contain the improvements covered by the patent of 1866. Moreover, the master reports profits only, and finds that the plaintiff has suffered no damages in addition to the profits to be assessed against the defendant. If there had been an award of damages, and the loss of trade by the plaintiff, in consequence of the competition by the defendant, had been an element entering into those damages, it would have been a material fact to be shown by the plaintiff that it was putting on the market goods embodying the Richardson invention; but, as the plaintiff recovers only the profits made by the defendant in using in its business the Richardson invention, it is immaterial whether or not the plaintiff itself employed that invention. The

profits made by the defendant cannot be increased or diminished by any act on the part of the plaintiff; and the amount of them is not affected by the question whether during the same time the plaintiff did or did not use the patented invention.

In regard to the holding by the master and the court that all the profits of the defendant from the valves it made and sold were to be attributed to the employment by it of the improvement covered by the patent of 1866, we hold that, in view of what was determined in the former opinion of this court, and on the whole case, the safety-valves known to the art and open to be used by the defendant would not do the same work as the Richardson invention covered by the patent of 1866, or have any commercial value; and that, within the case of *Garretson* v. *Clark*, 111 U. S. 120, it appears, by reliable and satisfactory evidence, that the profits made by the defendant are to be calculated in reference to the entire valve made and sold by it, for the reason that the entire value of that valve, as a marketable article, is properly and legally attributable to the patented feature of the patent of 1866.

As to the assignment of error that the master did not ascertain what part of the profits derived by the defendant was due to the patented improvements covered by the two patents to Crosby, the master said, in his report, as before quoted: "The defendants claim that some of the profits which they have made are due to the peculiar form of their valves, but the form which they used in making their valves, was the form in which they clothed the Richardson invention, the life of their valves, and without that life the Crosby form is worthless." The defendant contends, that the master ought to have found, upon the evidence, that, with the exception of an allowance of a nominal sum for profits on account of the Richardson invention, the profits of the defendant accrued from its employment of the Crosby inventions. This contention was made before the master, and was overruled by him. There was some evidence before the master relating to the form of the Crosby valve, to the effect that it had an encased spring, and was readily attached and adjusted, and that those

features of its construction were advantageous. The first patent to Crosby does not show any encased spring; and while the second patent to him shows an encased spring, its claims relate solely to the features which produce and regulate the recoil action of the steam. The master was correct, therefore, in saying that the patented improvements of Crosby embodied the form in which the defendant clothed the Richardson invention, the life of the defendant's valve, and without which the Crosby form was worthless. There is no evidence that any of the things patented by Crosby gave any advantage in selling the defendant's valve.

It appearing that the defendant's valve derived its entire value from the use of the Richardson invention covered by the patent of 1866, and that the entire value of the defendant's valve, as a marketable article, was properly and legally attributable to that invention of Richardson, the plaintiff is entitled to recover the entire profit of the manufacture and sale of the valves. *Elizabeth* v. *Pavement Company*, 97 U. S. 126, 139; *Root* v. *Railway Company*, 105 U. S. 189, 203; *Garretson* v. *Clark*, 111 U. S. 120; *Callaghan* v. *Myers*, 128 U. S. 617, 665, 666; *Hurlbut* v. *Schillinger*, 130 U. S. 456, 471, 472.

The defendant contends that the master and the Circuit Court erred in disallowing as a credit to the defendant in diminution of the profits reported, the sum of $1978.34, it being contended that that was an expense suffered by the defendant in modifying and reconstructing certain valves to render them more perfect and more salable. These were valves made by the defendant and destroyed by it before sale, or after a sale and an exchange for other valves: which destroyed valves did not appear in the account on either side, thus becoming unsold valves. The expense thus referred to is one incurred in making experimental and defective valves.

In regard to this item, the master said in his report: "Item 7 is for modification and reconstruction of iron valves. The costs of the reconstructed valves have already been charged in the costs of valves for the periods in which the reconstruction, so called, took place. The old valves were destroyed and a salvage made of such parts as were of value or could be

used, and new valves were made and their full costs charged in the accounts of defendants. This item 7 is a claim for the cost of the destroyed valves (whether with or without an allowance for salvage I am unable to say) and should not be allowed." In respect to this item, the defendant put in the following claim before the master: "Finding 8. The charge found in item 7, in heading IV of defendants' account filed with the master, is for the reconstruction and modification of safety-valves made by them. The work of this modification and reconstruction was in the direction of perfecting the characteristics of the safety-valves they were then producing. The result of such endeavor was that they produced a species of safety-valves, classified in the account as iron safety-valves, which was made and sold after that time by the defendants, the account of which has been fully rendered to the master, and on which he has computed profits in his consideration of them. In the labor and efforts of the defendants certain valves were rendered useless and were valueless except for junk, and certain parts of valves made for them and paid for were rejected, and the difference between the original cost and their value as old metal became a loss to the defendants. All these losses occasioned by the destruction of valves, by the replacing of valves in hands of buyers of valves by giving them new valves for old ones without additional charge, and by the destruction of parts of valves which could not be used because of the modification of the design, were a part of the expense suffered by the defendants in their valve business, in the producing and manufacture of a marketable safety-valve of the characteristics of the Crosby valve, and constituted a wastage in their business which their valve department suffered for the purpose of making more salable products. This loss was an item of expense which should be charged to the cost of valves as such, because it became a charge upon all the safety-valves thereafter made following the plan and models which resulted from such loss. Upon inspection of the records of the master, the defendants do not find that they have filed specifications of such loss, and, trusting to the belief that their account, with the testimony, was sufficient and

proper in such respect, they evidently neglected so to do. Moreover, the examination of Mr. Crosby, the defendants' superintendent at that time, by the complainants, upon that item of their account, shows only the items of loss in part. This latter incomplete showing, which is now first noticed by the defendants, was evidently overlooked, and thus the facts making up the character of the loss were not properly and fully laid before the master for his consideration. On this account the defendants respectfully submit a statement of facts, and request that they may introduce testimony, if necessary, in proof thereof." Here follows the statement. "Whenever valves have been accounted for as returned and the master has deducted the returned valves from the sales and costs the account then shows itself free from any profits on such valves. The cost to the defendants of such valves remains as a part of the expenses they have incurred in the making of valves, and which, when they were destroyed, became a direct loss to them and their business. It is for this actual loss so sustained, decreasing their profits, which they now ask to have allowed. The loss is inseparable from their whole valve business and belongs to it."

To this view, the master replied as follows, in his report: "It is clear, upon this statement, that no allowance should be made to defendants for the sixty-nine valves which they made and destroyed without selling or consigning them. The thirty-eight valves which were originally sold to Babcock & Wilcox were accounted for both in costs and sales, but when new valves were sent them to replace the returned valves, the new valves were not included in defendants' accounts, either in costs or sales. The twelve brass valves were returned and so treated in the account. The result, therefore, is substantially this, that the defendants made some one hundred and nineteen valves which they subsequently destroyed, with some castings which they concluded not to use. I find no sufficient reasons for modifying my former disallowance of item 7 in each case."

In regard to this item, the Circuit Court said: "As for the objection to the findings of the master respecting expenses to be allowed for certain valves destroyed, which forms the sub-

ject matter of the first exception, I think the master was right in the conclusion he reached. The defendants were not charged on valves which were subsequently destroyed, or, if so, they were not charged upon the new valves which replaced them. See master's note 29, page 43 of master's report. The master properly disallowed the cost of destroyed valves."

Without going into details, it is sufficient to say that we concur in the conclusion that the defendant was not charged for valves which were subsequently destroyed, or, if so, it was not charged upon the new valves which replaced the destroyed valves.

As for the contention that the destroyed valves ought to form a credit against the profits actually realized by the defendant on other valves, it is sufficient to say that the only subject of inquiry is the profit made by the defendant on the articles which it sold at a profit, and for which it received payment, and that losses incurred by the defendant through its wrongful invasion of the patent are not chargeable to the plaintiff, nor can their amount be deducted from the compensation which the plaintiff is entitled to receive. *The Cawood Patent*, 94 U. S. 695; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 138; *Tilghman* v. *Proctor*, 125 U. S. 136.

The Circuit Court allowed interest on the $40,344.59 from the date of the filing of the master's report. The defendant assigns this as error, and contends that interest should have been allowed only from the date of the decree. In support of this view, the case of *Mowry* v. *Whitney*, 14 Wall. 620, 653, is cited. But we regard it as established by the cases of *Illinois Central Railroad* v. *Turrill*, 110 U. S. 301, 303, and *Tilghman* v. *Proctor*, 125 U. S. 136, 160, that the ruling as to interest made by the Circuit Court is proper. In the latter case, it is said: "By a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced

in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced. *Silsby* v. *Foote*, 20 How. 378, 387; *Mowry* v. *Whitney*, 14 Wall. 620, 651; *Littlefield* v. *Perry*, 21 Wall. 205, 229; Act of July 8, 1870, c. 230, § 55, 16 Stat. 206; Rev. Stat. § 4921; *Parks* v. *Booth*, 102 U. S. 96, 106; *Railway Co.* v. *Root*, 105 U. S. 189, 198, 200, 204; *Illinois Central Railroad* v. *Turrill*, 110 U. S. 301, 303. Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. Interest should therefore be allowed as in *Illinois Central Railroad* v. *Turrill*, just cited, only from the day when the master's report was submitted to the court (which appears, by the terms of his report and of the decree below, to have been October 7, 1884) upon the amount shown to be due by that report and the accompanying evidence."

Delay caused by the court, or not attributable to the plaintiff, in coming to a conclusion on the master's report, where the amount found by that report is confirmed, ought not to deprive the plaintiff of interest on the amount found by the master. Under such circumstances, the account ought to be considered as liquidated on the day when the master's report is filed. This is in analogy to the allowance of interest on the amount of the verdict of a jury from the date of the verdict to the date of the judgment, in accordance with the statutes of many States, and among others of Massachusetts. Pub. Stats. c. 171, § 8.

The decree of the Circuit Court is

Affirmed.

The Chief Justice and Mr. Justice Gray were not present at the argument, and took no part in the decision of this case.

McCREARY *v.* PENNSYLVANIA CANAL COMPANY.

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

No. 54. Submitted October 22, 1891. — Decided November 9, 1891.

In estimating, in a suit for the infringement of letters patent, the profits which the defendant has made by the use of the plaintiff's device, where such device is a mere improvement upon what was known before and was open to the defendant to use, the plaintiff is limited to such profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvement.

An inventor took out letters patent for an invention intended to accomplish a certain result. Subsequently he took out a second patent, covering the invention protected by the first, and accomplishing the same result by a further improvement. While holding both patents, he sued to recover damages for the infringement of the second, without claiming to recover damages for the infringement of the first. *Held*, that he could recover only for the injuries resulting from use of the further improvement covered by the second letters, and that if no such injury were shown the defendant would be entitled to judgment.

This was a bill in equity for the infringement of letters patent number 129,844, issued July 23, 1872, and reissued as number 5630, October 28, 1873, to the appellant, John McCreary, for an "improvement in coupling and steering apparatus." In the specification of the reissue the patentee stated that his invention related "to certain improvements in devices for steering canal boats," etc., described in letters patent granted to Elijah and John McCreary, April 16, 1872, number 125,684, by means of which two boats are coupled together, and navigated and steered as one boat by means of a single steering-wheel. The invention described in said letters patent consisted, principally, "in coupling two boats together by means of a chain or rope passing around a steering-wheel on one boat, and around a system of sheaves or pulleys, and attached to the other boat, for the purposes of steering said boats as well as of coupling them; and in centring said boats together and form-

ing a universal joint between them by means of an overhanging guard or bumper on the stern of the forward boat, with a central notch therein, into which the projecting stem or cutwater of the rear boat fitted." "My improvements," says the patentee, "consist, first, in coupling and centring said boats together and forming a universal joint between them by means of a chain, the two ends of which are fastened to opposite points on the stern of the forward boat and the central part to the stem or cutwater, or some central point on the bow of the rear boat, so as to hold its stem or cutwater against the overhanging guard or bumper of said forward boat, said chain serving to centre the boats without the necessity of any notch in the overhanging guard for the stem of the rear boat to fit into, and at the same time coupling and holding the boats together and forming a universal joint between them; second, in attaching the ends of the coupling and steering chains to the boats by means of crow-foot claw-hooks so as to render the chains easily adjustable, as hereinafter shown and described."

He claimed as his invention:

"1. The combination of the two boats A and B, the steering-chain *a* passing around sheaves or pulleys, and around the windlass C, or its equivalent, the overhanging guard or bumper on the stern of the forward boat, and the chain D attached to opposite points on the stern of said boat and to the stem or central part of the bow of the rear boat, so as to form a universal joint between them, and keep them coupled and centred, substantially as shown and described.

"2. In combination with the boats A and B and the coupling and steering mechanism herein described, the claw-hooks *h h*, for attaching and adjusting the coupling and steering chains, substantially as set forth."

Upon the hearing in the Circuit Court an interlocutory decree was entered in favor of the plaintiff, finding the validity of the patent, and the infringement by the defendant, and ordering a reference to a master for an account of the "profits, gains and advantages which the said defendant has received or made, or which have arisen or accrued to it" from the said infringement, etc., but denying the injunction upon the ground, stated

in the opinion of the court, *McCreary* v. *Pennsylvania Canal Co.*, 5 Fed. Rep. 367, that its allowance would cause much greater injury to the defendant than benefit to the plaintiff. A large amount of testimony was taken before the master, who reported that he found no proven profits, savings or advantages to have been received by or accrued to defendant from the manufacture, use or sale of the plaintiff's patented improvements. Exceptions were filed to this report, and upon the hearing of such exceptions a final decree was entered in accordance with the report, and that the plaintiff should recover his costs, except the costs of the accounting before the master, and the costs of the exceptions to the master's report, which were awarded to the defendant. The decree was subsequently amended by ordering that the defendant pay all the costs of the suit. From the decree denying the recovery of profits and damages an appeal was taken to this court.

Mr. Charles Sidney Whitman for appellant.

Mr. S. S. Hollingsworth for appellee.

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

About three months prior to the patent in suit, and on April 16, 1872, another patent, numbered 125,684, was issued to Elijah and John McCreary, for "an improvement in steering devices for canal boats," etc., which covered a similar coupling together of boats, barges and scows by means of a vertical groove formed in the overhanging stern guard or bumper of the forward boat, which groove was entered by the cutwater of the rear boat, a chain being used for connecting the boats, which chain was so connected with a train of gear-wheels placed in the rear boat as to enable both boats to be steered by means of a windlass. The first claim of this patent was as follows:

"1. Two boats or barges, A and B, fitted together by means of a projecting cutwater fitting into a notch in an overhanging guard, as described, and coupled and steered by means of a

chain or rope, having its ends fastened to the forward boat and passing around pulleys, . . . substantially as herein set forth."

The second claim was immaterial.

In patent numbered 129,844 the patentee stated that his improvement upon the prior patent consisted "in substituting for the projecting cutwater and notch, described in said patent for centring the boats together, and forming a universal joint, a chain attached at both ends to one boat, and at its centre to a central point on the adjacent end of the other boat," etc.

One of the main difficulties in the assessment of damages in this case arises from the fact that the two patents, the first one of which is not included in this bill, describe a system of coupling together two boats by means of chains and a centring device much the same — differing from each other only in two particulars: First, in the earlier patent, the two boats are connected together by the cutwater of the rear boat fitting a groove in the overhanging guard of the forward boat; while in the later patent, there is substituted for this a chain attached by both ends to the forward boat, and at its centre to a central point on the adjacent end of the rear boat. Second, in the later patent, the centre of the chain is wound around a horizontal windlass, while in the earlier it is wound around a separate wheel geared to the windlass below the deck — a difference which it was not insisted was material. In this connection, the master found that "the combination of the patent in suit and that of the prior patent are practically identical in function and result, and are identical in constitution, save only as to one particular element, the 'centring' device. As, therefore, the combination of the patent in suit is one, the sole invention and novelty of which consisted of a single element, the profit which complainant is entitled to recover from the defendant in this case is that which he may have shown to have accrued to it from the use of substantially that new element in substantially the combination in which he has described and claimed it." Exception was taken to this finding, upon the ground that the finding contained an "erroneous construction of law,

if it means that the complainant is not entitled to recover the entire profits which have accrued to the defendant from the use of boats containing the invention described and claimed in the patent in suit because of anything shown or described, but not claimed, in said prior patent of the complainant numbered 125,684." Plaintiff claimed, and offered evidence tending to show, that defendant had made a large sum in "savings" by the transportation of coal in its infringing double boats in place of single boats, and asked that defendant should be held accountable to him for these savings (less the cost of applying the couplings to the double boats) as its profits from the use of this improvement.

The master found, however, in this connection, that complainant was not entitled, upon the proofs, to recover from the defendant as its profits from the use of his "improvement" the entire savings in freight accruing from the shipping of coal in the infringing coupled boats in place of single boats, but was restricted to such as were attributable solely to the improvement.

There is no doubt of the general principle that, in estimating the profits the defendant has made by the use of the plaintiff's device, where such device is a mere improvement upon what was known before, and was open to the defendant to use, the plaintiff is limited to such profits as have arisen from the use of the improvement over what the defendant might have made by the use of that or other devices without such improvements. This is a familiar doctrine announced by this court in a number of cases. *Seymour* v. *McCormick*, 16 How. 480; *Mowry* v. *Whitney*, 14 Wall. 620; *Littlefield* v. *Perry*, 21 Wall. 205; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126; *Garretson* v. *Clark*, 111 U. S. 120.

The important question in this connection is, whether, in considering what was already known, and open to the defendant to use, we are to include the device shown in patent numbered 125,684, issued to Elijah and John McCreary about three months before the patent in suit. There were other methods of connecting vessels in train, such as were disclosed in the British patent to Taylor of 1846; the British patent to Bourne

of 1857; the patent to McCreary of 1860, constructed and put into use upon a coupled boat called "The Experiment;" the British patent to Bartholomew of 1862; and the American patent to Stackpole of 1866: but none of these seem to have been adapted to defendant's use with any advantage over single boats, because, as the master found, "their construction was such that a rudder could not be applied to the forward boat." He found, further, that "these prior boats were in other respects inferior to the machines of complainant's patent, but their fatal defect for defendant's purposes was this inability to apply a rudder to the forward boat, which was therefore unmanageable when separated from its mate."

There is nothing, however, to show that the device described in the patent of April 16, 1872, to the McCrearys, was not an operative device, and if it were open to the defendant to use, the plaintiff, in this action, would be limited in his recovery to the profits which the defendant made by the use of the improvement described in the second patent, over the device shown in the earlier patent. This improvement, as before stated, consisted principally in substituting for the projecting cutwater and notch, described in the earlier patent, a chain attached at both ends to one boat, and at its centre to a central point upon the adjacent end of the other boat. No attempt was made to distinguish or separate the profits arising from this improvement, the testimony being directed only to showing the profits defendant made by the use of coupled boats in the place of single boats. There was evidence tending strongly to show that the transportation of coal in double boats was more economically effected than in single boats, but none that the second patent was superior to the first. Indeed, the plaintiff admitted, in his argument, that the patent of April 16 described a plan of coupling and steering very little inferior to that described in the patent sued upon, and that, if defendant had pirated that invention instead of this, the same result in profits or savings would have been realized. Plaintiff, however, contended in this connection, that in determining the state of the art, or what was open to the defendant to use, the invention disclosed in the earlier patent to the McCrearys

should not have been considered, as this patent was also owned by John McCreary, the plaintiff, by assignment of Elijah's interest to him before the reissue sued upon was granted, and hence, that defendant had no more right to use this invention than the other. Had this earlier patent also been made the basis of suit in this case, this position would have been impregnable, but the question here is, not whether the defendant had in fact the right to use this patent, but whether, so far as this particular case is concerned, it had not that right. To hold that it had not is to assume that the plaintiff owned the earlier patent, that it was a valid patent and that defendant had infringed it. This was a question that could not be raised upon an assessment of damages in this case. It is true the plaintiff claims to be the sole owner of this patent, that it described an invention both novel and useful, and that defendant had appropriated this device as well as the one set forth in the patent in suit; but these were issues which could only be determined upon a bill framed for this purpose, and could not be made the subject of contest in a collateral proceeding. For the purposes of this suit the master was bound to assume that this patent was open to the defendant, otherwise he might be led into inquiries entirely foreign to the subject of his investigation.

Suppose, for example, this patent had belonged to another person, and the plaintiff, foreseeing that the defendant would, upon this hearing, claim that it was open to him, had purchased it and taken an assignment of all claims for past infringements, could he in this way forestall such defence? Clearly not. In such case the defendant might justly reply: "I was summoned here to answer a charge of infringing your patent, and in case it is established to pay such damages as may be awarded for such infringement. But I could not anticipate that you would purchase another patent and set it up in aggravation of such damages." But if this could not be done pending the suit, it is difficult to see how it could be done before suit brought, if such patent be not made the basis of the suit. Had the defendant attempted to justify by setting up a device obtained subsequent to the date of the plain-

tiff's patent, a different question would have arisen. This question was considered by Mr. Justice Harlan, in *Turrill* v. *Illinois Central Railroad*, 20 Fed. Rep. 912, in which he held that in estimating the profits made by the infringer of a patent, the comparison must be between the patented invention and what was known and open to the public at and before the date of the patent.

The case of *Seymour* v. *McCormick*, 16 How. 480, while not exactly in point, is somewhat analogous to the one under consideration. This was an action at common law to recover damages for the infringement of certain improvements in reaping machines. There were three patents issued, in 1834, 1845 and 1847; the earliest of these patents had expired. The first count charged an infringement of the patent of 1845; the second that of 1847. The plaintiff, to avoid delay, consented to go to trial on the second count only, which was for an improvement upon prior patents, consisting chiefly in giving to the raker of the grain a convenient seat upon the machine. The court permitted the jury to assess the damages as for the infringement of the entire machine, defendant insisting that he was liable only for the damages occasioned by the infringement of the improvement — in other words, that the plaintiff had the right to recover as great damages for the infringement of the patent set forth in the second count as if he had proceeded upon both counts, and shown infringement of all the patents claimed. The case was removed to this court by writ of error, and the plaintiff in error argued that, for the purposes of that suit, the defendant had a perfectly lawful right to use the machine described in the patent of 1834, (which had, in fact, become public property,) and the improvements in the patent of 1845, and a large portion of those included in that of 1847. These covered the whole of the improved reaper, except what related to the seat, and its combination with the reel. He further claimed that, as the plaintiff had decided not to proceed on his patent of 1845, that was in effect public property; that by waiving any right to proceed upon the first claim of his patent of 1847, he had limited himself to the seat, combined with the reel; and that

the ruling of the court allowed the plaintiff damages to as great an extent as if the trial had been in a suit upon the old patents of 1834 and 1845, and upon the first claim of that of 1847 as well as the second, and was therefore erroneous. It seems that the defendant sought to attack the validity of the patent of 1845, but the evidence was ruled out; still the plaintiff was allowed to recover for the profits of the part of the machine covered by this patent, as if it had been included in the patent of 1847. This court adopted the reasoning of the plaintiff in error, reversed the judgment of the court below, and held that the plaintiff should be limited in his recovery to the damages occasioned by the infringement of the second claim of the patent of 1847. "The jury," said Mr. Justice Grier, in the opinion of the court, "gave a verdict for nearly double the amount demanded for the use of three several patents, in a suit where the defendant was charged with violating one only, and that for an improvement of small importance when compared with the whole machine."

If plaintiff be unable to recover damages for the infringement of a patent originally included in a suit, but upon which he elects not to proceed, it is difficult to see how he can recover for the infringement of one not made the basis of any action at all. It is true that the combination of the earlier patent in this case is substantially contained in the later. If it be identical with it or only a colorable variation from it, the second patent would be void, as a patentee cannot take out two patents for the same invention. *James* v. *Campbell*, 104 U. S. 356. If it be for a different device, then plaintiff could not recover damages for its infringement without making it the basis of suit.

We think, therefore, that for the purposes of this suit the earlier patent must be deemed open to the defendant, and no damages having been proved for the infringement of the improvement under the later patent, considered separately, the finding of the court below was correct.

We do not wish to be understood as expressing an opinion, whether, if there had been an earlier patent for coupling vessels outstanding at the date of this infringement, and owned

by a third person, defendant could claim that the device described in such patent was open to it. In such case it might perhaps be held that the plaintiff was entitled to stand upon the *prima facie* validity of the earlier patent; and that presumptively the defendant would be bound to pay a royalty to the patentee, and, having elected to make use of the plaintiff's invention, would be bound to pay a like royalty to him. This question, however, is not presented in the case under consideration.

The decree of the court below must be

Affirmed.

MR. JUSTICE BRADLEY and MR. JUSTICE GRAY were not present at the argument, and took no part in the decision of this case.

AMERICAN NET AND TWINE COMPANY *v.* WORTHINGTON.

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

No. 55. Argued October 27, 1891. — Decided November 9, 1891.

In fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense; and their denomination in the market will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied.

Gilling twine, when imported as gilling, for the manufacture of gill nets, is liable only to the duty of 25 per cent under the act of March 3, 1883, 22 Stat. 488.

Statements made in Congress by the promoters of a customs-act are inadmissible as bearing upon its construction; but the proceedings therein may be referred to to inform the court of the reasons for fixing upon a specific rate of duty.

Where a customs-act imposes a duty upon an article by a specific name, general terms in the act, though sufficiently broad to cover it, are not applicable to it.

In cases of doubt in the construction of a customs-act, the courts resolve the doubt in favor of the importer.

Statement of the Case.

THIS was an action against the collector of the port of Boston to recover back certain duties upon gilling twine, paid under protest. By written stipulation of the parties the case was heard by the court without a jury, and the following facts were found:

"The plaintiff corporation, whose business is the manufacture of fishing nets and seines, in the months of February, March, April and May, 1885, made seven different importations of gilling into the port of Boston from Liverpool — in all, forty-five cases. The merchandise was invoiced and entered at the custom-house as gilling twine. Upon the appraisement by the custom-house officials here, the merchandise was classified as linen thread, and the collector assessed upon it a duty of 40 per cent ad valorem. The plaintiff in each instance paid the assessed duty under protest, claiming that the article was dutiable at twenty-five per cent ad valorem as gilling twine. Upon appeals to the Secretary of the Treasury, the decisions of the collector were affirmed, and the plaintiff then brought this suit to recover back the alleged excess, which amounted on all the importations to $1685.85. All the proceedings in respect to the plaintiff's protests and appeals were regular and taken in due season, and this suit was commenced within the time limited by law for bringing such suits. The merchandise after its importation was used by the plaintiff in the manufacture of gill nets, and was imported expressly for that purpose.

"The article in question is No. 35 three-cord unbleached linen thread of superior quality, put up in half-pound balls, and was manufactured by the Scotch firm of W. & J. Knox at their works in Kilbirnie, Scotland. For more than twenty years thread of this description has been used by the plaintiff and other net-makers in this country for the manufacture of gill nets, principally for the fisheries on the great Western lakes, the numbers of the thread used for this purpose ranging from 10 to 60. For many years before the tariff act of 1883, this kind of thread, of the manufacture of W. & J. Knox and other foreign makers, was imported under the name of gilling twine to be used in making gill nets, and was invoiced and entered at the custom-house under that name, and was so designated

on price-lists and trade circulars of the foreign makers. For many years before the act no other imported article was known by the special name of gilling twine. One of the custom-house officers testified that he never heard or knew of any other imported article that was called gilling twine.

"On the other hand, the article is clearly not twine. It is not suitable for the uses which twine is commonly put to. It is made of flax from which the gum has been removed by boiling. It is flexible, without the stiffness of twine, highly finished, capable of being used for sewing, and is largely used for machine sewing in many trades. It is not claimed by the plaintiff in this suit that in a general sense, it is anything else than linen thread, or that it differs in material or quality or mode of manufacture from other similar threads. For many years linen thread of the same kind and quality has been both imported from abroad and made here in large quantities for many other purposes than for gilling. It is used by boot and shoe makers, upholsterers, bookbinders, saddlers and in many other trades as sewing thread. When imported for this purpose it is invoiced and entered as linen thread, and is so known in commerce and designated on price-lists and trade circulars. That which is made here for these uses is known only as linen thread. It is also made here for gilling purposes, and in such cases is invariably called gilling thread, never gilling twine. Of all that is made here or imported, at least nine-tenths, and probably nineteen-twentieths, is used for other purposes than as gilling. It also appears that there is a large, coarse twine made of hemp, which is imported under the name of salmon twine, and is made into nets for gilling salmon. This article seems never to have acquired the name of gilling twine in the trade. There is also a cotton gilling twine which is made in this country, but never imported."

Upon the foregoing facts the court decided that the plaintiff could not maintain the action, and ordered judgment for the defendant with costs.

The plaintiff thereupon sued out a writ of error from this court. The opinion of the court below is reported in 33 Fed. Rep. 826.

Mr. Edward Hartley for plaintiff in error. *Mr. Walter H. Coleman* and *Mr. Charles P. Searle* were with him on the brief.

Mr. Assistant Attorney General Parker for defendant in error.

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

The decision of this case depends upon the construction of the tariff act of March 3, 1883, 22 Stat. 488, c. 121. Schedule J of this act, page 507, provides for a duty of 40 per cent *ad valorem* upon "flax or linen thread, twine and pack thread, and all manufactures of flax, or of which flax shall be the component material of chief value, not specially enumerated or provided for in this act;" while a subsequent paragraph of the same schedule imposes a duty of 25 per cent *ad valorem* upon "seines and seine and gilling twine." The question is, to which category, under the finding of facts, these goods are to be assigned. We think the following extract from the finding is decisive in favor of the position taken by the plaintiff in error: "For many years before the tariff act of 1883, this kind of thread, of the manufacture of W. & J. Knox and other foreign makers, was imported under the name of gilling twine, to be used in making gill nets, and was invoiced and entered at the custom-house under that name, and was so designated on price-lists and trade circulars of the foreign makers. For many years before the act no other imported article was known by the special name of gilling twine."

It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied. *Two Hundred Chests of Tea*, 9 Wheat. 430, 438; *United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet. 277;

Elliott v. *Swartwout*, 10 Pet. 137; *Curtis* v. *Martin*, 3 How. 106; *Arthur* v. *Morrison*, 96 U. S. 108; *Swan* v. *Arthur*, 103 U. S. 597; *Schmieder* v. *Barney*, 113 U. S. 645; *Arthur* v. *Butterfield*, 125 U. S. 70; *Robertson* v. *Salomon*, 130 U. S. 412.

It must be assumed that Congress in imposing a duty upon "gilling twine" *eo nomine*, intended that some article used for the purpose of manufacturing gill nets should pay duty as such, and as the article in question is and was, for many years before the act was passed, imported, invoiced and entered at the custom-house under that name, and was so designated in price-lists and trade circulars, and was actually intended for use in the manufacture of gill nets, and no other article was imported under that name, it follows that it should be classified as such, notwithstanding it is in fact linen thread, and when intended for sewing purposes is invoiced and entered as linen thread.

The argument for the higher duty is based upon the finding that the article is not twine, is not suitable for the purposes to which twine is commonly put, because made of flax from which the gum has been removed by boiling, and is flexible, without the stiffness of twine, highly finished, capable of being used for sewing and largely used for machine sewing in many trades. It would seem to follow from this that, in the opinion of the court below, twine must be stiff and contain a certain quantity of gum, as the most ordinary form of twine for wrapping parcels undoubtedly does. But these qualities are not essential to twine, which is defined by Webster as, "A strong thread composed or two or three smaller threads or strands twisted together, and used for various purposes, as for binding small parcels, making nets and the like; a small cord or string." If in fact twine were necessarily stiff and contained an infusion of gum, there could be no such thing as "gilling twine," since for the purpose of gill nets, linen thread must combine the utmost possible flexibility of movement with lightness of texture, strength and invisibility. It is stated in the opinion of the general appraisers at New York of December 4, 1890, referred to in the brief of counsel, that "the action of

the water would kink the hard twisted thread and dissolve the gum or sizing, thus rendering the nets made therefrom comparatively worthless." It should be so light as to float in the current, so fine and so near the color of the water as to be invisible, and so strong that when the fish are caught by the gills they are held by the tenacity of the thread. It is undoubtedly thread, and the finding is that home-made linen thread used for gilling purposes is invariably (and more properly) called gilling thread; never gilling twine. We are bound, however, to give some effect to the words "gilling twine," and if there be no other imported article of that name, it follows conclusively that this must have been the article intended. Nor is this inference greatly weakened by the fact that the article is nothing less than linen thread, differing not in material quality or mode of manufacture from other similar thread, that nine-tenths of the thread so imported is used for other purposes than gilling, and that when so imported, it is invoiced and entered as linen thread, and is so known in commerce, and designated on price-lists and trade circulars.

It would appear from the Treasury reports and circulars to admit of some doubt whether there is an absolute identity between the thread used for gilling and that used for sewing; but it is not necessary for us to determine whether the same duty should be imposed if the same article be imported for different purposes. Of course this would follow only in case the two articles were absolutely identical, and if, as found by the board of general appraisers of New York, to which reference has already been made, the difference between the two is so marked as to render them easily separable, the question of identity would not arise. It was found by them that the machine thread is a harder twist and contains more sizing than the gilling, and that the former could not be satisfactorily used for the manufacture of gill nets.

It is sufficient for the purposes of this case to hold that, when imported as gilling, for the manufacture of gill nets, it is liable only to the duty of 25 per cent.

While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmis-

sible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount. *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Blake* v. *National Banks*, 23 Wall. 307, 317; *The Collector* v. *Richards*, 23 Wall. 246, 258; *Gilmer* v. *Stone*, 120 U. S. 586, 590; *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79. It seems that the duty upon seines was originally fixed at six and one-half cents per pound; when, upon representations of the fishermen upon the Lakes, who use seines and gill nets which are only made of Scotch and Irish flax, and always from imported twine, that they were suffering from the competition of Canadian fishermen, who imported their twine free of duty and found a ready sale for their fish in American ports, also free of duty, an effort was made to put seines and seine and gilling twine on the free list; but the matter was finally compromised by fixing the duty at 25 per cent ad valorem. Unless this be held to include the thread of which these gill nets are actually made, the intention of Congress will evidently be defeated.

While in the absence of a more specific designation this article might properly be classed as linen thread, it is a familiar rule in revenue cases that, where Congress has designated an article by a specific name and imposed a duty upon it, general terms in the same act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation, rather than under a general description. *Homer* v. *The Collector*, 1 Wall. 486; *Arthur* v. *Lahey*, 96 U. S. 112; *Arthur* v. *Stephani*, 96 U. S. 125; *Movius* v. *Arthur*, 95 U. S. 144.

We think the intention of Congress that these goods should be classified as "gilling twine" is plain; but were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language. *United States* v. *Isham*, 17 Wall. 496; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Gurr* v. *Scudds*, 11 Exch. 190.

The judgment of the court below will, therefore, be

Reversed, and the case remanded for further proceedings in conformity with this opinion.

Mr. Justice Bradley and Mr. Justice Gray were not present at the argument, and took no part in the decision of this case.

LEADVILLE COAL COMPANY *v.* McCREERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 969. Argued and submitted October 29, 1891. — Decided November 9, 1891.

When, in pursuance of the jurisdiction conferred by the laws of the United States, a Circuit Court of the United States takes possession of the property of a defendant, situated within a State, and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded and its jurisdiction ended by reason of subsequent proceedings in the courts of the State looking to the administration of that property in accordance with the laws of the State.

A decree in such case, determining the claims of all creditors and their right to share in the distribution of the property, is final as to all who had notice and knowledge of the proceedings.

In this case there were no irregularities in the proceedings which can be challenged here.

In equity. The case is stated in the opinion.

Mr. Henry Crawford, for appellants, submitted on his brief.

Mr. Charles C. Baldwin, with whom was *Mr. Cecil D. Hine* on the brief, for appellees.

Mr. Justice Brewer delivered the opinion of the court.

The facts in this case are these: On February 21, 1883, a suit was commenced in the Circuit Court of the United States for the Northern District of Ohio, by the Lake Superior Iron

Company and others against Brown, Bonnell & Company, a corporation having large and extensive iron works. A receiver was then appointed, who took possession of the property of the company; and such proceedings were thereafter had that in February, 1886, a decree was entered ascertaining the claims of each creditor who had appeared and proved his claim, 176 in number, and directing a sale of the property. From that decree the defendant appealed to this court. On the hearing of the appeal the decree was affirmed, *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, and a mandate sent to the court below, directing it to carry the decree into execution. An order of sale was thereafter issued and the property sold, and purchased by the present appellees, acting as trustees for all the creditors who chose to enter into a proposed new corporation; and into such corporation nearly all the creditors, over ninety-six per cent in amount, entered. On the coming in of the report of the master, a decree was entered confirming the sale, 44 Fed. Rep. 539; from which decree these appellants have taken this appeal. Two of the appellants, the Leadville Coal Company and Charles S. Worden, claimed to have been creditors of Brown, Bonnell & Company; and the other two to have been stockholders in that corporation.

The first contention of appellants is, that by proper proceedings in the Court of Common Pleas of Mahoning County, Ohio, the corporation defendant, Brown, Bonnell & Company, had been, on July 12, 1889, after the original decree in the Circuit Court of the United States, and before the hearing of the appeal by this court, judicially dissolved, and one Hallett K. Taylor appointed receiver, and charged with the statutory duties of holding, managing and disposing of all the corporate assets, and distributing them among creditors; and that thereafter the Circuit Court of the United States ought not to have proceeded further, but should have turned the property over to such statutory receiver, in order that the property might be distributed under the direction of the state court. The argument is, that the judicial decree of dissolution of the corporation, the sole defendant, was equivalent to the death of an individual defendant: and that all subsequent proceedings

in reference to the disposition of the property and assets of this deceased defendant must be had according to the laws, and in the courts, of the State creating the corporation.

It is worthy of notice that the case in which the decree of dissolution was entered was not commenced till long after this suit was begun and the receiver had taken possession of the property: that the receiver thus appointed by the state court does not himself come into this court and ask possession of this property; and also, that the state court in its decree of dissolution, expressly recognized the possession of the United States court, and in the following words declined to interfere therewith: "But inasmuch as it appears to the court that the estate and effects of said Brown, Bonnell & Co. are at the present time in the hands of a receiver appointed by and acting under the orders of the Circuit Court of the United States for the Northern District of Ohio, it is ordered that the receiver hereby appointed shall not interfere with the possession of the receiver appointed by said Federal court of the effects and assets of said corporation." But we do not care to rest our conclusion on these circumstances. The Circuit Court takes its jurisdiction not from the State of Ohio, but from the United States; and the extent of its jurisdiction is not determined by the laws of the State, but by those of the United States. Doubtless, while sitting in the State as a court of the United States, it accepts and gives effect to the laws of the State so far as they do not affect its jurisdiction and the rights of non-resident creditors. It nevertheless exercises powers independent of the laws of the State; and when, in pursuance of the jurisdiction conferred by the laws of the United States, it takes possession of the property of a defendant and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded and its jurisdiction ended by reason of subsequent proceedings in the courts of the State, looking to an administration of that property in accordance with the laws of the State. It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another

jurisdiction could annul such decree, and disturb all rights once definitely determined. No such anomaly exists in the relative jurisdiction of state and Federal courts. The latter having once acquired full jurisdiction, and proceeded to a final determination, may rightfully proceed still further and to an execution of that decree, irrespective of any proceedings in the courts of the State. The first and principal contention of the appellants must therefore be overruled.

Secondly. It is insisted that the Circuit Court erred in refusing to allow a contest of the adjudication of the rights of creditors made in its final decree, on the subsequently filed petition of these appellants; and also that it refused to allow the claim of one of these appellants, who now insists that he is a creditor and entitled to share in the proceeds of the sale. In the proceedings anterior to the final decree, it appears that notice was given to all creditors to prove their claims, and that this particular creditor had notice of those proceedings, but failed to make proof of his right. It is now insisted that the decree in respect to these several claims was merely interlocutory, and that the matter is open to further and subsequent inquiry. There is no pretence of want of notice, or ignorance of the proceedings, and no excuse given for failing to litigate all these matters when before the court prior to the decree. Under such circumstances we dissent entirely from the contention that this decree was, as to these matters, merely an interlocutory order. That decree determined the rights of all parties interested in the proceeds of this property, and if any one of these appellants, after notice, failed to assert his rights or to challenge the allowances then made by the court, his rights and challenge were lost. He has had his day in court, and is concluded by the final decree.

The final contention is, that there were certain irregularities in the sale, and those irregularities are sought to be established principally by the affidavits of counsel for appellants, based upon hearsay testimony. So far as such affidavits rest on hearsay testimony, it is enough to say that they prove nothing; and in so far as they refer to other matters, it is also enough to say that we see no substantial error in the proceedings of

the sale. The defendant is not now contesting the sale, and so far as any trifling matters are concerned, it does not lie in the mouth of these alleged creditors and stockholders to challenge the regularity of the proceedings. Indeed, we cannot fail to observe that the main scope and purpose of this appeal seem to be to relitigate questions fully determined by the final decree appealed from and affirmed.

We see no error in the record, and the decree of the Circuit Court is

Affirmed.

Mr. Justice Bradley and Mr. Justice Gray did not hear the argument or take part in the decision of this case.

DAVIS *v.* PATRICK.

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

No. 984. Argued October 22, 23, 1891. — Decided November 9, 1891.

In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) if the promissor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld: (2) but if he has a personal, immediate and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise.

The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise.

When, in an action to recover on a contract, testimony is admitted without objection, showing the alleged contract to have been made, but on a day different from that averred in the declaration, and the court directs a verdict for the defendant without amendment of the declaration, such ruling is not erroneous by reason of the variation.

The case was stated by the court as follows:

This case was commenced on the 24th day of November, 1880, by the filing of a petition in the District Court of Knox County, Nebraska. Subsequently it was removed to the Circuit Court of the United States, and at the May term, 1883,

of that court a judgment was rendered in favor of the plaintiff. That judgment was reversed by this court, at its October term, 1886. *Davis* v. *Patrick*, 122 U. S. 138. A second trial in January, 1890, resulted in another verdict and judgment for the plaintiff, and again the defendant alleges error. The petition counts on two causes of action. No question is made by counsel for plaintiff in error with respect to the first count or the rulings thereon — the only error alleged being in reference to the second count. That count is for the transportation of silver ore from the Flagstaff mine, in Utah Territory, to furnaces at Sandy, in the same Territory. In the first trial it was claimed that Davis, the defendant, was the real owner of the Flagstaff mine, and therefore primarily responsible for all debts contracted in its working. The relations between Davis and the Flagstaff Mining Company were disclosed by a written agreement, of date December 16, 1873. By that agreement it appeared that Davis, on June 12, 1873, had advanced to the company £5000, at the rate of six per cent interest, a sum then due; that it had sold to Davis and agreed to deliver at the ore-house of the company, free of cost, 5195 tons of ore, of which it had only then delivered 200 tons, although Davis had paid in full for the entire amount. The agreement also recited that Davis was to advance an additional amount, if needed, not exceeding £10,000. It then provided that the mine should be put under the sole management of J. N. H. Patrick, to be worked and controlled by him until such time as the ore sold had been delivered and the sums borrowed had been repaid, with interest. This control was irrevocable, save at the instance of Davis. Coupled with this agreement was a full power of attorney to Patrick. This court held that such contract established between Davis and the mining company simply the relation of creditor and debtor, and did not make him in any true sense the owner. For the erroneous rulings of the trial court in this respect the judgment was reversed. In the second trial, this construction of the relations of Davis to the Flagstaff Mining Company was followed by the court, and the jury instructed that the contract put in evidence between Davis and the mining company created simply the rela-

tions of creditor and debtor, and did not make the former liable for expenses created in working and operating the mine; and the trial proceeded upon the theory that during the time the services sued for were being rendered Davis was the party mainly and pecuniarily interested in the working of the mine, and that he assumed to Patrick a personal responsibility for such services; and the real question tried was whether Davis's promises were collateral undertakings to pay the debts of another, and void because not in writing.

[In the opinion of the court, *post*, 485–487, some of the material evidence at the last trial is set forth.]

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

The case was put to the jury upon the words of an original and absolute promise. It was said to them, if Davis agreed to pay for the services, and if he agreed to pay the account, and if he agreed to pay for the work, and so on, he is liable. This was error, whether the proof shows that the form of expression was "I will see you paid," or "I will be responsible." Both forms have in law a different meaning and effect from the one, "I will pay you." It is elementary that the words "I will see you paid" form a collateral promise. On this point we must look to the statute of Nebraska, and its construction by the Supreme Court of that State. *De Wolf* v. *Rabaud*, 1 Pet. 476.

The statute in Nebraska, as that in New York, (considered in *De Wolf* v. *Rabaud*,) is substantially "a transcript of the 29th of Charles 2, c. 3." It is as follows: "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith: . . . *Second*, every special promise to answer for the debt, default or misdoings of another person." Comp. Stats. c. 32, § 8.

The cases upon the statute are as follows: *Rose* v. *O'Linn*, 10 Nebraska, 364. The servant of A was injured by the wrongful act of B. A physician was called in by B, who went to A's house, where the servant lay, and performed medical services; immediately after which A told him that B was

responsible for the accident, adding: "But you need not be at all alarmed, I will see that you are paid;" and the physician continued treating the patient until he was cured. Mr. Justice Cobb deals with the question as one arising upon these words, "I will see that you are paid," and considers the promise as within the second class of cases mentioned by Chief Justice Kent in *Leonard* v. *Vredenburgh*, 8 Johns. 29; *S. C.* 5 Am. Dec. 317; that is, as a collateral undertaking. See also *Morrissey* v. *Kinsey*, 16 Nebraska, 17; *Waters* v. *Shaffer*, 25 Nebraska, 225.

These cases dispose of the question and show the error into which the court fell in perverting a promise to see Patrick paid into a promise to pay him. And this is the old law. In *Watkins* v. *Perkins*, 1 Ld. Raym. 224, the Chief Justice said: "If A promise B, being a surgeon, that if B cure D of a wound, he will see him paid; this is only a promise to pay if D does not, and therefore it ought to be in writing, by the statute of frauds."

Matson v. *Wharam*, 2 T. R. 80, is the leading case on this subject. The defendant had applied to one of the plaintiffs, to know if they were willing to serve one R. C. with groceries, and on his replying that they did not know R. C., the defendant said, "If you do not know him, you know me, and I will see you paid." The goods were subsequently sent to R. C., and charged to him. Application was made to him for payment, and he not responding, and the defendant refusing to pay, the action was brought for goods sold and delivered to the defendant. Mr. Justice Buller, reviewing some previous cases, said: "The authorities are not now to be shaken; and the general line now taken, is that if persons for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt, must be in writing; otherwise it is void by the statute of frauds." And judgment was given to the defendant, without hearing his counsel. See also *Brown* v. *Bradshaw*, 1 Duer, 199; *Hill* v. *Raymond*, 3 Allen, 540; *Williams* v. *Corbet*, 28 Illinois, 262; *Greene* v. *Burton*, 59 Vermont, 423; *Birchell* v. *Neaster*, 36 Ohio St., 331; *Simpson* v. *Hall*, 47 Connecticut, 417; *Wagner* v. *Hallack*, 3 Colorado, 176. They all agree with the Nebraska cases, that the prom-

ise, "I will see you paid," is a collateral one and within the statute.

From these words, I pass to consider the other form of the promise, which Patrick put into Davis's mouth; namely, that he would be responsible for the debt.

Anderson v. *Hayman*, 1 H. Bl. 120, was upon a promise by a father in these words: "I will be bound for the payment of the money as far as £800 or £1000," for goods sold and delivered to the son. Payment was demanded of the son, but he having become bankrupt, plaintiff sued the father. The verdict being for the defendant, the court upon a rule *nisi* for a new trial, held that this promise not being in writing, was void by the statute of frauds.

In *Tileston* v. *Nettleton*, 6 Pick. 509, the defendant was the commanding officer of a militia company, and also a member of the committee on arrangements for a celebration of the Fourth of July, which included a public dinner provided by the plaintiff. The members of the company with other citizens partook of the dinner, and while they were eating the plaintiff sent two persons to collect one dollar from each of those present to pay for his dinner, etc. Whereupon the defendant stopped them and said that they need not call upon the members of the company, as he would be responsible for them; to which the plaintiff assented, and no money was collected from them. The evidence was submitted to the jury, which found for the defendant; and the court, affirming the judgment, stated that the members of the company were the original debtors, and might have been sued separately upon an implied promise; and their original liability proved that the defendant's engagement was only collateral.

Walker v. *McDonald*, 5 Minnesota, 455, was an action for rent for which the defendant promised to be "responsible," which was held to be a collateral promise.

In *Walker* v. *Richards*, 41 N. H. 388, it was held that a promise to be "accountable" for goods sold and delivered to a third person was within the statute.

No circumstance testified to by any of the witnesses shows that either of the parties, the company, Patrick or Davis con-

Counsel for Defendant in Error.

sidered Davis liable upon an original promise, nor in fact liable at all until Patrick ceased to haul the ores. Everything, on the other hand, shows that Davis's liability was not upon an original promise. These circumstances entitled Davis to a direction from the court to the jury, as requested by him in his third and fourth requests, that he was not liable as upon an original promise.

The cases are all to the effect that when the words of a promise are equivocal, the question upon all the circumstances must be submitted to the jury. *Anderson* v. *Hayman*, 1 H. Bl. 120; *Darnell* v. *Tratt*, 2 Car. & Payne, 82; *Dixon* v. *Frazee*, 1 E. D. Smith, 32.

The case at bar differs from *Emerson* v. *Slater*, 22 How. 28, in all material circumstances. When the alleged promise was made, the Flagstaff Company was solvent, and possessed of valuable properties, none of which had been placed in the hands of Davis. Patrick never stopped or threatened to stop working for the company; all he says is that but for Davis's promise he would have forced him to pay. He had not taken possession of the company's property so as to exclude it, or any contractor from doing the work. The promise was not in its form absolute and original, but contingent and collateral. These are material distinctions.

There are several cases classified according to their circumstances, which illustrate the distinction taken above, between *Emerson* v. *Slater* and the case at bar; that when the alleged promise was made by Davis, Patrick had not put either himself or Davis in a position which made his employment necessary. *Clay* v. *Walton*, 9 California, 328; *Doyle* v. *White*, 26 Maine, 341; *S. C.* 45 Am. Dec. 110; *Ames* v. *Foster*, 106 Mass. 400; *Gill* v. *Herrick*, 111 Mass. 501.

Another set of cases is where the new promisor has agreed to pay a lien upon property where the protection of his interest called for the discharge of the lien. *Fullam* v. *Adams*, 37 Vermont, 391.

Mr. John L. Webster for defendant in error. *Mr. Nathaniel Wilson* was with him on the brief.

Opinion of the Court.

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

That Davis was interested in having the ore transported to the furnaces is clear. He was interested in two respects: First, as to the 4995 tons to be delivered to him at the ore-house, it being his property when thus delivered, any subsequent handling was wholly for his benefit; and in respect to the balance, as the transportation was one step in the process of converting the product of the mine into money, it would help to pay the debt of the company to him. Davis, therefore, was so pecuniarily interested in, and so much to be benefited by, the prompt and successful transportation of the ore, that any contract which he might enter into in reference to it was supported by abundant consideration. We proceed, therefore, to inquire what he said and did. After the execution of the papers, the newly appointed manager took possession of the mine; and in the fore part of 1874 the plaintiff commenced the transportation of the ore under a contract with the agent of the manager. The business was carried on in the name of the mining company. The plaintiff understood that Davis was interested in the matter, though not informed as to the extent of the interest, or the terms of the agreement between him and the mining company. In the fall of 1874 Davis came to Utah to examine the property. He was introduced by the manager to the foreman of plaintiff, in the latter's presence, as the boss of the mine, to which Davis assented. After this, plaintiff, who had not received his pay in full for the services already rendered, had an account made up showing the balance due him, and presented it to Davis. His testimony as to the conversation which followed is in these words: "I showed it to Mr. Davis and told him I was not getting my money, and Mr. Davis said my account was all right and he would be personally responsible to me for the money, and for me to go on as I had been doing and draw as little money as I could get along with to pay the men and the running expenses, and he would see that I got every dollar of my money." The plaintiff's cashier, who was present at this conversation, gives this as his recollection of the conversation:

"Q. In that conversation state what Mr. Davis said about being responsible to A. S. Patrick for that account.

"A. He stated to Mr. Patrick in my presence that he would personally be responsible for that account. He says: 'You know, Al., I practically own this mine, but money is scarce and we must get what we can out of the mine.' He says we are making large expenditures for improvements, and he says you shall have all the money you want to pay your men and expenses, but you must wait for the balance, and I will see that you are paid.

"Q. What did he say in that connection to A. S. Patrick about continuing on in the hauling of the ores?

"A. He requested him to continue in the hauling of the ores. He requested him to do it.

"Q. In response to Mr. Davis to that request, what did Mr. Patrick say?

"A. He said to Mr. Davis if he would guarantee him to be paid he would continue to work, and Davis said he would see him paid."

After this, the plaintiff continued the work of transportation until the fall of 1875, receiving such payments from time to time as to extinguish the amount due him at the date of this conversation, and leaving a balance more than covered by the work done in 1875, and it is only for work done after these promises that this recovery was had and in respect to which the questions presented and discussed arise. The plaintiff testified to another conversation, in September, 1876, in the city of New York. His account of that conversation is given in these words: "Plaintiff told Davis that his brother and himself were hard up for money, and wanted to know if Davis would not give them some money on the 'Flagstaff' account, for hauling the ores. Plaintiff had his account with him and showed it to Davis. Davis said the whole of the account was all right, and he proposed to pay the account, and said he would pay the plaintiff. Plaintiff said to Davis that if he would give him some money on the account it would help him out. Davis said he had some securities in London which he was going to sell, and would have some money in a few days

and would give plaintiff $5000 on the account. Plaintiff said if the money was going to be there in a few days he would wait for it, but Davis said: 'No; you go home and I will pledge you my word that I will telegraph the money to you to the First National Bank by the first of October.'"

And, again, he testified to an interview in 1877 with Davis, in the city of Omaha, in the presence of other parties, in which he said: "Davis, you promised all along to pay me that money," and Davis replied, "I believe I did."

This testimony of plaintiff as to conversations with defendant is corroborated by other witnesses and contradicted by none. It must therefore be accepted as presenting the facts upon which this case must be determined. Were these promises binding upon Davis, or of no avail to the plaintiff because not in writing? Were it not for the statute of frauds there would be no question, for obviously there was both promise and consideration. Defendant relies upon that provision of the statute of frauds which forbids the maintenance of an action "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encour-

agement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As said by this court in *Emerson* v. *Slater*, 22 How. 28, 43: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To this may be added the observation of Browne, in his work on the statute of frauds, section 165: "The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." The thought is, that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract enured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining com-

pany's debt to him; and as the mining company was apparently destitute of any other property, and the payment of its debt to Davis therefore depended upon the continued and successful working of this mine, and as the control and working of the mine had been put in the hands of Davis so that he might justly say, as he did, "I am practically the owner," it follows that he was a real, substantial party in interest in the performance of this contract. His promise was not one purely collateral to sustain the obligations of the mining company, but substantially a direct and personal one to advance his own interests. While the mining company was ultimately to be benefited, Davis was primarily to be benefited by the transportation of the ore, for thereby that debt, which otherwise could not, would be paid to him. He, therefore, in any true sense of the term occupied not the position of a collateral undertaker, but that of an original promisor, and it would be a shadow on justice if the administration of the law relieved him from the burden of his promise on the ground that it also resulted to the benefit of the mining company, his debtor.

Counsel for Davis place stress on the form of expression attributed by Patrick to Davis, to wit: "I will be personally responsible; I will see you paid;" and contends that the import of such language is that of a collateral promise. There is force in this contention, as it implies that some one else was also bound, but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Patrick declares he understood it to be a direct promise, and acted on the faith of it. That Davis understood it in the same way, is evidenced not only from the circumstances surrounding the parties at the time, but from the fact that in a subsequent interview, when charged to have always promised to pay this debt, he admits that he believes that he did. The plaintiff, believing that Davis was, as he said, practically the owner, the party primarily to be benefited by the conversion of the products of the mine into money, understood that Davis was making an

original promise to pay for the work which he might do, and upon such promise he might surely rely as an original promise, at least for any work done thereafter.

The merits of the case, therefore, as disclosed by the testimony were with Patrick, and the judgment in his favor was right. It is objected that the court in its instructions spoke of Davis as an original promisor, as one promising to pay the debt, and not as one promising to be responsible for the debt, or to see it paid. But as Davis, in the second conversation promised to pay, and in the third admitted that he had always promised to pay the debt, we cannot think that the court misinterpreted the scope and effect of his words. It is not probable that the parties to this transaction understood the difference between an original and a collateral promise. We must interpret Davis's promises in the light of the surroundings, and of his subsequent admissions, and in that light we cannot think that the court erred in its construction thereof; and if the jury believed that he had made such promises, we cannot doubt that the verdict should have been as it was.

It is also objected, that the court erred in not directing a verdict for defendant upon the ground of a departure from the allegations of the petition. That counts on an original employment by Davis, in 1873, while the testimony shows that the original employment was by the mining company, and that the promise of Davis was made in the fall of 1874, and after Patrick had been at work for months for the mining company. As no objection was made to the admission of testimony on this ground, and as an amendment of the petition to correspond to the proof would involve but a trifling change, we cannot see that there was any error in the ruling of the court. If objection had been made in the first instance, doubtless the court would, as it ought to have done, have permitted an amendment of the petition. There was no surprise, for the facts were fully developed in the former trial.

Upon the record as presented, we think that the verdict and judgment were right, and as no substantial error appears in the proceedings the judgment is

Affirmed.

Statement of the Case.

The Chief Justice, Mr. Justice Bradley and Mr. Justice Gray did not hear the argument or take part in the decision of this case.

KNEELAND *v.* LUCE. (2)

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

No. 39. Argued October 19, 20, 1891. — Decided November 9, 1891.

In a suit in equity brought against a railroad company, by a judgment creditor, for the sale of its road, because of insolvency, the road being covered by numerous mortgages, a receiver was appointed, on whose petition an order was made directing him to issue receiver's certificates to various parties, who claimed to be sub-contractors for building the road, and were about to sell certain shares of the stock of a company whose road formed part of the line of road and were held in pledge for the debts. The order directed that the certificates should be a first lien on a certain part of the road and should so state on their face. They were so issued. The trustee in the mortgages was a party defendant to the suit, when the receiver was appointed, and, by its counsel, consented to the issue of the certificates. The trustee also filed a foreclosure bill, in which a decree of foreclosure and sale was made, providing for the payment of "court and receiver's indebtedness," prior to the payment of the bondholders, and gave leave to the purchaser at the sale to appeal from any order directing the payment of claims as prior to the mortgage bonds. The road was sold, and the purchaser, under the order of the court, received the shares of stock referred to. The claims of the holders of the certificates were reported favorably by a master, and, on exceptions to the report, by the purchaser, for himself and other bondholders, the court allowed all the certificates as prior liens, and directed the purchaser to pay their amount into court: *Held,*

(1) The issue of the certificates was proper.

(2) Good faith required that the promise of the court should be redeemed;

(3) The purchaser and the bondholders were estopped from setting up any claim against the priority of the certificates.

The appeal was dismissed as to the claims of the appellees which did not exceed $5000.

The court stated the case as follows:

Statement of the Case.

The Toledo, Cincinnati and St. Louis Railroad Company (hereinafter called the St. Louis Company) was organized about June, 1881, and was formed by the consolidation of ten local railroad companies which were engaged in building lines of narrow-gauge railroad in Indiana and Illinois, between Kokomo, Indiana and East St. Louis. A construction company, known as the Western Construction Company (hereinafter called the Construction Company), before that, and in 1880, had entered into contracts with these local railroad companies for the construction of their roads, whereby the Construction Company was to receive for the work all the stock and bonds of the several railroad companies, and, in some cases, in addition, certain local aid which had been raised along the respective lines. The lines had been located and the work was in progress when, in the summer of 1881, it was concluded that it would be better to organize a continuous line of railroad; and with that view the St. Louis Company was formed by consolidation.

There was a local company called the Frankfort and State Line Railroad Company (hereinafter called the Frankfort Company) which had been organized in 1874, to build a line of road from Frankfort, Indiana, westward to the west line of that State. The road was located in part, and a broad-gauge railroad was built from Frankfort west for a distance of about 11 miles, in Indiana. In August, 1880, the Construction Company contracted with the Frankfort Company to build the road of the latter, as a narrow-gauge road, from Frankfort west to the west line of Indiana. The Construction Company was to receive the 11 miles of road, on which there was a mortgage, and $4000 per mile in local aid taxes and subscriptions, which had been voted and raised, and $10,000 per mile in first mortgage bonds, and all the stock of the railroad company, being $2,000,000, except what it should be necessary to deliver to taxpayers for local aid, for which $200,000 was reserved, the length of the line, including the 11 miles, being 67 miles.

In February, 1881, the Construction Company made a contract with Barnes & Co., which was assigned to the Iowa

Construction Company, for the grading of the line and some other work. The line was located early in 1881, by the engineer of the Construction Company, the work was commenced, and the grading had been done to a considerable extent, when, after the formation of the St. Louis Company, the Construction Company entered into a contract with the St. Louis Company to construct a line of narrow-gauge railroad running west from Frankfort, Indiana, to a point on the west line of that State, for which the Construction Company was to receive the bonds and stock of the St. Louis Company.

The Frankfort Company was not included in the consolidation, and the stock of that company was not exchanged for the stock of the St. Louis Company, while the stock of all the consolidated companies was so exchanged. It was not the intention to construct two lines of railroad, but the object was ultimately to consolidate the Frankfort Company with the new organization, and thus form a continuous line. This was not done then, for the reason that it was supposed that if the consolidation should include the Frankfort Company it would render void the local taxes voted, and the local subscriptions made, in aid of that company, which amounted to over $170,000. It was determined, therefore, to keep up the separate organization of the Frankfort Company, although the line of the two roads would be continuous.

The construction of the Frankfort railroad was completed in 1881 or early in 1882, and much of the work was done on the whole line to East St. Louis; but the Construction Company was unable to sell the bonds and stock of the new line, and could not proceed further; and early in 1882, a syndicate was formed in Boston, known as the Delphos Trust, which agreed to take all of the bonds and stock then unsold and pay an amount equal to that estimated as required to complete the road. Under that arrangement, all of the securities then unsold were turned over by the Construction Company to the Delphos Trust, except the stock of the Frankfort Company.

At the time this arrangement was made, the Construction Company was entitled to the whole of the stock of the Frankfort Company, because the Construction Company had com-

pleted its contract with that company, and had at the time $1,000,000 of such stock, and soon after received the remaining $800,000 of it; and it was arranged between the Delphos Trust and the Construction Company that the president of the latter should hold the $1,800,000 of stock until all of the debts of the Construction Company, due to its sub-contractors, were paid. Those debts not being paid, the sub-contractors filed their several claims for liens, and commenced suits to foreclose those liens, prior to March 20, 1883, making the Construction Company and the St. Louis Company parties to the suits.

The road was completed during 1882; but the debts due to the sub-contractors were not paid, and they, having learned of the fact that the stock of the Frankfort Company was held by the president of the Construction Company to secure their claims, being about to commence proceedings to attach such stock, a written agreement was entered into, on the 20th of March, 1883, by the St. Louis Company, the Construction Company, the Frankfort Company, the American Loan and Trust Company of Boston (hereinafter called the Trust Company) and certain of the sub-contractors, namely, Patrick Dowling, H. S. Hopkins & Co., Cochran & Brown, the Iowa Construction Company and Beeson & Hammond, whereby the St. Louis Company gave its notes to said creditors for the amounts of their several claims, payable in instalments, the last to become due running for a year; and, to secure the payment of such notes, the stock of the Frankfort Company, being $1,800,000 in par value, held by the Construction Company, was deposited with the Trust Company, as collateral security, and it was provided that it should be sold in case of default in the payment of the notes, and that on payment of the notes the stock was to pass to the St. Louis Company. In the meantime, the creditors were not to prosecute further their mechanic lien suits. Two creditors, namely, William F. Richie and Henry McPherson, did not sign the agreement or receive any notes.

The reason why the St. Louis Company assumed the debts due to the sub-contractors, was that its officers became fearful

that, by the seizure and sale of the stock of the Frankfort Company, that stock would get into hostile hands, and the St. Louis Company would thus lose 67 miles of its line of road; and they were anxious to stay the mechanic lien foreclosure suits, because they feared that, if those suits were pressed, a receivership of the road might become necessary.

On the 1st of August, 1883, one Braman, a citizen of Massachusetts, filed a bill in equity in the Circuit Court of the United States for the District of Indiana, against the St. Louis Company, as a citizen of Illinois, founded on a judgment obtained by him against that company in a state court of Ohio, asking for the appointment of a receiver of the company, and for the sale of its road to satisfy his debt and the debts of other creditors of the St. Louis Company, on the ground of the insolvency of that company. The bill set forth the contents of various mortgages, which covered in the aggregate the entire property of the St. Louis Company, although there was no mortgage made by it on its line as a whole. These several mortgages were sixteen in number, nine of them being first mortgages and seven second mortgages, the first mortgages amounting to $10,500,000 and the second mortgages to $9,250,000. The Central Trust Company of New York, a corporation of New York, was the sole trustee in all of the mortgages except one, and in that it was a trustee conjointly with Thomas A. Hendricks; and that company and Hendricks were made defendants to the bill.

On the 2d of August, 1883, an order was made by the court, the St. Louis Company and the Central Trust Company appearing by solicitors, the former assenting and the latter not objecting, appointing Edward E. Dwight as receiver, to take possession of and operate the railroad from Toledo, Ohio, through Indiana and Illinois to East St. Louis, and sundry branches in Ohio. Hendricks also appeared and waived process, and stated that he did not object nor consent to the appointment of a receiver.

On the 14th of November, 1883, Dwight, the receiver, filed his petition to enjoin the American Loan and Trust Company from selling the stock of the Frankfort Company. The peti-

tion set forth the agreement of March 20, 1883, and stated that the indebtedness secured by the pledge of the stock was overdue and had not been paid; that the creditors secured by the agreement had demanded of the Trust Company that the stock be sold; that the Trust Company had notified the St. Louis Company that it would, on November 21, 1883, in Boston, sell the $1,800,000 of stock, at public auction, for cash; that it was claimed by the holders of the bonds secured by the mortgage on the railroad extending from Kokomo to East St. Louis, that that mortgage was, at least, an equitable lien on the road of the Frankfort Company; that that claim was disputed by certain of said creditors; that it would be ruinous to the interests of the stockholders and bondholders and creditors of the St. Louis Company, and to the interests of the public, if by the sale of said stock the legal title to that portion of the road between Frankfort and the State of Illinois, and possibly the right of its possession, should be sold away, and the continuity of the line be destroyed; that, in that view, the receiver submitted to the court whether it was not to the advantage of the holders of the mortgage bonds and of all parties in interest that the court should protect the title, continuity and possession of said line of railroad by the issue of receiver's certificates, or otherwise, whereby the indebtedness covered by the agreement of March 20, 1883, might be paid off; and that he was informed and believed that the creditors secured by said agreement were willing to appear voluntarily in the case and to set forth their claims and ask the decision of the court thereon.

The prayer of the petition was, that the court would order said parties so to appear and interplead and set forth their respective claims in the matter of the stock; that the court might thereupon take such action as equity would permit; and that in the meantime it would enjoin the American Loan and Trust Company from the threatened sale of said stock.

By an order made by the court on November 28, 1883, William J. Craig was appointed receiver in the place of Edward E. Dwight, resigned.

On the third of January, 1884, William F. Richie filed an

intervening petition, claiming the benefit of the agreement of March 20, 1883, on the ground that the Construction Company owed him $12,921.98 for lumber and cross-ties delivered by him to that company to be used in building the road of the St. Louis Company, and the lines with which it had been consolidated, and praying that he might participate in the fund to be raised from the sale of the $1,800,000 of stock.

On the 28th of January, 1884, the court made an order, on the receiver's petition of November 14, 1883, which set forth that all of the parties named in the receiver's petition, which included H. S. Hopkins & Co., Cochran & Brown, W. F. Richie & Co., Kapp & Co., the Iowa Construction Company, Patrick Dowling and Beeson & Hammond, appeared in open court, in person, or by attorney; that the court found that the facts set forth in the petition were true, and that it would be injurious to the interests of the stockholders, bondholders and creditors of the St. Louis Company, more especially to the bondholders of the portion thereof between Kokomo and East St. Louis, and to the interests of the public, so far as interested therein, that the stock of the Frankfort Company, the legal title to the portion of the road between Frankfort and Illinois, and possibly, the right to the possession of the same, should be sold and the connection and continuity of the line be destroyed; and that it was desirable and necessary for the protection of the rights of all of said parties, and particularly the rights and interests of the holders of the bonds secured by the mortgage on the portion of the line between Kokomo and East St. Louis, that the court should authorize the issue of receiver's certificates in the manner, for the purpose and on the conditions afterwards set forth in said order. It was ordered, therefore, that the receiver issue and deliver to each of said creditors the respective amounts due to them and so secured, to wit: H. S. Hopkins & Co., $30,475.13; Cochran & Brown, $20,061.66; Kapp & Co., $1731.98; the Iowa Construction Company, $33,750; Patrick Dowling, $3375; and Beeson & Hammond, $11,626.14. This did not include William F. Richie or W. F. Richie & Co. or Henry McPherson.

The order directed that the certificates should bear interest

at 6 per cent per annum from April 3, 1883, and should bear date of their issue and be payable on or before one year thereafter; and it made the indebtedness evidenced by them a first and best lien on all the railroad lying between Kokomo, Indiana and East St. Louis, Illinois. The order gave the form of the certificates to be issued, which form stated that the certificate was issued in settlement of the indebtedness mentioned in the order of the court, and in a like order made by the Circuit Court of the United States for the Southern District of Illinois, and was a first and best lien on all the line of the railroad company lying between Kokomo and East St. Louis. The order further directed that the certificates should not be delivered until the parties had all of them cancelled all mechanics' liens claimed by them, and dismissed all pending actions therefor, and surrendered to the receiver the notes of the company held by them, and caused the American Loan and Trust Company to consent in writing to the order and to deliver to the receiver all of the stock so held in pledge. The order reserved for consideration the claim of W. F. Richie & Co.

On the 4th of March, 1884, the court made an order on the intervening petition of Richie, allowing his claim at $12,921.28, with interest at 6 per cent per annum from July 20, 1882, and directing the receiver to issue and deliver to him receiver's certificates for the amount due him; and the order contained further provisions like those found in the order of January 28, 1884.

On the 16th of April, 1884, Henry McPherson filed his intervening petition, stating that he was a contractor under a contract with the Construction Company to build in Illinois a portion of the road of the St. Louis Company; that he completed his contract, and, being thus a creditor of the Construction Company, brought suit to enforce his lien, which amounted to $20,000, and received, on January 29, 1883, from the St. Louis Company, notes for that amount, all of that date, the longest running for twelve months. He claimed a participation in the benefit of the agreement of March 20, 1883, and in the security of the $1,800,000 of stock, and prayed for an order for the issue to him of receiver's certificates to the amount of $20,000.

Statement of the Case.

The petition of McPherson was referred to a master, who, after taking testimony, filed a report thereon on August 29, 1884. The report was in favor of the petitioner, and exceptions were filed to it. The court made an order, on March 26, 1885, which stated the appearance of the Central Trust Company, of the bondholders' committee of the St. Louis Company, of McPherson, and of the receiver, and overruled the exceptions to the report and confirmed it, and directed, "the parties present consenting," that the receiver issue to McPherson receiver's certificates for the amount of his notes, and made provisions in regard to those certificates similar to the provisions contained in the orders of January 28, 1884, and March 4, 1884, in respect to the other certificates.

On the 17th of June, 1884, the Central Trust Company filed a bill in the Circuit Court of the United States for the District of Indiana, against the St. Louis Company, as a corporation of Indiana and Illinois, a corporation of the same name created by the laws of Ohio, Indiana and Illinois, the Frankfort Company, as a corporation of Indiana, Thomas A. Hendricks, as a citizen of Indiana, and Braman, praying for the foreclosure of the mortgages on the line of railroad, including the line of the Frankfort Company. There were various answers to this bill, and on the 12th of November, 1885, a decree was made in the suit brought by the Central Trust Company and in another suit which had been consolidated with it, brought by Edward F. Leonard, which foreclosed a mortgage made July 23, 1881, by the St. Louis Company of Indiana and Illinois, to the Central Trust Company and Hendricks, on its road from Kokomo, Indiana, through Indiana, and Illinois, to East St. Louis, 270 miles long, and securing 3000 bonds of $1000 each. The decree directed the sale of the property, and the assignment to the purchaser of the $1,800,000 of the stock of the Frankfort Company. It appointed two special masters to make the sale, and directed the execution of a deed to the purchaser by them, on compliance with the prescribed terms of sale. It directed the distribution of the proceeds of sale, and provided for the payment of "court and receiver's indebtedness," prior to the payment of anything upon the bonds and

coupons secured by the mortgage foreclosed. It directed that a certified copy of the decree be delivered to the Circuit Court of the United States for the Southern District of Illinois, and contained this clause: "Leave is hereby reserved to said trustees, and to the purchaser or purchasers at the foreclosure sale under this decree, to appeal from any order or final decree made by the court directing the payment of claims as prior and paramount to said mortgage bonds and coupons."

On the 21st of December, 1885, an order was made appointing a special master to report upon claims against the property. On the 30th of December, 1885, the special masters appointed to sell the property filed their report of sale, stating that they had sold it on that day to Sylvester H. Kneeland, for $901,000. On the 5th of February, 1886, an order was made confirming the sale and ordering the delivery of a deed of the property on the performance by the purchaser of the terms of sale specified in the decree. On the 10th of March, 1886, an order was made approving the form of the deed to the purchaser then presented to the court, and directing the deed to be delivered to him. On the 27th of March, 1886, on the petition of Kneeland, the purchaser, an order was made that the clerk of the court assign and deliver to Kneeland the certificate for the $1,800,000 stock of the Frankfort Company.

On the 25th of May, 1886, an order was made directing the special master appointed as to claims to report to the court, among other things: "What receiver's certificates have been issued by said receiver, Craig, to whom such certificates were issued, for what consideration they were issued, when the indebtedness accrued upon which they are based, and whether any of said certificates were issued for a greater or less sum than was proper, and what, if any, of said certificates should be contested, giving dates and amounts of certificates."

On the 4th of April, 1887, such special master filed a report as to the receiver's certificates. He attached to his report an exhibit showing what certificates had been issued, and to whom, and for what consideration, when the indebtedness accrued upon which they were based, and who then held

them. This exhibit covered, among others, the certificates so issued to H. S. Hopkins & Co., Cochran & Brown, W. S. Kapp & Co., the Iowa Construction Company, Patrick Dowling, Beeson & Hammond, William F. Richie and Henry McPherson. The master reported that he had taken testimony offered for the purpose of showing that the court which authorized the certificates had been misled as to the amounts justly due to the parties who applied for them, and of showing that they had been in fact issued for a greater sum than was proper; but that, as the parties had once had a full hearing before the court, he did not feel that the testimony then offered was sufficient to justify opening the decrees as to the amounts allowed, and he therefore found that the certificates were not issued for a greater sum than was proper. He stated that he construed the order of reference as authorizing him to report all facts necessary to enable the court to distribute the proceeds of sale to the persons who had the first lien and claim thereon. He then set forth the proceedings in regard to the issuing of the certificates, as hereinbefore stated, including the contents of the petition of the receiver, and stated that, in the proceedings under that petition, all parties in interest were duly represented and fully heard, the first mortgage bondholders being represented by their trustee as fully and fairly as such trustee was by law authorized to represent them and bind them by its action; and that, after full hearing and consideration, the court made the decree of January 28, 1884. He then set forth the proceedings in regard to the certificates issued to Richie, and stated that all persons, parties to the other proceedings, were made parties to the petition of Richie, and the proceedings on the petition of McPherson, in regard to which he stated that there were appearances by all parties in interest, including the trustee for the first mortgage bondholders. He further stated that no appeal was taken, and no review had of those proceedings, and that the certificates had passed into the hands of their present holders for due consideration, without notice of any proposed contest, and, as was claimed, with the knowledge of the chairman of the bondholders' committee, who was now contesting them. He

further stated that the representative of certain of the first mortgage bondholders contended that such proceedings were not binding upon them, and that they ought to be allowed to contest the certificates and dispute their priority, alleging that the court did not have before it all the facts relating to the original transactions; that the additional evidence taken before him showed that the creditors had no lien prior to the first mortgage bondholders; that the lien of the latter upon the 67 miles of road was prior to that of the creditors; that the claims of the latter were nothing more than the unsecured construction accounts; that the trust agreement of March 20, 1883, was made without consideration to the St. Louis Company; that its recitals were false and misleading; that it did not and could not give to the creditors, who were parties to it, any lien upon the stock of the Frankfort Company; and that the court was not justified in enforcing it. He further stated that if such allegations were true, the certificates ought to be contested; and he then proceeded to state the material facts in reference to each of the eight claims referred to.

Sylvester H. Kneeland, for himself and others, holders of the first mortgage bonds of the St. Louis division of the St. Louis Company, filed exceptions to the report of the master. On the 16th of September, 1887, the court heard the case and overruled the exceptions and confirmed the report. The order of the court, made on that day, allowed all the receiver's certificates mentioned in the report and the schedule attached thereto, as valid and just claims against the St. Louis division of the road, extending from Kokomo, Indiana, to East St. Louis, Illinois, and as a lien thereon prior to the first mortgage and to be paid from the proceeds derived from the sale of that division, in pursuance of the decree of foreclosure. It adjudged who were the owners and holders of the receiver's certificates issued to H. S. Hopkins & Co., Cochran & Brown, the Iowa Construction Company, Patrick Dowling, Beeson & Hammond, William F. Richie, Henry McPherson, and Kapp & Co., and named as such owners and holders: C. L. Luce & Co. and John T. Newton, for $82,891.25; C. L. Luce & Co., for $7374.73; the National State Bank of Mount Pleasant,

Argument for Appellant.

Iowa, for $36,989.46; the First National Bank of Mount Pleasant, Iowa, for $1286.59; the National State Bank of Terre Haute, Indiana, for $6353.65; W. W. Whitney & Co., for $1696.70; H. E. Bowers, for $1286.59; Emily Worthington, for $2573.18; T. P. M. Roome, for $2573.18; Hugh Dougherty, for $2573.18; William J. Craig, for $1689; John T. Newton, for $13,934.93; and unknown owners for $11,361.75; the aggregate amount due on all the certificates being $172,681.44, with interest at 6 per cent per annum from September 15, 1887, until paid.

The order further directed that the purchaser of the St. Louis division of the road of the St. Louis Company pay into the registry of the court all of the said sums, with interest; that they be paid over to the owners and holders of the certificates; and that the certificates be surrendered to the clerk of the court and cancelled. From this order Kneeland appealed to this court.

Mr. Robert G. Ingersoll and *Mr. John M. Butler* for appellant.

These certificates are not negotiable; they are not commercial paper, and the same defences are available that would be available were they held by those to whom they were originally issued. The appellant has the right to contest their validity, as he represents the first mortgage bondholders. *Union Trust Co.* v. *Chicago & Lake Huron Railway*, 7 Fed. Rep. 513; *Turner* v. *Peoria & Springfield Railway*, 95 Illinois, 135; *Stanton* v. *Alabama & Chattanooga Railroad*, 2 Woods, 506; *S. C.* 31 Fed. Rep. 585; *Central National Bank* v. *Hazard*, 30 Fed. Rep. 484. See also Beach on Receivers, sec. 396.

We therefore insist that the certificates were issued under a misconception of the facts; that they were given in payment of construction debts — debts due by the Western Construction Company and not by the railroad company; that the debts for which they were given were not a prior lien to the bonds; that the Frankfort and State Line Railroad Company built no line, issued no bonds, and that its stockholders had no claim

upon the road; that the stock of the Frankfort and State Line Company was of no value, and that the certificates should be set aside and the judgment of the court below reversed.

Mr. Charles Pratt and *Mr. W. I. Babb* for appellees.

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

Excluding the cases which are not within the jurisdiction of this court because the amounts do not exceed $5000, we proceed to examine the merits as to the certificates.

On the part of the appellant, the case has been argued principally on the contention that the sub-contractors had no lien superior to the first mortgage bonds; that the railroad company owed no debt to any sub-contractor; and that the receiver's certificates were issued without consideration, and were invalid as against the first mortgage bondholders. It is urged, that the testimony shows that the certificates were issued under a misapprehension by the court as to the real facts of the case, produced by misstatements and suppressions of facts; that the alleged construction debts and claims, on which they were based, were fictitious, fraudulent and unjust; that the certificates were issued in some cases where nothing was due, and in all cases for a greater amount than was due; that the certificates are not commercial paper or negotiable; that the same defences are available against them that would be were they all now held by the persons to whom they were first issued; and that the appellant, as representing not only himself but the first mortgage bondholders, for whom, and in whose interest, the road was purchased at the foreclosure sale, and to whom the right of appeal was given by the decree of November 12, 1885, has a right, in such representative capacity, to contest the validity of the certificates.

It is contended by the appellant that the Construction Company did not build the road from Frankfort, Indiana, to the west line of Indiana, under its contract with the Frankfort Company, but built it under its contract with the St. Louis

Company. But the contract of the Construction Company to build that line was made with the Frankfort Company on August 31, 1880, more than ten months before the St. Louis Company was formed, which was on the 9th of June, 1881. On the 10th of June, 1881, the Construction Company made a contract with the St. Louis Company to build a line of road for the latter company from Kokomo, Indiana, to East St. Louis, Illinois; and it was expected that when the Construction Company should receive the stock of the Frankfort Company, which it was to receive for constructing the road for that company, there would be a consolidation of the line of the Frankfort Company with the line of the St. Louis Company. The Construction Company in fact built the road for the Frankfort Company; and the latter held the legal title to the road in 1883, whatever equities the St. Louis Company might have had therein. The road was largely built, aside from the iron, before the last-mentioned company was organized. Practically all the right of way was secured by the Frankfort Company and in its name, and the line when built was leased by the St. Louis Company from the other company, and was so held until the receiver was appointed.

Moreover, in the decree of foreclosure of November 12, 1885, under which decree the appellant purchased and holds title, it is said: "Third. The court further finds that so much of said line of railroad, described in the aforesaid mortgages, as lies between the city of Frankfort, Clinton County, Indiana, and the line dividing the States of Indiana and Illinois, being about sixty-seven miles in length, was constructed by a company known as the Western Construction Company under a written contract entered into between it and said Frankfort and State Line Railroad Company on the 31st of August, 1880, except eleven and three-tenths miles that had theretofore been built." The Frankfort Company was a party defendant to the bill of foreclosure filed by the Central Trust Company. It answered that bill and contested the right of the bondholders to a lien upon the sixty-seven miles of road. The decree further finds that the trustees for the bondholders have in equity a lien on the road of the Frankfort Company,

and directs the $1,800,000 of stock of that company to be turned over to the purchaser at the sale.

The court was not deceived as to the true condition of affairs when it ordered the receiver's certificates to be issued, nor were the bondholders or their trustees deceived when they consented to such issue. The petition of the receiver stated all the material facts fully and accurately, and substantially as they were found by the court in its final decree, under which the appellant claims title. It is shown that all of the facts set out in that petition were true, and that the trustees, by their counsel, consented to the issue of the certificates because they were uncertain what view the court might take as to the right of the trustees to a lien upon the line of road of the Frankfort Company, under a mortgage given by the St. Louis Company, which never had the legal title to that line of road. The testimony of Mr. Thomas E. Stillman, the attorney of the Central Trust Company in the foreclosure suit, shows that he consented to the issue of the receiver's certificates covering the road from Kokomo to East St. Louis, and leads to the before-named conclusion; and there is other evidence to the same effect. It does not appear that any one was deceived. The evidence shows that the stock probably would have sold in the market for enough to satisfy the claims made upon it. The master found that the amounts of the claims were correct. The claims, except those of Richie and McPherson, were examined and cut down before the St. Louis Company would give its notes for them; and the amounts of the Richie and McPherson claims were contested in the taking of testimony by the master, before the certificates were issued.

The fifth paragraph of the foreclosure bill filed by the Central Trust Company sets forth the facts connected with the construction of the road of the Frankfort Company, and avers that it was built by the Construction Company under a contract between it and the Frankfort Company, under which the former was to receive all the stock of the latter, except $200,000, and $10,000 per mile in mortgage bonds and all local aid; and that the Construction Company did receive $1,800,000 of the stock, and afterwards held the stock to

secure the amounts due to its sub-contractors. The bill then sets out the trust agreement of March 20, 1883, and avers that, by its terms, when those debts should be paid, the stock was to become the property of the St. Louis Company. It then recites the failure of the last-mentioned company to pay those debts, and avers that the receiver had issued the certificates, under the order of the court, as a paramount lien on the line of the road from Kokomo to East St. Louis, wherewith to pay said debts, and was to hold the stock subject to the order of the court, if it should be redeemed, and then so held it. The bill further claims for the trustee an equitable lien on the sixty-seven miles of the road of the Frankfort Company. The final decree of foreclosure of November 12, 1885, recites the facts substantially as set out in the bill, and states that, with the consent of the Frankfort Company, the road of that company was built with money derived from the sale of the bonds issued by the St. Louis Company; and that, for that reason, and because the receiver's certificates had been issued to the sub-contractors as a first lien on the road from Kokomo to East St. Louis, and the court had come into possession of the $1,800,000 of stock which the sub-contractors had held in pledge as security, the first mortgage bondholders had in equity a lien on the road of the Frankfort Company; and it, therefore, directed that, on the sale of the road, that stock should be turned over to the purchaser of the line.

The creditors were induced by the intervention of the court and the action of the bondholders, acting through the trustees, to release their mechanics' liens and surrender the $1,800,000 of stock held by them as security, and which they were about to sell; and the bondholders procured from the court a decree giving them an equitable lien on that part of the line which was represented by the stock, to make good their title thereto; and the court directed the stock to be transferred to the purchaser. Now the bondholders, who became the purchasers of the road, ask to have the lien of the holders of the receiver's certificates set aside. This demand is entirely devoid of equity.

The interposition of the court in issuing the receiver's cer-

tificates was eminently proper. Where such certificates are issued, and the court, as in this case, impresses upon them a preferential lien, good faith requires that its promise should be redeemed, unless, perhaps, it be shown that the issue of the certificates was actually fraudulent. The propriety of the issue of certificates, in a case like the present, has been sustained repeatedly by this court, by Circuit Courts of the United States and by courts of the States. *Jerome* v. *McCarter*, 94 U. S. 734; *Wallace* v. *Loomis*, 97 U. S. 146; *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286; *Burnham* v. *Bowen*, 111 U. S. 776; *Kennedy* v. *St. Paul & Pacific Railroad*, 2 Dillon, 448; *Stanton* v. *Alabama & Chattanooga Railroad*, 2 Woods, 506; *Bank of Montreal* v. *Chicago, Clinton & Western Railroad*, 48 Iowa, 518; *Coe* v. *New Jersey Midland Railway*, 27 N. J. Eq. (12 C. E. Green) 37; *Hoover* v. *Montclair &c. Co.*, 29 N. J. Eq. (2 Stewart) 4; *Meyer* v. *Johnston*, 53 Alabama, 237.

In the present case, the creditors had in their hands, as a pledge for their debts, stock representing 67 miles of road, and that road was a link necessary in the continuous line of road. The bondholders had no legal mortgage thereon, but only an equitable lien. The bondholders, who now object to the priority of the receiver's certificates, were parties to the suit in which the decree was rendered, by their trustees and committee. No appeal was taken from that decree, nor were any steps taken to set it aside. On the contrary, the bondholders purchased the road and reorganized the company, and now hold the road under that decree. The sale of the stock to satisfy the debts of the creditors would have carried with it the title to the road, and put in jeopardy the continuity of the line. It was especially proper for the court to order the certificates to be issued, when the parties in interest consented. The equity of the creditors to whom the certificates were issued, especially as they had the legal title to the $1,800,000 of stock, was as high as the equity of the bondholders, who had no legal mortgage on the road of the Frankfort Company, and whose equitable right to a lien on the 67 miles of that road arose only out of the fact that the road had been built,

in part at least, with money arising from the sale of some of the bonds issued by the St. Louis Company.

The consent of the trustees to the issue of the certificates bound every bondholder. There is nothing to show that the trustees acted corruptly or fraudulently. Under all the circumstances of the case, the bondholders are precluded from claiming priority over the receiver's certificates, which were issued for the purpose of preserving the mortgaged property. In *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 461, this court said: "As to receiver's certificates issued, with the sanction of the court, after the trustees become parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises." See also *Miltenberger* v. *Logansport Railway*, 106 U. S. 286; Jones on Railroad Securities, sections 539, 540; *Humphreys* v. *Allen*, 101 Illinois, 490, 499.

The appellant and those whom he represents are clearly estopped from setting up any claim against the priority of the receiver's certificates. *Swan* v. *Wright's Executor*, 110 U. S. 590; 2 Pomeroy's Equity Jurisprudence, sections 804, 805.

The certificates are all of them payable to bearer. No one of them is now held by the original parties, but they have all passed into the hands of third persons for a valuable consideration. Those persons had a right to rely on the promise of the court as to their priority, plainly borne on their face, when the consent of the trustees, and thus of the bondholders, was given to their issue.

The order is affirmed, with costs, as to all the appellees except the First National Bank of Mount Pleasant, Iowa, W. W. Whitney & Co., H. E. Bowers, Emily Worthington, T. P. M. Roome, Hugh Dougherty and William J. Craig, and as to them the appeal is dismissed for want of jurisdiction.

Mr. Justice Gray was not present at the argument and took no part in the decision.

SEITZ *v.* BREWERS' REFRIGERATING MACHINE COMPANY.

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

No. 61. Argued October 29, 1891. — Decided November 9, 1891.

When a contract is couched in terms which import a complete legal obligation, with no uncertainty as to the object, or extent of the engagement, it is, (in the absence of fraud, accident or mistake,) conclusively to be presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing.

Whether the written contract in this case fully expressed the terms of the agreement between the parties was a question for the court; and silence on a point that might have been embodied in it does not open the door to parol evidence in that regard.

When a known, described and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular purpose, yet, if the known, described and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

THE case was stated by the court as follows:

This was an action brought by the Brewers' Refrigerating Machine Company against Michael Seitz upon the following contract:

"This agreement, made this 11th day of January, A.D. 1879, between the Brewers' Refrigerating Machine Company of Alexandria, Va., party of the first part, and Michael Seitz, of Brooklyn, N. Y., party of the second part, witnesseth:

"That the party of the first part hereby agrees and contracts to supply the party of the second part with a No. 2 size refrigerating machine, as constructed by the said party of the first part, by the 15th day of March next, or as soon thereafter as possible, the machine to be delivered at the depot or wharf in Philadelphia, Penn., and to be put up and put in operation in the brewery of the said party of the second part at 258–264 Maujer street, at Brooklyn, E. D., N. Y., under the superinten-

dence of a competent man furnished by the said party of the first part.

"The party of the second part hereby agrees and contracts to pay to the said party of the first part for said machine the sum of nine thousand four hundred and fifty dollars ($9450.00) in manner as follows, namely: Four thousand seven hundred and twenty-five dollars ($4725.00) on the day when the machine is put in operation at the brewery of the said party of the second part, and the balance of four thousand seven hundred and twenty five dollars ($4725) in three equal instalments — that is to say, one thousand five hundred and seventy-five dollars ($1575.00) for each instalment, payable respectively in one (1), two (2) and three (3) months after the day when the machine is put in operation at the brewery of the said party of the second part, for which instalments the said party of the second part agrees and contracts to give his notes on the day last mentioned."

The complaint, after setting forth the execution of the contract on the 11th of January, A.D. 1879, alleged compliance therewith in every respect by the plaintiff, and breach of the promise to pay the purchase price.

The defendant stated in his answer, among other things, "that the machine placed in defendant's brewery was worthless and incapable of operating to produce the results represented by plaintiff to this defendant as an inducement to enter into the aforesaid agreement; that said machine has not been accepted by this defendant nor operated or attempted to be operated by defendant, his agents, employés nor any other person acting by or under his authority, and did not pass out of the control of the plaintiff, nor has the said machine been used by him in his said brewery, because said machine was worthless and incapable of serving any useful purpose therein." And defendant also averred, by way of counter-claim, that he had sustained damages by reason of false and fraudulent representations by plaintiff as to what the machine would accomplish, in reliance upon which he had permitted his brewery to be subjected to the action of said machine, and suffered loss accordingly.

Statement of the Case.

Upon the trial before the circuit judge and a jury, plaintiff proved that a No. 2 size refrigerating machine, as constructed by the Brewers' Refrigerating Machine Company, was supplied defendant and put up and put in operation in his brewery, by it, in accordance with the terms of the contract.

Defendant thereupon asked to amend his answer, "to set up that defendant entered into that contract by reason of fraudulent representations on the part of this company." The amendment was allowed, and was in substance that plaintiff represented that the machine was capable of cooling certain rooms in the brewery which had been examined by plaintiff, but the machine, when set up and operated, was not so capable, and failed to perform the work for which, upon the representations of the plaintiff, the machine had been contracted for by defendant; that defendant contracted to purchase the machine upon the guarantee by plaintiff to defendant that it would cool certain rooms, and it was upon that guarantee alone that defendant entered into the contract; that defendant entered into the contract upon the representations of the plaintiff to the effect that the No. 2 machine referred to in the contract set forth in the complaint would cool and was capable of cooling a space of 150,000 cubic feet of air continuously to a temperature sufficiently low for the purpose of brewing or manufacturing beer in the defendant's brewery or premises, that is to say, to a temperature in the neighborhood of 40° Fahrenheit; and that the plaintiff knew at and before the time when the contract was made that the representations made to the defendant were false and unfounded, and knew that the said No. 2 machine was not capable of performing the work which plaintiff represented it as being capable of performing, and knew that the machine would be worthless to the defendant for the purposes for which defendant contracted for it and intended to use it.

Evidence on defendant's behalf was then admitted tending to show that prior to the execution of the contract, plaintiff's agents had represented that the machine would cool 150,000 cubic feet to 40° Fahrenheit; that defendant had been cooling his brewery with ice and wished the machine to cool the

rooms to about the same extent; and that the machine did not cool the rooms as desired. On cross-examination of the defendant's agent, it appeared that on January 13, 1879, he wrote to the secretary of the refrigerating company: "In speaking to Mr. M. Seitz to-day he said that your agreement was very unsatisfactory to him; in fact, that before he would get the machine that he wanted a written guarantee from you that you would cool his building, which you have seen, to 3½ R. and keep it at that all the time; otherwise he would not have the machine, as he would have no use for it, as he would have to put himself to great expense and great risk at the same time." To which plaintiff responded, January 20: "I regret to hear that Mr. Seitz feels dissatisfaction with the contract made with him. The guarantee he now asks for in addition it would not be proper for us to give, as Mr. Seitz himself will see on further reflection, we think. The maintenance of a certain temperature in his rooms is not solely dependent upon our machines; in fact, there are a great many other things entirely beyond the control of the machine which influence this temperature. The mode of working the rooms, the water used for washing, the fermentation, and many other things might be mentioned in this connection as matters which we cannot control, and which nevertheless are most important considerations in the maintenance of a given temperature. We are confident from the experience with the Portner machine during last summer and fall that the machine sold to Mr. Seitz will not only give him the desired low temperature, but will, in addition, give him what he never before had in the warmer months, namely, pure and dry air. The machine we are building for him is in many respects far superior (aside from size) to the Portner machine, and when he has had it a year we believe he would not part with it for any money if he could not replace it. That we must decline to guarantee what Mr. Seitz asks for is simply for the reasons stated. There are too many side considerations entirely beyond the control of the machines. We would add that we have not in any instance been asked for such a guarantee as a condition of sale, but that all the parties to whom we have

sold bought on our representations and what they have seen and heard of the working of the Portner machine."

On January 21, 1879, defendant's agent telegraphed plaintiff: "Will you defend any infringement suits against Mr. Seitz for using your machine?" and on January 23, 1879, wrote: "The machine sold to Mr. M. Seitz is all right, and can be sent at any time that it is ready." On the 16th of March, he again wrote plaintiff: "Mr. Seitz would like to have you to commence at once putting up his machine."

The defendant having rested, the court, on motion, directed a verdict for the plaintiff for the amount claimed.

The circuit judge remarked to the jury that the only defence worthy of consideration was that the machine was sold to the defendant under fraudulent representations by the plaintiff's agents, but that there was no evidence of fraud whatever in the case; that there was evidence to show that the machine did not work satisfactorily, and the jury were doubtless authorized to infer that it did not have the capacity of cooling 150,000 cubic feet to the degree stated, but that there was a written contract in the case, which contained no warranty, and, consequently, if the machine did not fulfil the expectations of the defendant, or if it did not fulfil verbal representation made at the time the contract was entered into, nevertheless defendant had no defence; that there was no evidence that false or fraudulent representations had been made; that the machine had been built and put up pursuant to the written contract; and that the defendant could not be permitted, upon the general theory that the machine was not a satisfactory article, to defeat the plaintiff from recovery.

The verdict having been rendered as directed, and judgment entered thereon, the cause was brought here on writ of error.

Mr. Esek Cowen for plaintiff in error.

I. The defence, set up in the amended answer, contained no element of fraud, but was a sufficiently well expressed pleading, setting up a contract of warranty, or guaranty, *collateral to the contract of purchase and sale.*

Argument for Plaintiff in Error.

II. The learned judge was entirely mistaken, in his supposition that the written contract precluded the proof of a parol guaranty, collateral to the main contract of purchase and sale, and not in any way contradicting or modifying it.

The contract of purchase and sale was simply a contract to sell and deliver on one part, and to purchase on the other part, a machine of the general description, which the plaintiffs were then constructing, and known as size No. 2. The sole effect of the contract was to bind one party to deliver such a machine, and to bind the other party to pay for it. It had no other legal effect whatever, and a contract that the machine *after it was delivered*, should do certain work, and be capable of a certain operation, and should produce a certain effect, in no way contradicted, modified or added to the original contract. It was purely collateral, and as such could be proved by parol. This is the law in England. It is the law of the State of New York, where this cause of action arose, and where this case was brought and tried.

It is only necessary upon this point to cite a few of the cases in which this question has been considered, and more especially, as at least two of the cases cited from the New York Court of Appeals contain a very elaborate examination of the question. *Batterman* v. *Pierce*, 3 Hill, 171; *Johnson* v. *Oppenheim*, 55 N. Y. 280, 293; *Chapin* v. *Dobson*, 78 N. Y. 74.

III. Aside from the express parol warranty or guaranty, there was clearly an implied warranty, arising from the very nature of the transaction, that this machine should be *reasonably fit to accomplish the purpose for which it was sold.*

There is no doubt of the general rule that when a manufacturer enters into an *executory* contract to manufacture and furnish a certain article to a purchaser, and fully knows the purpose for which the article is intended, that there arises an implied warranty that the article shall be reasonably fit for the purpose for which the buyer intends to use it, and that it shall, to a reasonable degree at least, accomplish the purpose for which it was bought. There is some difference apparently, in the decisions of the courts, with regard to the question of

how far this principle applies to an *executed* sale, but that it applies to an *executory* sale, where the manufacturer is to make and deliver the article at a future time, there can be no possible doubt. It is the rule in England, and so far as I know in all the States, and beyond all question it is the rule in the State of New York. Benjamin on Sales, § 988, and note; *Brown* v. *Edgington*, 2 Man. & Gr. 279; *Jones* v. *Bright*, 5 Bing. 533; *Van Wyck* v. *Allen*, 69 N. Y. 61; *Gautier* v. *Douglass Mfg. Co.*, 13 Hun, 514; *Hoe* v. *Sanborn*, 21 N. Y. 552; *S. C.* 78 Am. Dec. 163; *Gaylord Mfg. Co.* v. *Allen*, 53 N. Y. 515.

Mr. John H. V. Arnold for defendant in error.

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

If the defence were solely that the defendant was induced by false and fraudulent representations to enter into the contract in question, it is conceded that the Circuit Court did not err in directing a verdict for the plaintiff, as there was no evidence of fraud in the case. It is earnestly contended, however, that under the answer as amended, the defendant was entitled to avail himself of the breach of an alleged contract of warranty or guaranty collateral to the contract of purchase and sale; or of an implied warranty that the machine should be reasonably fit to accomplish a certain result. Assuming the sufficiency of the pleadings to enable the questions indicated to be raised, we are nevertheless of opinion that the direction of the Circuit Court was correct.

The position of plaintiff in error is, in the first place, that the evidence on his behalf tended to show an agreement between himself and defendant in error, entered into prior to or contemporaneously with the written contract, independent of the latter and collateral to it, that the machine purchased should have a certain capacity and should be capable of doing certain work; that the machine failed to come up to the requirements of such independent parol contract; that this evidence was competent; and that the case should therefore have been left to the jury.

Opinion of the Court.

Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing. Greenl. Ev. § 275.

There is no pretence here of any fraud, accident or mistake. The written contract was in all respects unambiguous and definite. The machine which the company sold and which Seitz bought was a No. 2 size refrigerating machine as constructed by the company, and such was the machine which was delivered, put up and operated in the brewery. A warranty or guaranty that that machine should reduce the temperature of the brewery to 40° Fahrenheit, while in itself collateral to the sale, which would be complete without it, would be part of the description and essential to the identity of the thing sold; and to admit proof of such an engagement by parol would be to add another term to the written contract, contrary to the settled and salutary rule upon that subject.

Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question.

We are clear that evidence tending to show the alleged independent collateral contract was inadmissible. *Martin* v. *Cole*, 104 U. S. 30; *Gilbert* v. *Moline Plough Co.*, 119 U. S. 491; *The Delaware*, 14 Wall. 579; *Naumberg* v. *Young*, 44 N. J. Law (15 Vroom) 331; *Conant* v. *National State Bank*, 121 Indiana, 323; *Mast* v. *Pearce*, 58 Iowa, 579; *Thompson* v. *Libby*, 34 Minnesota, 374; *Wilson* v. *Deen*, 74 N. Y. 531; *Robinson* v. *McNeill*, 51 Illinois, 225.

Failing in respect of the alleged express warranty, plaintiff in error contends, secondly, that there was an implied warranty, arising from the nature of the transaction, that the machine should be reasonably fit to accomplish certain results, to effect which he insists the purchase was made. It is argued that the evidence tended to establish that the plaintiff knew that the defendant had been cooling his brewery with ice, and that the object of obtaining the machine was to render unnecessary the expense of purchasing ice for that purpose; and that unless the machine would cool it to the same extent, or about the same, as the ice did, it would be worthless, so far as he was concerned. It is not denied that the machine was constructed for refrigerating purposes, and that it worked and operated as a refrigerating machine should; but it is said that it did not so refrigerate as to reduce the temperature of the brewery to 40° Fahrenheit, or to a temperature which would enable defendant to dispense with the purchase of ice.

The rule invoked is, that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described and definite

thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Benjamin on Sales, § 657; Addison on Contracts, Book II, c. vii, p. *977; *Chanter* v. *Hopkins*, 4 M. & W. 399; *Ollivant* v. *Bayley*, 5 Q. B. 288; *Dist. of Columbia* v. *Clephane*, 110 U. S. 212; *Kellogg Bridge Company* v. *Hamilton*, 110 U. S. 108; *Hoe* v. *Sanborn*, 21 N. Y. 552; *Deming* v. *Foster*, 42 N. H. 165.

In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance.

This is not the case of an alleged defect in the process of manufacture known to the vendor but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed.

In short, there was no express warranty that the machine would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit, or any other temperature, without reference to the construction of the particular brewery or other surrounding circumstances, and, if there were no actual warranty, none could be imputed.

We may add, that in the light of all the evidence in the record, treated as competent, we think no verdict could be permitted to stand, which proceeded upon the ground of the existence of such a warranty as is contended for. The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery, were no more than expressions of opinion, confessedly honestly entertained, and dependent upon other elements than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; and the conduct of plaintiff

in error in demanding, two days after the contract was executed, a written guaranty that the machine company would cool his building to 3½° Reaumur (or 40° Fahrenheit), and keep it at that all the time, and in acquiescing in the company's refusal to give the guaranty for reasons stated, and in thereupon afterwards ordering the company to go on with the work, as exhibited in the correspondence between the parties, seems to us to justify no other conclusion than that reached by the verdict.

The judgment of the Circuit Court is *Affirmed.*

MR. JUSTICE BRADLEY and MR. JUSTICE GRAY were not present at the argument and took no part in the decision of this case.

METROPOLITAN NATIONAL BANK *v.* CLAGGETT.

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

No. 1064. Submitted October 19, 1891. — Decided November 9, 1891.

When a state bank acting under a statute of the State calls in its circulation issued under state laws, and becomes a national bank under the laws of the United States, and a judgment is recovered in a court of the State against the national bank upon such outstanding circulation, the defence of the state statute of limitations having been set up, a Federal question arises which may give this court jurisdiction in error.

The conversion of a state bank in New York into a national bank, under the act of the Legislature of that State of March 9, 1865 (N. Y. Laws of 1865, c. 97) did not destroy its identity or its corporate existence, nor discharge it as a national bank from its liability to holders of its outstanding circulation, issued in accordance with state laws.

The provisions in the statute of New York of April 11, 1859 (Laws of 1859, c. 236) as to the redemption of circulating notes issued by a state bank and the release of the bank if the notes should not be presented within six years do not apply to a state bank converted into a national bank under the act of March 9, 1865, and not "closing the business of banking."

THE court stated the case as follows:

This was a motion to dismiss a writ of error to the Supreme Court of the State of New York to review its judgment

Statement of the Case.

against the plaintiff in error, with which was united a motion to affirm that judgment if the motion to dismiss be denied.

The case arose upon a complaint filed in the Supreme Court of New York June 4, 1886, by the defendant in error and another, as administrators of the goods, chattels and credits of James H. Paine, deceased, against the plaintiff in error, the Metropolitan National Bank, demanding judgment against the latter for $12,300, and interest from May 21, 1886, that being the aggregate amount due on eighty-four bank bills issued by the Metropolitan Bank of New York, for the payment of which it was claimed that the plaintiff in error was liable. The complaint alleged that, at the time of the issue of the bank bills sued upon, the Metropolitan Bank of New York was a state bank duly organized and doing banking business under the law of the State of New York, having authority to issue such bills and to put the same into circulation as money; that from 1858 to 1861 it issued each of the eighty-four bills therein described, and prior to 1862, for a valuable consideration, delivered the same to James H. Paine, the intestate of the plaintiffs; that the bills thereupon became his property, and remained in his ownership and possession until his death; that the plaintiffs, as administrators of his goods and effects, duly appointed and qualified, having become the owners and holders thereof, presented the same on the 21st of May, 1886, to the Metropolitan National Bank, the plaintiff in error, for payment, which was refused; that on the 14th of March, 1865, pursuant to the act of Congress of June 3, 1864, and the act of the legislature of New York of March 9, 1865, the said state bank became and still is a national bank for carrying on the business of banking under the name of the Metropolitan National Bank; and that, by virtue of the laws of the United States and its own voluntary action, the said Metropolitan National Bank, plaintiff in error, received and became vested with all the assets of the Metropolitan Bank of the State, and assumed and became liable to pay its obligations, including the bank bills described in said complaint.

Three defences were set up in the answer to the complaint: (1) A denial that the plaintiff in error had at any time as-

sumed or, by any of its acts, become liable to pay the bills of the Metropolitan Bank of New York, which was a state bank doing business under the laws of the State of New York. (2) That in 1865 plaintiff in error became a national bank under the laws of Congress, doing the business of banking, as such, by virtue of the laws of the United States, under the corporate name of the Metropolitan National Bank, and that the Metropolitan Bank of New York (the state bank) went through certain proceedings, under the New York statutes, of notice, publication and deposit with the superintendent of banking of that State, for the redemption of its circulating bills, on the ground of its closing business, whereby its liability and that of the plaintiff in error on these bills (they not being presented for payment in due time) ceased six years from March 14, 1867. (3) That the cause of action was barred by the statute of limitations of the State of New York.

The action being at issue upon the pleadings and having come on for trial before the court without a jury, the parties having expressly waived a jury trial, the court made a finding of facts which substantially accorded with the averments of the complaint, and rendered judgment in favor of the plaintiff below, the defendant in error herein, for the sum of $12,300, and interest thereon from May 21, 1886, and costs. 4 N. Y. Supplement, 115. This judgment was affirmed by the general term of the Supreme Court of New York, 56 Hun, 578; and subsequently by the Court of Appeals of New York. 125 N. Y. 729. Hence this writ of error. The defendant moved to dismiss the writ, on the ground that this court had no jurisdiction to review the judgment of the state court of New York, and that no Federal question was raised or decided in the court below or appeared upon the record.

[The material part of the statutes of New York referred to will be found in the margin.]

An Act *in relation to the bank department.* Passed April 11, 1859. Laws of 1859, c. 236, p. 503.

"1. Whenever any banking association, individual banker, receiver of a banking association, assignee or assignees of an individual banker, shall

Argument for the Motions.

Mr. Leslie W. Russell for the motions, on the question of jurisdiction, said:

---

have given notice to the superintendent of their intention to close the business of banking, or the trustees or legal representatives of any incorporated bank whose charter has expired, or the receiver of any incorporated bank, which shall have been declared insolvent, shall have redeemed at least ninety per cent of their circulating notes, outstanding at the date of such notice, expiration of charter or declaration of insolvency, they shall be entitled to deposit with the superintendent, and he is hereby authorized to receive, a deposit of money equal to the amount of the outstanding circulation at the time of such deposit, to be placed by him in some bank in the city of Albany, in good credit, upon the receipt of which it shall be lawful for the superintendent to give up all other securities theretofore deposited with him for the redemption of circulating notes issued thereon.

"2. Upon the receipt of such deposit the superintendent shall immediately give notice in the state paper, and at least one newspaper in the county where such bank, banking association or banker shall have been located or doing business, which notice shall be published at least once a week for six months successively, that the notes of such bank, banking association or banker will be redeemed by him, at the bank where such deposit is made, at par; and that all the outstanding circulating notes of such bank, banking association or banker, must be so presented for redemption within six years from the date of such notice, and all notes which shall not be thus presented for redemption and payment within the time specified in such notice, shall cease to be a charge upon the funds in the hands of the superintendent for that purpose.

"3. At the expiration of such notice, it shall be lawful for the superintendent to surrender, and such bank, banking association, banker, receiver, assignees or trustees, or their legal representatives, shall be entitled to receive from him all the money remaining in his hands after such redemption, except so much thereof as may be necessary to pay the reasonable expenses chargeable against the said accounts, including the payment for the publication of the above mentioned notices.

"4. All circulating notes of such bank, banking association or banker, which shall not have been presented for payment within the period required by such notice, shall, upon the expiration of such period, cease to be a lien or charge upon the property and effects of such bank, banking association or banker, in the hands of such receivers, assignees, trustees or otherwise; and all liability of such receivers, assignees, trustees, banks, banking associations or bankers, for or on account of any circulating notes, which shall not have been presented within the time aforesaid, shall also cease."

An Act *enabling the banks of this State to become associations for the purpose of banking under the laws of the United States.* Passed March 9, 1865. Laws of 1865, c. 97, p. 169.

"§ 2. Any bank incorporated or organized by authority of this State,

Argument for the Motions.

The rules in regard to jurisdiction in these cases are well settled. If the facts of the case are broad enough to sustain the judgment on grounds entirely aside from any Federal question, (if one exists,) and the state court puts its judgment on those grounds, no case is made for review here. *Murdock* v. *City of Memphis*, 20 Wall. 590; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Johnson* v. *Risk*, 137 U. S. 300.

To give this court jurisdiction, it must appear affirmatively not only that a Federal question was presented for decision to the highest state court having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *DeSaussure* v. *Gaillard*, 127 U. S. 216.

Although a case from the highest court of a State may involve a Federal question, yet if that court proceeds upon another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the final judgment without reference to the Federal question involved, its judgment will be affirmed here. *Beaupré* v. *Noyes*, 138 U. S. 397.

In determining the ground upon which a judgment in a state court was rendered, this court may refer to the opinion of that court; and when it does not appear upon what ground the *highest* court of a state placed its judgment, (which is the case at bar,) and the judgment may be supported without deciding a Federal question, this court is without jurisdiction of it

---

which shall become an association for carrying on the business of banking under the laws of the United States, shall be deemed to have surrendered its charter if it shall have complied with the requirements of this act; provided, that every such bank shall nevertheless be continued a body corporate for the term of three years after the time of such surrender, for the purpose of prosecuting and defending suits by and against it, and of enabling it to close its concerns and to dispose of and convey its property; but not for the purpose of continuing under the laws of this State the business for which it was established."

"§ 8. Nothing in this act shall be construed as releasing such association from its obligations to pay and discharge all the liabilities created by law or incurred by the bank before becoming such association, or any tax imposed by the laws of this State up to the date of its becoming such association, in proportion to the time since the next preceding payment therefor."

in error. *Wood Mowing Machine Co.* v. *Skinner*, 139 U. S. 293.

Mr. Charles A. Peabody for appellee, on the merits said:

The court did not hold the plaintiff in error liable because the state bank transferred its assets to the plaintiff in error.

If it did, such transfer took place more than twenty years ago, and the six years' statute of limitations would apply.

The mere transfer of property from A to B does not create a common law liability on the part of B to pay A's creditors. A creditor of A may obtain judgment and by a suit in equity get a lien upon the property transferred to B and by proceedings in equity recover his debt. But here also the statute of limitations would apply, and this court will not assume that the New York court ignored that defence which was duly set up in the answer.

The only way the judgment can be sustained is by holding that the contract of the state bank became the contract of the national bank without any change or modification.

The plaintiff in error became a corporation without the aid of the laws of New York. From abundant caution it complied with all the provisions of the act of 1865. The state law could not impose on the plaintiff in error the obligations of another corporation and it did not attempt to do so. The most that the state law says is that the law should not be construed as releasing the obligations of the old bank. No searching of the law will discover any provision making the two banks identical.

The question involved is not a frivolous one. The New York Court of Appeals, *City Bank* v. *Phelps*, 86 N. Y. 484, 491, says this question "is not so easy of concession or refutation as it may seem at first sight."

A judgment for over $14,000 has been obtained against a corporation created by the national authority upon contracts which it never made and never assumed. Although a corporation during its existence continues to be the same body, the stockholders, whose property the corporation holds, change;

and after twenty-five years very few persons are probably now interested in this matter who were stockholders of the plaintiff in error in 1865. The present directors are trustees winding up a closing bank, and it is their duty to ascertain with care who are the true creditors of the bank.

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

The first assignment of error is as follows:

"That the Metropolitan National Bank, the plaintiff in error, which was created under the act of Congress entitled 'An act to provide a national currency secured by the pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864, is held liable to pay the bills described in the complaint, which were made by the Metropolitan Bank, a corporation created under the law of the State of New York, entitled 'An act to authorize the business of banking,' passed April 18, 1838."

The second defence set up in the answer, as we have seen, is, that the defendant below (the plaintiff in error) became a national bank under the authority of the act of Congress of 1864, entitled "An act to provide a national currency secured by the pledge of United States bonds, and to provide for the circulation and redemption thereof," and thereby acquired immunity from liability for the bank bills issued by the state bank. The court found that the plaintiff in error did become a national bank doing a banking business under the laws of the United States, but decided that it did not thereby acquire an immunity from liability to pay the bank bills of the Metropolitan Bank of New York, upon the ground that the proceedings set up in the answer did not terminate the existence of the state bank, but simply effected a continuation of the same body under a changed jurisdiction. In this we think the record presents a claim of Federal immunity raised by the plaintiff in error and denied by the court, which brings the case within the jurisdiction of this court; and upon the authority of *McNulta* v. *Lochridge*, decided at this term of the court, *ante*,

327, the motion to dismiss is denied. But as the record also shows there was color for the motion to dismiss, it is proper that we should proceed to a review of the judgment of the court below.

The question we are to consider here is, did the court err in holding that the plaintiff in error was not exonerated from liability either by its becoming a national bank or by the proceedings for the redemption and retirement of its circulating bills issued whilst a state bank, which proceedings, it was claimed, were in strict observance of every requirement of the New York statute of 1859 in relation thereto, or by the statute of limitations of the State of New York? The court decided that the New York statute providing for a redemption of circulating notes and for releasing the bank, if the notes were not presented in six years, applied alone to banks "closing the business of banking;" that the change or conversion of the Metropolitan Bank into the Metropolitan National Bank did not "close its business of banking" nor destroy its identity or its corporate existence, but simply resulted in a continuation of the same body with the same officers and stockholders, the same property, assets, and banking business under a changed jurisdiction; that it remained one and the same bank, and went on doing business uninterruptedly; and that, therefore, the statutory proceedings relied upon in the answer could not operate as a bar to the liability of either bank to pay the bills delivered by the Metropolitan Bank in 1861 to plaintiffs' intestate.

This decision is so manifestly correct that it needs no argument to sustain it. The judgment is, therefore,

Affirmed.

The Chief Justice, Mr. Justice Bradley and Mr. Justice Gray took no part in the consideration and disposition of this motion.

CROSS *v.* ALLEN.

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

No. 23. Argued October 13, 1891. — Decided November 16, 1891.

The transfer of an overdue note and mortgage for a valuable consideration to a *bona fide* purchaser, is not a collusive transaction which prevents the transferee from maintaining an action upon them, under the provisions of the act of March 3, 1875, 18 Stat. 470, c. 137, § 1; although made to make a case to be tried in a Federal Court.

It being conceded that this case comes within the rules laid down in *Ackley School District* v. *Hall*, 113 U. S. 135, and in *New Providence* v. *Halsey*, 117 U. S. 336, this court adheres to the doctrines enunciated in those cases.

The payment by the principal debtor, after the death of his wife, of interest upon a note, signed by him alone, but secured by a mortgage upon her separate real estate executed by her, operates in Oregon to keep alive the lien upon the property for the security of the mortgage debt, as against the statute of limitations of that State.

So long as demands secured by a mortgage are not barred by the statute of limitations, there can be no laches in prosecuting a suit upon the mortgage to enforce them.

While adhering to the rule that any material change in a contract made by the principal without the assent of the surety, discharges the latter, the court is of opinion that the changes set up in this case as a reason for the discharge of the property of the surety were not material and did not operate to discharge it.

Under the constitution and laws of Oregon, in force when these contracts were made, a married woman could bind her separate property for the payment of her husband's debts.

This court is bound to assume that decisions of state courts on matters of state law have been made after thorough consideration, and that they embody the deliberate judgment of the court.

THE case is stated in the opinion.

Mr. John H. Mitchell for appellants.

Mr. C. E. S. Wood for appellees. *Mr. George H. Williams* was with him on the brief.

MR. JUSTICE LAMAR delivered the opinion of the court.

Opinion of the Court.

This was a suit in equity to foreclose two mortgages of real estate in Oregon. The case is this: On the first of November, 1871, Thomas Cross of Salem, Oregon, gave his note to the firm of Allen & Lewis of Portland in that State, for $30,000, payable in three years, with interest at 10 per cent per annum from date; and to secure its payment he and his wife, Pluma F. Cross, on the same day executed a mortgage in favor of that firm upon fifteen parcels of agricultural land in that State, numbered respectively from "one" to "fifteen," and containing over 3000 acres. Parcels "14" and "15," containing about 211 acres, were the separate property of Pluma F. Cross, while the remainder of the property belonged to Thomas Cross. On January 23, 1872, they gave another mortgage to the same firm upon the same property embraced in the preceding mortgage and certain town lots in Salem, to secure the payment of another note, of even date therewith, given by said Thomas Cross to said firm, for $10,000, due in one year, and bearing twelve per cent interest from date.

On the 16th of September, 1872, before either note became due, Pluma F. Cross died, but there was never any administration of her estate.

Nothing was paid on either of the notes when they became due, but on the 22d of January, 1876, Thomas Cross conveyed the premises embraced in the mortgages to C. H. Lewis of Portland, one of the members of the firm to which the mortgages were given. This conveyance, though absolute in form, was in fact, and was intended to be, upon the following trusts: (1) that the grantee should, at the cost and expense of the lands, keep them in cultivation, or lease or let them, or any part of them; (2) that he should sell and dispose of the crops, collect the rents, and, after deducting all necessary and proper charges and expenses connected therewith and incident thereto, apply the net proceeds thereof upon the mortgage debts; and (3) that he might, with the consent of said Thomas Cross, sell any portion or portions of said premises either at public or private sale, and apply the net proceeds of such sales toward the satisfaction of the mortgage debts.

During the year 1876, Lewis, with the assent of Thomas

Cross, had a large portion of the lands surveyed and divided into 40-acre tracts, and between October 14 and November 15 of that year, in pursuance of the trust contained in the deed to him, he sold at private and public sale over 800 acres thereof for $8593.18, which was $268.16 more than their appraised value, the net proceeds of which sum, amounting to nearly $7000, after payment of certain items owing by Cross, were credited upon the aforesaid indebtedness, and the firm afterward executed a release to Cross discharging the lands thus sold from the lien of the mortgages.

On the 5th of February, 1884, Thomas Cross died; and on the 8th of July following the claim on the notes and mortgages was presented to the administrators of his estate and was rejected by them. Soon afterwards, the notes and mortgages were assigned by the firm to L. H. Allen, one of the members thereof, a resident of San Francisco, California, who, on the 6th of August, 1884, brought this suit to foreclose the mortgages and establish and enforce their lien on all the property embraced in them.

A number of persons, including the present appellants, E. C. Cross and Frank R. Cross, (who are the children of Thomas Cross, by his wife Pluma F. Cross,) were made parties defendant to the bill. Frank R. Cross, being a minor, defended by his guardian *ad litem*, E. C. Cross. The other defendants were the heirs at law of Thomas Cross, deceased, the administrators of his estate, and said C. H. Lewis.

Upon the filing of the bill, it appearing that the mortgaged property would be insufficient to pay the indebtedness, a receiver was appointed to collect the rents and manage the property generally, pending the foreclosure proceedings.

On the 21st of January, 1885, an order was entered in the court below that the bill be taken as confessed by all of the defendants, except Edwin C. Cross and Frank R. Cross; and they, on the 10th of March following, filed their joint and several answer to the bill.

The defences set up in this answer were, substantially: (1) laches on the part of complainant and staleness of his claim; (2) the sale of certain portions of the mortgaged prop-

erty by Lewis aforesaid was for a grossly inadequate sum, whereby the heirs of Pluma F. Cross suffered loss and damage; (3) the arrangements between Thomas Cross and his transferee, Lewis, were equivalent to a variation of the terms of the mortgage contracts, and amounted to an extension of time to Thomas Cross, the original debtor, whereby the mortgages, as respects the property of Pluma F. Cross, became ineffective, she being in law a mere surety for her husband; (4) the transfer of the claims in suit to the complainant, L. H. Allen, was not made in good faith, but solely for the purpose of giving jurisdiction to the Federal court, he being a citizen of California, while the other member of the firm was a citizen of Oregon, and most of the defendants also were citizens of the latter State; and (5) the mortgages, as respects the property of Pluma F. Cross, were absolutely void, because, under the constitution and laws of Oregon at the date of those contracts, a married woman had no authority whatever to bind her separate property for the payment of the debts of her husband.

There was a demurrer to those portions of the answer referring to the inadequacy of consideration arising from the sales made by Lewis, of the property mortgaged on the ground of impertinence; but it was overruled with leave to complainant to amend his bill, (*Allen* v. *O'Donald*, 23 Fed. Rep. 573,) which he did, setting out in detail a description of each tract of land sold by Lewis, together with the price paid for each and the names of the respective purchasers, and alleging that the price paid in each instance was equal to the value of the property sold.

By stipulation it was agreed that the original answer should stand as the answer to the amended bill; and, after replication filed, the case went to trial on the pleadings and certain stipulations as to the most material facts, but one witness, Mr. Lewis, being examined. His testimony was taken only upon the question of the *bona fides* of the transfer by the firm of Allen & Lewis to Allen, the complainant, and went to sustain that transaction, although he admitted that one of the purposes of that transfer was to make a case for the jurisdiction

of the Federal courts. The trial resulted in a decree of foreclosure against the property of Pluma F. Cross, the Circuit Court finding in favor of the complainant on every material issue in the case. 28 Fed. Rep. 17.

Afterwards a motion for rehearing was made and argued mainly upon the question whether there had, in law, been an extension of time to the principal debtor, Thomas Cross, whereby the surety became discharged. The motion was overruled, the court below adhering to its original decision and decree. 28 Fed. Rep. 346. The case was then appealed to this court. Since the appeal here was filed the complainant has died, and his administrator is now representing his estate.

There are ten assignments of error, which, as applied to the facts of the case, involve five different questions for consideration, viz. (1) the *bona fides* of the assignment and transfer of the notes and mortgages by the firm to Mr. Allen, the complainant, and therein the jurisdiction of the court below; (2) the negotiability of the notes by the *law merchant;* (3) laches on the part of the complainant and staleness of his claim, and the statute of limitations of the State of Oregon with relation to such matter; (4) whether the conveyance to Lewis of all the lands embraced in the mortgages and the subsequent transactions in relation thereto amounted to an extension of time to Thomas Cross, the principal debtor, and a substantial change in the contract of indebtedness between him and the creditors, whereby the surety became released; and (5) whether, in any event, under the constitution and laws of Oregon in force when the mortgages were made, a married woman could bind her separate property for the payment of her husband's debts.

With reference to the first question, as above classified, we deem it sufficient to say that, upon the evidence of Mr. Lewis himself, (which was all the evidence in the case,) the court below was correct in finding that the sale and transfer of the notes to the complainant, Allen, was a *bona fide* transaction. He testified, in substance, that his pecuniary interest in the claim against Thomas Cross ceased at the time the transfer was made, at the same time stating the consideration for the

transfer. He also stated that one of the purposes of the transfer of the notes and mortgages was to make a case that could be tried in the Federal court; and it is upon this feature of his testimony that the argument is based that the transfer was not *bona fide*, and that the court below did not have jurisdiction of the case.

We cannot coincide with that view. The transfer of the notes and mortgages having been made for a valuable consideration, and the pecuniary interest of the transferrer in the subject matter of the transfer having thereby terminated, it makes no difference that by such transaction the transferee acquired the advantage of suing in the Federal court. This suit, so far as the record shows, is for the sole and exclusive benefit of the complainant, Allen. Lewis has no interest in the result of it. The jurisdictional statute of March 3, 1875, 18 Stat. 470, c. 137, warranted the Circuit Court in entertaining jurisdiction of the case. There is nothing in the facts and circumstances relating to this transfer to bring the case within the class of collusive cases referred to in section 5 of that act, and require its dismissal at the hands of the Federal court, on jurisdictional grounds. *Farmington* v. *Pillsbury*, 114 U. S. 138; *Lanier* v. *Nash*, 121 U. S. 404, 410.

But it was contended that the notes were not negotiable by the law merchant, because they were long past due when they were transferred, and that, therefore, under section 1 of the aforesaid act of March 3, 1875, the Federal court could not take jurisdiction of the case. The provision of the statute referred to reads as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

Counsel for appellants concedes, however, that this question has been determined adversely to his contention by this court in *Ackley School District* v. *Hall*, 113 U. S. 135, and also in *New Providence* v. *Halsey*, 117 U. S. 336. Inasmuch as those cases are decisive upon the point under consideration, a mere

reference to them is all that is essential in this connection. We still adhere to the doctrines therein enunciated, and this assignment of error is, therefore, without force.

This leads up to the next questions in the case, viz. laches, staleness of claim and the statute of limitations of the State of Oregon.

Pluma F. Cross having executed a mortgage upon her separate property to secure the debt of her husband, became, as to that debt, a surety. She did not become personally bound for the payment of the debt, but her property mortgaged was bound. As such surety, she was entitled to all the rights and privileges of a personal surety, and would be discharged by anything that would discharge a surety who was personally bound. *Spear* v. *Ward*, 20 California, 659, 674; *Gahn* v. *Niemcewicz*, 11 Wendell, 312, 326; *Vartie* v. *Underwood*, 18 Barb. 561, 563; *Bank of Albion* v. *Burns*, 46 N. Y. 170, 175; Bishop, Law of Married Women, § 604; Brandt on Suretyship and Guaranty, § 22; Jones on Mortgages, § 114. And the appellants, having succeeded by inheritance to the estate and interest of their mother, occupy the same position as she would have done had she lived. *Bank of Albion* v. *Burns*, *supra*. Her death did not discharge her estate from the lien which she created upon it, nor did it vest in her heirs an estate which she had conveyed away as a security for her husband's debts. *Miner* v. *Graham*, 24 Penn. St. 491, 495.

It is by the application of these rules to the facts of this case that the liability of the surety is to be determined. Under the Civil Code of Oregon, the period of limitation for promissory notes is six years; and it is argued that, as the notes in this controversy were not sued on until more than six years from the dates when they respectively became due, an action on them would not lie, notwithstanding the fact that the maker made payments of interest upon them from time to time. The facts in this matter are these: The first note was dated November 1, 1871, payable in three years. Consequently it matured November 4, 1874, and, if no payment of interest had been made, the bar of the statute would have been complete November 4, 1880; but in 1877, 1878,

1880 and on the 22d of December, 1881, partial payments of interest were made on the note by Thomas Cross, or in his interest. The second note was dated January 23, 1872, payable in one year, and consequently matured January 26, 1873. The bar of the statute on this note would have been complete January 26, 1879, had no interest been paid upon it in the meantime. It is averred in the bill and admitted in the answer that the interest on this note was paid in full up to January 25, 1879, one day before the completion of the bar; and another payment of interest was made February 1, 1883. This suit was commenced August 6, 1884. Consequently it is to be observed that there never was a period of six years between the making of either note and the bringing of this suit that no payments were made upon them. Section 25 of the Code of Civil Procedure of Oregon provides as follows: "Whenever any payment of principal or interest is made on an existing contract, whether it be bill of exchange, promissory note, bond or other evidence of indebtedness, after the same becomes due, the limitation shall commence from the time the last payment was made."

It is conceded that the payments of interest above referred to served to keep the debt alive, so far as the principal was concerned; but it is argued that they did not do so with reference to the surety, Pluma F. Cross, or her estate, especially in view of the fact that she died before the maturity of either note, and also in view of the fact that she never signed the notes at all, but became a legal surety by reason of having signed the mortgages.

This presents a question worthy of much consideration. At common law, a payment made upon a note by the principal debtor before the completion of the bar of the statute, served to keep the debt alive, both as to himself and the surety. *Whitcomb* v. *Whiting*, 2 Doug. 652; *Burleigh* v. *Stott*, 8 B. & C. 36; *Wyatt* v. *Hodson*, 8 Bing. 309; *Mainzinger* v. *Mohr*, 41 Michigan, 685.

That is the rule in many of the States of this Union — in all, in fact, where it has not been changed by statute. *National Bank of Delavan* v. *Cotton*, 53 Wisconsin, 31; *Quimby*

v. *Putnam*, 28 Maine, 419. At common law and in those of the States where the common law rule prevails, a distinction is made between those cases in which a part payment is made by one of several promisors of a note before the statute of limitations has attached and those in which the payment is made after the completion of the bar of the statute; it being held in the former that the debt or demand is kept alive as to all, and in the latter, that it is revived only as to the party making the payment. *Atkins* v. *Tredgold*, 2 B. & C. 23; *Sigourney* v. *Drury*, 14 Pick. 387, 391; *Ellicott* v. *Nichols*, 7 Gill, 72, 85, and cases cited. The reason of this distinction lies in the principle that, by withdrawing from a joint debtor the protection of the statute, he is subjected to a new liability not created by the original contract of indebtedness.

There is no statute of Oregon, so far as we have been able to discover, changing the common law rule of liability with reference to sureties. Consequently, under the admitted facts of this case, it must be held that the statute of limitations of the State never operated as a bar to the enforcement of the original demands against both the principal and the surety.

Nor do we think the death of the surety before either of the demands matured makes any difference, in principle, where, as in this case, the liability is not of a personal nature, but is an incumbrance upon the surety's property. We are aware that there is authority holding that payment of interest by the principal debtor, after the death of the surety, but before the statute of limitations has run against the note, will not prevent the surety's executors from pleading the statute. *Lane* v. *Doty*, 4 Barb. 530; *Smith* v. *Townsend*, 9 Rich. (S. C.) Law 44; Byles on Bills, sec. 353; 2 Parsons on Notes and Bills, 659, and note *t*. But we know of no authority extending this rule to the representatives of a deceased surety whose liability was *not* personal but upon property mortgaged. On the contrary, the cases of *Miner* v. *Graham* and *Bank of Albion* v. *Burns*, *supra*, seem to recognize the doctrine which we are inclined to accept. We conclude, therefore, that the contract of suretyship in this case was not terminated by the death of the surety before the maturity of the indebtedness.

The question of laches and staleness of claim virtually falls with that of the defence of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce those demands. The mortgage is virtually a security for the debt, and an incident of it. *Ewell* v. *Daggs*, 108 U. S. 143. And it is immaterial that the failure to sue upon the demands may have resulted injuriously to the surety, so long as there was no variation in the original contract of suretyship, either as respects a new consideration or a definite extension of time; since it is a familiar principle of law that the mere omission or forbearance to sue the principal without the request of the surety will not discharge the surety. 1 Parsons on Notes and Bills, 236, 238, and notes.

Did the conveyance by Cross to Lewis of the lands mortgaged and the subsequent transactions in relation thereto, before set out, amount to an extension of time for a definite period, or vary the terms of the original contract of suretyship? We think not. In this connection we are not unmindful of the rule that any material change in the contract on which he is a surety, made by the principal parties to it, without his assent, discharges the surety, even though he may be benefited by such change; the reason being that he has not assented to the contract in its altered form, and has a right to stand upon the very terms of his undertaking. *Reese* v. *United States*, 9 Wall. 13, 21; 1 Parsons on Notes and Bills, 239. But in this case there was no extension of time for a definite period, no new consideration passed, nor was there any material alteration of the terms of the original contract. The rights of the surety remained the same after those transactions as they were before. The transactions in this matter were at farthest a more convenient method of enforcing payment of the original demand, and possibly may be considered as amounting to an additional security. But that is all. Even that would not release the surety. 1 Parsons on Notes and Bills, 245, and notes. The mortgage security was not lessened at all, for the net proceeds arising from the sale of those portions of the property on which the mortgages were released

were applied to the diminishing of the debt. That property, too, seems to have been sold for more than its appraised value, and there is nothing in the record to show that, under the circumstances of the case, it was worth any more. True, the record states that there are five persons who would testify that in 1876 it was worth fifty per cent more than it was sold for. But as was well remarked by the court below, it is not to be expected that mortgaged property, when sold on account of the default of the debtor, will bring what it would at ordinary private sale; and if the five persons mentioned had been asked what the property sold would have brought, *under such circumstances*, it may be they would not have differed much from the appraised value of it. There does not seem to have been any fraud whatever in this whole transaction. In fact, none is charged. The sales were made with the assent of the owner, Thomas Cross, were open and without concealment or deception, and were for a fair value. The whole affair bears the impress of good faith, and we are not warranted in saying it was otherwise.

The only remaining question is, whether, under the constitution and laws of Oregon in force at the time these contracts were made, a married woman could, in any event, bind her separate property for the payment of her husband's debts. Without discussing this question upon the merits, it is sufficient to say that the Supreme Court of the State has decided it in the affirmative in at least two separate cases, *Moore* v. *Fuller*, 6 Oregon, 272, 274, and *Gray* v. *Holland*, 9 Oregon, 512; and it is not our province to question such construction. Being a construction by the highest court of the State of its constitution and laws, we should accept it.

It is said, however, that the cases just cited were decided without having been fully argued and without mature consideration of this question, upon the mistaken assumption that it had been previously decided in the affirmative by the Supreme Court of the State, and, therefore, they have not become a rule of property in the State and are not binding upon this court. We are not impressed with this contention. Such argument might with propriety be addressed to the Supreme

Court of the State, but it is without favor here. We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon.

There are no other questions in the case that call for especial consideration, as the foregoing virtually disposes of all of them. Upon the whole case we are of the opinion that the decree of the court below was correct, and it is

Affirmed.

The Chief Justice and Mr. Justice Gray did not hear the argument or take part in the decision of this case.

ADAMS v. BELLAIRE STAMPING COMPANY.

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

No. 50. Argued October 26, 1891. — Decided November 16, 1891.

The alleged invention protected by letters patent No. 50,591, granted October 24, 1865, to John H. Irwin, was a combination of old devices, each performing its old function and working out its own effect, without producing anything novel as the result of the combination, and was not patentable.

When the sole issue in an action for the infringement of a patent is as to the patentable character of the alleged invention, it is not error to decline to instruct the jury that the fact that the machine had practically superseded all others was strong evidence of its novelty.

The case is stated in the opinion.

Mr. J. H. Raymond for plaintiff in error.

Mr. Lysander Hill for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This is an action to recover damages for the alleged infringement of a patent for an improvement in lanterns, granted to

John H. Irwin in October, 1865, and assigned to the plaintiff in October, 1874. It was brought in the Circuit Court of the United States for the Southern District of Ohio. The plaintiff is a citizen of Illinois and the defendant is a corporation formed under the laws of Ohio.

Previous to the invention claimed, lanterns were in use constructed in a similar manner to the one upon which the alleged improvement is made. They had a like metallic bottom and top, a glass globe and a guard formed of upright wires attached to rings at the top and bottom — the guard, bottom and top, forming together something like a basket, into which the lamp with a glass chimney was placed, the glass protecting the flame from the wind and the wire guard protecting the glass from injury by collision. The lantern was carried by means of a swinging bail, connected with the guard or the top. The lamp, placed inside of the globe, rested on the bottom of the lantern, which was so connected with the lower ring of the guard that it could be detached and removed when the lamp was to be trimmed or filled, or the chimney to be cleaned. The top of the lantern also aided in securing the globe in place.

To a lantern of this kind Irwin added his alleged improvement. In his patent he states that what he claimed was "securing a removable lantern top to the upper part of the guard, substantially as therein specified and described." And in his specification he says that the invention "consists in attaching the metallic top of the lantern in which the top of the glass globe or protector enters, and by which it is held in place by a hinge, to the upper part of the wire guard surrounding the globe, and securing it at the side opposite said hinge by a removable fastening or spring-catch, so that by detaching said catch from the said upper part of the lantern guard the top of the lantern may be thrown back, opening upon the aforesaid hinge, thus enabling the globe to be removed, or for any other purpose."

The terms "removable fastening" or "spring-catch," as observed by counsel, cover every conceivable device applicable to lanterns and adapted to connect one edge of the lid with

the top of the lantern or guard or to disconnect it. It was simply the application to the ordinary lantern of a lid secured by a hinge on one side and by any kind of locking device on the opposite side. An invention having no greater extent than this was not deemed by the defendant as possessing any virtue deserving a patent. It consisted simply in the use of a hinge and a catch instead of two equivalent fastenings generally employed before, and only possessed this merit — that by the use of the hinge the cover could not be separated and lost in case the catch on the other side should from any cause become unfastened. So that the alleged invention only amounted to securing a lid to a lantern by means of a catch on one side and a hinge on the other.

The plaintiff in his declaration alleges that this invention was of great utility and was extensively introduced into public use and generally acquiesced in. The defendant in his general and special pleas alleged; first, that the supposed invention of Irwin did not, in view of the state of the art, require the exercise of the inventive faculty, but only mechanical skill and good judgment; second, that it was not for a patentable combination of parts, but only for an aggregation of old and well-known parts, each of which performed only its old and well-known function unchanged by the combination; third, that at the time Irwin filed his application there was pending in the Patent Office another application for the same invention in the name of one Duburn, upon which application a patent was afterwards issued; and, fourth, that the said supposed invention had been patented, or described in printed publications or patents, prior thereto.

On the trial special questions were submitted to the jury, and they found that the Irwin patent disclosed no improvement which required invention as distinguished from mere mechanical skill or judgment; that the invention claimed had been patented or described in previous publications; that Irwin was not the original or first inventor or discoverer of any material or substantial part of the thing patented; and that the defendant had not infringed the alleged patent. Judgment was accordingly entered for the defendant in the action.

We do not perceive that in the rulings of the court any substantial error was committed. The elements combined to form the alleged invention merely constituted an aggregation of old devices, each working out its own effect, without producing anything novel, and such an assemblage or bringing together of old devices, without securing some new and useful result as the joint product of the combination — something more than a mere aggregation of old results — does not constitute a patentable invention. *Hailes* v. *Van Wormer*, 20 Wall. 353; *Pickering* v. *McCullough*, 104 U. S. 310.

The court did not, therefore, err in refusing the instruction requested, that before the patent could be held invalid by reason of a prior patent it was not sufficient to find one of the elements in one patent, a second in another and a third in another. If the patent were for a combination of new or old elements producing a new result such instruction might have been correct, but as it was merely a new aggregation of old elements, in which each element performed its old function and no new result was produced by their combination, the instruction was not applicable and was properly refused.

Nor, under the circumstances, did the court err in declining to instruct the jury that the fact that the Irwin lantern had practically superseded all others was strong evidence of its novelty. The question before the court upon the main issue was not of the novelty of the invention, but rather of its patentable character. Where there is no invention the extent of the use is not a matter of moment.

We think that all the important questions of fact in the case were properly submitted to the jury.

The judgment is, therefore,

Affirmed.

OLCOTT *v.* HEADRICK.

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

No. 77. Argued and submitted November 5, 1891. — Decided November 16, 1891.

A decree of foreclosure and sale, made by a Circuit Court, on a railroad mortgage, provided that the purchaser should pay off all claims incurred by the receiver, and that all such claims should be barred unless presented within six months after the confirmation of the sale. On the sale the property was bought by the appellants. The decree confirming the sale provided that a deed should be given, and the purchasers should take the property, and the deed should recite that they took it, subject to all claims incurred by the receiver. After the six months had expired, the appellee filed a petition to recover damages for an injury sustained by him, as a passenger on the road, through the negligence of the employés of the receiver. The expiration of the six months was set up as a bar to the claim. It did not appear that the purchasers objected to the terms of the decree of confirmation, or appealed to this court from that decree. *Held*, that the Circuit Court had discretion to abrogate the six months' limitation, and to decree that the purchasers should pay the claim, as the receiver had been discharged.

IN EQUITY. The case is stated in the opinion.

Mr. William M. Baxter for appellants submitted on his brief.

Mr. Henry H. Ingersoll for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

A bill in equity was filed in the Circuit Court of the United States for the Eastern District of Tennessee, by the Central Trust Company of New York against the East Tennessee, Virginia and Georgia Railroad Company, the Tennessee State Line Railroad Company and one Thomas, to foreclose a mortgage given June 15, 1881, by the first named railroad company to the Trust Company, on its property situated in Tennessee, Georgia, Alabama and Mississippi. On the 6th of January, 1885, one Fink was appointed receiver in the cause, and placed

in possession of the whole of the property of the railroad company.

On the 18th of March, 1886, a decree of foreclosure and sale was entered. That decree contained the following provisions: "And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy and discharge any and all claims now pending and undetermined in either of said courts, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to said respective mortgages, together with such interest as may be allowed, except as to mortgages prior to said mortgages foreclosed in this suit, and subject to which said property shall be sold; and also upon the further express conditions that he or they will pay off, satisfy and discharge all debts, claims and demands, of whatsoever nature, incurred or which may hereafter be incurred by said receiver, Henry Fink, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors or assigns, shall have the right to appear and make defence to any claim, debt or demand sought to be enforced against said property; and said purchaser or purchasers, their successor or successors or assigns, shall also have the right to enter appearance in this or any other court and contest any claim or demand pending and undetermined at the date of the confirmation of such sale. All claims, debts and demands accruing during the receivership herein shall be barred, unless presented, as herein provided, within six months after the confirmation of said sale; and jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this article of this decree."

A supplemental decree was made April 26, 1886, and a special master, on the 25th of May, 1886, sold the property at public auction to Frederick P. Olcott and others, the appellants herein, for $10,250,000. The master reported the sale to the court, and a decree confirming it was made June 28, 1886. That

decree recited that the plaintiff had applied for the confirmation of the sale, that the sale had been made to Olcott and others, acting as a committee on the part of the bondholders, as purchasing trustees, that no exceptions to the report of the sale had been filed, and sufficient notice of the hearing of the application had been given to the solicitors of the parties to the cause; and the decree went on to confirm the sale and the report of sale, and to provide that the special master should execute a proper instrument in writing, conveying to the purchasers, as a committee acting on behalf of the bondholders, as purchasing trustees, all the property described in the decree of sale, and further provided as follows: "And it is further ordered, adjudged and decreed that the said purchasers shall take the said property, and that it be recited in said deed that they do take the said property, subject to, and that the said purchasers assume and pay off, any and all debts, claims and demands of whatsoever nature now pending and undetermined in either of the courts in which the original and ancillary bills in this cause are pending which may be allowed and adjudged by this court, or either of said courts where ancillary bills are pending, as prior to any right secured under said consolidated first mortgage, under foreclosure of which the said sale was made, and subject likewise to all debts, claims and demands of whatsoever nature incurred by Henry Fink, as receiver in this cause, and which may remain unpaid at the termination of said Fink's receivership." It does not appear by the record whether such deed was given; but it is to be presumed that it was.

On the 2d of March, 1887, an intervening petition was filed in the cause by O. B. Headrick, the appellee herein, alleging that he, on March 30, 1886, as a passenger upon one of the trains of the railroad operated by the receiver, had been seriously injured and permanently disabled, by reason of a collision which occurred on the road, without fault on his part, but through the negligence of the agents and employés of the receiver; and he prayed for a judgment for damages for such injuries, and that the same might be paid out of one or the other of the following funds, alleged to be in the custody of

the court and still undistributed: "1st. The fund resulting from the operation of the road by the receiver and hitherto unappropriated. 2d. The funds hitherto in the hands of the receiver, which have been by him diverted from the expenses of the receivership and appropriated to the payment of the bonded indebtedness of the railroad company, defendant, and to the purchase of rolling stock for, and the permanent improvement of, said railroad property. 3d. The funds resulting from the operation of said railroad by said receiver, which were turned over to the purchasers of said railroad under the sale ordered thereof by this court in this cause. 4th. The obligation of the purchasers to pay for and discharge all the liabilities and obligations of the receiver, on all accounts, as a part of the terms of their purchase of the property."

To this petition it was answered, as a defence, that the petitioner's right of action, if any, was barred by the provisions of the decree of sale and the decree of confirmation, because the petition was not filed until after the lapse of six months after the decree was made confirming the sale. It was, in fact, filed more than eight months thereafter.

On the hearing of the petition by the Circuit Court, held by the circuit judge (Judge Jackson) and the district judge, (Judge Key,) their opinions were opposed on the following questions: "1st. Whether or not the petitioner was entitled to file said petition in said cause after the lapse of more than six (6) months after the entry of the decree confirming sale. 2d. Whether or not, under the decrees of sale, and confirmation of sale, plaintiff's action was barred. 3d. Whether or not the purchasers of the property were liable for any claim against the receiver presented to the court more than six (6) months after the decree of confirmation of the sale." The opinion of the circuit judge was in favor of the petitioner, and judgment was entered accordingly; and the foregoing questions were certified to this court. The judgment was for $500 in favor of the petitioner, with costs, and against the receiver, but the judgment stated that, as the receiver had been discharged from further liability, and the purchasers took the property subject to, and assumed to pay, any and all claims

and demands of whatsoever nature, incurred by the receiver, it was adjudged that the purchasers pay the $500, and costs, to the petitioner.

We are of opinion that the first and third questions must be answered in the affirmative, and the second question in the negative; and that the judgment must be affirmed.

Although the decree of sale provided that all claims, debts, and demands accruing during the receivership should be barred unless presented within six months after the confirmation of the sale, yet the decree of confirmation provided that the purchasers should take the property, and that the deed should recite that they took it, subject to all debts, claims and demands, of whatsoever nature, incurred by the receiver, and which might remain unpaid at the termination of his receivership. It does not appear that the purchasers objected to the terms of the decree of confirmation, or appealed to this court from that decree. They might have done both, on the ground that the decree of confirmation varied from the terms of the decree of sale under which they had bought, in destroying the six months' limitation. It was uncertain, under the terms of the decree of sale, what claims might be presented within six months after the confirmation of the sale and be allowed by the court; and, as they became parties to the proceeding by their purchase, they should have seen to it that the terms of the decree of confirmation did not create still further uncertainty, by destroying the six months' limitation. The time of the confirmation of the sale was uncertain, and, inasmuch as the six months, by the decree of March 18, 1886, was to run from the confirmation of the sale, the purchasers were put upon inquiry to see that the term of six months was not varied by the decree of confirmation.

If the purchasers had objected to the decree of confirmation because it destroyed the six months' limitation, they could either have asked the court not to insert such a provision, and, on its refusal, have appealed to this court, or have declined to be bound by the sale, on the ground that the new terms varied from those contained in the decree of sale.

It was within the discretion of the court to abrogate the six

months' limitation, the fund being substantially a fund in court. *Brooks* v. *Gibbons*, 4 Paige, 374; *Burchard* v. *Phillips*, 11 Paige, 70; *Grinnell* v. *Merchants' Ins. Co.*, 1 C. E. Green (16 N. J. Eq.), 283; *Lashley* v. *Hogg*, 11 Vesey, 602; *Hurley* v. *Murrell*, 2 Tenn. Ch. 620. That being so, as the record does not show on what grounds the court acted, the presumption must be that it properly exercised its discretion.

The first and third questions are answered in the affirmative, and the second question in the negative, and the judgment is

Affirmed.

ROGERS *v.* UNITED STATES.

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

No. 78. Argued November 5, 1891. — Decided November 16, 1891.

Where an action at law was tried by a District Court without a jury, which found the facts and conclusions of law, and entered judgment for the plaintiff thereon, and a bill of exceptions was signed, which stated that the defendant moved the court to direct a verdict for him, on the ground that, as matter of law, no action could be maintained by the plaintiff, and the Circuit Court, on a writ of error, affirmed the judgment, and the defendant then sued out a writ of error from this court: *Held*,

(1) The Circuit Court could not properly consider any matter raised by the bill of exceptions, nor can this court do so, because the trial was not by a jury nor on an agreed statement of facts;

(2) All that the Circuit Court could do was to affirm the judgment of the District Court, and all that this court can do is to affirm the judgment of the Circuit Court, as the latter court had jurisdiction and this court has it.

THE case is stated in the opinion.

Mr. George Bliss for plaintiff in error.

Mr. Solicitor General for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 12th of March, 1885, the United States brought an action at law in the District Court of the United States for the Southern District of New York, against Lebbeus H. Rogers, to recover $12,000, with interest and costs, the principal sum being the amount of the penalty of a bond executed by Henry W. Howgate as principal, and Rogers and another person as sureties, on the 13th of March, 1878, which bond recited that Howgate, first lieutenant of the twentieth infantry, had been "assigned to duty as a property and disbursing officer, Signal Service, U. S. A.," and was conditioned that Howgate should at all times "during his holding and remaining in said office," carefully discharge the duties thereof, and faithfully expend all public money, and honestly account for the same and for all public property which should or might come into his hands "on account of Signal Service, U. S. Army, without fraud or delay."

The complaint alleged that Howgate entered upon the duties "of property and disbursing officer, Signal Service of the United States Army;" that, while acting as such officer, he did not carefully discharge the duties of his office, and faithfully expend all public moneys, and honestly account for the same, and for all public property which came into his hands "on account of the Signal Service, U. S. Army," without fraud or delay, in this, that on divers dates during the years 1878, 1879 and 1880, while acting as such officer, he received from the United States, on account of the Signal Service of the United States Army, $133,255.22, which sum he did not faithfully expend and had not accounted for.

The answer of Rogers, besides denying the breaches of the bond alleged in the complaint, set up that the bond was executed, taken and delivered without authority of law and in violation of law.

The parties filed a written stipulation waiving the right of trial by jury, and consenting that the cause be tried by the court without a jury. It was so tried, before Judge Brown. In April, 1887, he filed findings of fact, which stated that he had "heard the testimony of the witnesses." Those findings of fact were as follows:

"1st. That long prior to 1874 the signal corps, under the Department of War, was organized, and has continued from its organization to the present time under such Department; that during such time such signal corps has had property and disbursing officers.

"2d. That prior to 25th July, 1876, one Henry W. Howgate was a first lieutenant of the 20th infantry of the United States army, attached to the signal corps.

"3d. That on the 25th July, 1876, said Howgate, by a special order, as follows:

"'War Department,

"'Office of the Chief Signal Officer,

"'Washington, D.C. *July* 25, 1876.

"'Special Orders,
"'No. 115.

"'2. First Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, is hereby assigned to duty as property and disbursing officer at this office, together with such other duties as may be assigned to him.

"'3. First Lieutenant Henry Jackson, 7th cavalry, acting signal officer and assistant, is hereby relieved from duty as property and disbursing officer at this office, and will turn over all government property and funds pertaining to this office, for which he is responsible, to First Lieutenant H. W. Howgate, 20th infantry, brevet captain U. S. A., acting signal officer and assistant, who will receive and receipt for the same.

"'By order of the chief signal officer of the army:

"'Garrick Mallery,

"'*Captain 1st Inf'y, Bvt. Lieut. Col. U. S. A.,*

"'*Acting Signal Officer and Assistant,*'

was assigned to duty as property and disbursing officer in the office of the chief signal officer, and he voluntarily accepted such assignment and entered upon the duties thereof.

"That in March, 1878, said Howgate, as principal, and the defendant, as one of the sureties, executed and delivered the

bond mentioned in, and a copy of which is annexed to, the complaint in this action."

[The fifth finding set forth *in hæc verba* the condition of the bond.]

"6th. That said Henry W. Howgate, 20th infantry, while acting as property and disbursing officer, Signal Service, U. S. Army, did not carefully discharge the duties thereof and faithfully expend all public moneys and honestly account for the same and for all public property which came into his hands, but did fraudulently and with intent to defraud the plaintiffs embezzle the sum of $133,255.22.

"7th. That the said Howgate is indebted to the United States of America for moneys received as property and disbursing officer, Signal Service, U. S. Army, between the first day of April, 1878, and 31st day of September, 1881, in the sum of $133,255.22.

"8th. That such bond was made, executed, delivered and given by said Howgate and the defendant and the other surety voluntarily.

"9th. That there is now due on said bond the sum of $12,000, with interest from 31st March, 1885, making in all $13,476."

The court found the following conclusions of law:

"1st. That the office of property and disbursing officer, Signal Service, U. S. Army, is one created and duly authorized by law.

"2d. That the duties assigned to such officer are duly authorized by law.

"3d. That duties covered by the bond in this action are authorized by law.

"4th. That the bond in the complaint mentioned is a legal, valid obligation.

"5th. That the plaintiff is entitled to judgment against the defendant for the sum of $12,000, with interest from March 31, 1885, amounting in all to $13,476, for which sum judgment is ordered, with costs."

Thereupon a judgment was entered in the District Court, in favor of the United States, against Rogers, for $13,476 damages and $30.87 costs.

Opinion of the Court.

A bill of exceptions was filed in the District Court, which states that the plaintiffs put in evidence the order set forth in the third finding of fact, and also the bond, which is set forth in full, and a stipulation in writing, whereby the defendant admitted that Howgate, "while acting as property and disbursing officer, Signal Service, U. S. Army, did not carefully discharge the duties thereof, and faithfully expend all public moneys, and honestly account for the same, and for all public property which came into his hands, but did fraudulently, and with intent to defraud the plaintiffs, embezzle the sum of $133,255.22," and that he was indebted to the United States in that sum.

The bill of exceptions also states that the plaintiffs put in evidence certain orders of the War Department, which are set forth, and that it was admitted that Howgate was an officer of the regular army of the United States. It then sets forth that, the evidence of the plaintiffs being closed, the defendant's counsel, without offering any testimony, moved the court to direct a verdict for the defendant, on the ground that, as a matter of law, no action could be maintained by the plaintiffs upon the bond proved; that the court refused to grant that motion, and the defendant excepted to such refusal; and that he also excepted to the decision and finding of the court in favor of the plaintiffs.

The opinion of the district judge is reported in 28 Fed. Rep. 607. It states that the only defence was that the bond was not given voluntarily, and that the office was not one created or authorized by statute; that, as Howgate was not bound, as an officer of the army, to accept the appointment of property and disbursing officer in the Signal Corps and to give the bond, his assignment to duty, in the order of July 25, 1876, must be deemed to have been an assignment upon his own application, or upon his acquiescence; that a failure to give a bond could not have subjected him to discipline or loss of rank in the army; that the bond must, therefore, be deemed to have been given voluntarily by him and his sureties; and that, the office and the duties assigned to the officer, and covered by the bond, being duly authorized by law, the defendant was liable.

Opinion of the Court.

In May, 1887, the defendant sued out a writ of error from the Circuit Court of the United States for the Southern District of New York, to review the judgment. The case was decided by Judge Wallace, in that court, in November, 1887, and his opinion is reported in 32 Fed. Rep. 890. He held that the bond was a voluntary one; that, although it should be assumed that Howgate was not an officer and did not hold an office while the bond was in force, still the bond must be treated as a contract to secure the United States against loss from the unfaithfulness of an employé in the Signal Service, who was about to be intrusted with public money in the course of his employment; and that the defendant was liable on the bond. The judgment of the District Court was affirmed, with costs, and afterwards a motion for a reargument was denied.

The defendant then sued out a writ of error from this court, to review the judgment of the Circuit Court, and the case has been argued here on the merits. But a preliminary question arises, which, though not alluded to in the brief of either party, must be taken notice of by this court.

The case was not tried in the District Court by a jury or on an agreed statement of facts. The court "heard the testimony of the witnesses." The stipulation which was put in evidence extended only to two specific matters. The important fact, relied upon in the opinions of both the district judge and the circuit judge, that the bond was given voluntarily, is found as a fact by the District Court. The bill of exceptions states that the defendant moved the court to direct a verdict for him, on the ground that, as a matter of law, no action could be maintained by the United States upon the bond proved. It is strongly argued in the brief for the plaintiff in error here, that the bond was not a voluntary one, because Howgate was placed under the orders of the Chief Signal Officer, and in effect ordered to give a bond, and would have been liable to a court martial if he had refused to obey his superior officer.

The finding by the District Court of the fact that the bond was given voluntarily may have depended upon the "testimony of the witnesses," referred to in the findings, as may

also the statement in the findings that Howgate voluntarily accepted his assignment to duty as property and disbursing officer. The question as to the liability of the defendant arises on the bill of exceptions, because it arises out of the refusal to grant the motion to direct a verdict for the defendant, which must be considered as a motion to find for the defendant.

There was no statute in existence which provided for the trial in the District Court by the court without a jury. It is provided by § 566 of the Revised Statutes that "the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury." The provision for waiving a jury, in § 649 of the Revised Statutes, applies only to the Circuit Court, as does also a special provision of § 700, in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials without a jury in the District Courts, to those found in §§ 649 and 700 in respect to Circuit Courts.

It is true that, in the District Court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon, for its decision as to the law. *Henderson's Distilled Spirits*, 14 Wall. 44, 53. That might have been done also in the Circuit Court, without any statute to that effect. *Campbell* v. *Boyreau*, 21 How. 223, 226, 227. This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of §§ 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts.

In the present case, the Circuit Court could not properly consider any of the matters raised by the bill of exceptions; nor can this court do so. All that the Circuit Court could do was to affirm the judgment of the District Court; and all that this court can do is to affirm the judgment of the Circuit Court. The Circuit Court had jurisdiction by its writ of error, and this court has jurisdiction in the present case.

Opinion of the Court.

The authority given to the Circuit Court by § 633 of the Revised Statutes is merely to reëxamine the final judgments of a District Court in civil actions. The same authority was given to this court in respect to judgments of the Circuit Court, before the act of March 3, 1865, 13 Stat. 501, § 4, the provisions of which are now embodied in §§ 649 and 700 of the Revised Statutes. The extent of that authority was settled by the case of *Campbell* v. *Boyreau*, before cited. That was a suit at law in a Circuit Court. The whole case having been submitted to the court upon the trial, and a jury having been expressly waived by agreement of parties, evidence was offered on both sides. The court found the facts, and then decided the questions of law arising upon such facts, and gave judgment for the plaintiff. The defendants sued out a writ of error from this court. There were in the record bills of exceptions, which showed exceptions by the defendants to the admissibility of evidence, and exceptions to the construction and legal effect which the court gave to certain instruments in writing. But this court held that, in the mode of proceeding which the parties had seen proper to adopt, none of the questions, whether of fact or of law, decided by the Circuit Court, could be reexamined by this court upon a writ of error. The opinion of this court, delivered by Chief Justice Taney, cited to that effect *Guild* v. *Frontin*, 18 How. 135; *Suydam* v. *Williamson*, 20 How. 427, 432, and *Kelsey* v. *Forsyth*, 21 How. 85, and said: "The finding of issues of fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon

any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject matter and the parties, and there is no question of law or fact open to our reëxamination, its judgment must be presumed to be right, and on that ground only affirmed."

Various decisions in the Circuit Courts have followed and applied this ruling to writs of error from them to the District Courts. *United States* v. *15 Hogsheads*, 5 Blatchford, 106; *Blair* v. *Allen*, 3 Dillon, 101; *Wear* v. *Mayer*, 2 McCrary, 172; *Town of Lyons* v. *Lyons Nat. Bank*, 19 Blatchford, 279; *Doty* v. *Jewett*, 22 Blatchford, 65. The same principles were applied by this court in *Flanders* v. *Tweed*, 9 Wall. 425; *Kearney* v. *Case*, 12 Wall. 275; *Gilman* v. *Ill. & Miss. Tel. Co.*, 91 U. S. 603, 614; *Supervisors* v. *Kennicott*, 103 U. S. 554, 556; *Bond* v. *Dustin*, 112 U. S. 604, 606; *Paine* v. *Central Vermont Railroad Co.*, 118 U. S. 152; *Andes* v. *Slauson*, 130 U. S. 435, 438, 439; *Glenn* v. *Fant*, 134 U. S. 398, 400, 401.

Without considering any questions on the merits, the judgment of the Circuit Court is, therefore,

Affirmed.

RECTOR *v.* LIPSCOMB.

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

No. 40. Argued and submitted October 20, 1891. — Decided November 16, 1891.

Nearly two years after the entry of a decree dismissing a bill in equity relating to the title to real estate, the complainant, without notice to the respondent, filed his affidavit to show that its value was more than $5000, appealed to this court, and the appeal was allowed below and was entered in this court. The respondent thereupon filed counter affidavits in the court below, and, after notice to the complainant, moved to set aside the appeal upon the ground that the value of the property was shown to be less than $5000. The complainant was present at the hearing of this motion, which resulted in an order vacating the order allowing the appeal. The respondent as appellee in this court, on all these facts as shown by the original and supplemental records, moved to dismiss the appeal for want of jurisdiction. *Held*, that, under the circumstances, it was no more than right that this court should consider the subsequent affidavits, and that they showed that the amount in controversy was not sufficient to give this court jurisdiction, and that therefore the appeal must be dismissed.

Red River Cattle Company v. *Needham*, 137 U. S. 632, affirmed and applied to the circumstances of this case.

The court stated the case as follows:

On April 29, 1884, appellant filed his bill in the Circuit Court of the United States for the Eastern District of Arkansas, alleging that he was the equitable owner of lot 10, in block 125, in the town of Hot Springs, Arkansas, that the legal title stood in the name of defendant, and praying that she be adjudged a trustee for his benefit, and ordered to convey the premises to him. On the final hearing a decree was entered, dismissing the bill. Nearly two years thereafter, without notice to the appellee, and on the single affidavit of appellant that the property was worth over five thousand dollars, an appeal was allowed. Subsequently, and at the same term, the appellee filed in the Circuit Court a motion to set aside the order allowing an appeal, and to sustain her motion

the affidavits of sixteen citizens of Hot Springs, among them the collector of taxes and sheriff and several real estate brokers, showing that the value of the property was not to exceed thirty-five hundred dollars, and probably not over twenty-five hundred dollars. Upon this testimony the Circuit Court made an order, setting aside and vacating the allowance of an appeal, with leave to the appellant to renew his motion therefor, and file additional affidavits as to the value of the property. Appellant took no further action. Prior, however, to the filing of this motion the citation had been served on appellee, and the record filed in this court. The appellee now moves to dismiss the appeal on the ground that there is not five thousand dollars involved in the controversy.

Mr. A. H. Garland, with whom on the brief was *Mr. H. J. May*, for appellant.

Mr. John McClure for appellee submitted on his brief.

Mr. Justice Brewer delivered the opinion of the court.

The motion to dismiss the appeal must be sustained. Upon the entire testimony finally presented to the Circuit Court, and transmitted in the record original and supplemental to this court, the proof is overwhelming that the value of the property did not exceed five thousand dollars; and this positive testimony is reinforced by all that appears in the case in respect to its situation and condition. There is little room for doubt on this matter, notwithstanding the opinion of appellant that the property is worth over five thousand dollars. It is not in the power of the Circuit Court to determine the extent and limits of our jurisdiction, for that is a matter which this court must finally decide for itself. The practice which is to be pursued and the rules which are to control have been clearly and fully stated by the Chief Justice, in the recent case of *Red River Cattle Company* v. *Needham*, 137 U. S. 632, in which this court, while deciding that where the value is not definitely determined by the pleadings or decree it should generally be settled in the first instance by the Circuit Court upon notice and testi-

mony, and not upon additional testimony here, also held that the showing made in that case in the Circuit Court by affidavits was not sufficient to establish a value in excess of five thousand dollars, and therefore dismissed the writ of error. In this case, by a like showing, the value clearly did not exceed five thousand dollars; and therefore we have no jurisdiction. This is not like the case of *Gaye* v. *Pumpelly*, 108 U. S. 164, where the affidavits left the matter doubtful, and therefore we declined to dismiss the appeal which had been allowed by the Circuit Court.

Nor is it sufficient answer to this, that the Circuit Court had no power to set aside the order allowing an appeal after the appeal had been perfected and the record filed here, *Keyser* v. *Farr*, 105 U. S. 265; for under the circumstances it is no more than right that we should consider these subsequent affidavits. The appellant was present at the hearing of this motion. It does not appear that he raised any question as to the power of the court to entertain it, and he was given leave to file additional affidavits if he desired. All these matters, including the affidavits, are presented to this court by a supplemental record brought up by stipulation of parties. While the order setting aside the allowance of an appeal may have been ineffectual, because the case had passed out of that into this court, yet these affidavits of value, one by the plaintiff and sixteen by the witnesses of the defendant, were all filed in that court, filed for the purpose of determining the right to an appeal, and have all come regularly before us and are presented for our consideration. Although in a doubtful case we shall not disturb the ruling of a Circuit Court granting or vacating an appeal, yet when we are fully satisfied that the amount in controversy is not sufficient to give us jurisdiction, we ought not to attempt an inquiry into the merits of the case which is sought to be appealed. Unless we exercise a supervising power over these matters, many cases might be thrust upon our consideration through the inattention of the trial court, or the mistake or wrong of the defeated party, which are not, in fact, within our jurisdiction. Upon the testimony which is called to our attention by the action of the Circuit Court and the certifi-

cate of the circuit clerk in such manner that we cannot shut our eyes to it, it is obvious that the amount in controversy is not sufficient to give us jurisdiction. Under the circumstances it would be sacrificing substance to form, and assuming a jurisdiction which we do not have, to hold that because this testimony did not get before the trial court in time for its primary action it must be wholly ignored by us. It reaches us before we are called upon to act, and comes to us from that court. We hold that, under all the showing that is presented, the amount in controversy is not sufficient to give us jurisdiction, and, therefore, the appeal must be and is

Dismissed.

MR. JUSTICE BRADLEY and MR. JUSTICE GRAY did not hear the argument or take part in the decision of this case.

PATENT CLOTHING COMPANY, LIMITED, *v.* GLOVER.

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

No. 52. Argued October 27, 1891. — Decided November 16, 1891

Reissued letters patent No. 9616, granted to Rodmond Gibbons March 22, 1881, on the surrender of letters patent No. 178,287, for an improvement in pantaloons, are void for want of patentable novelty in the invention claimed in it.

IN EQUITY, for the infringement of letters patent. The case is stated in the opinion.

Mr. Causten Browne for appellant.

Mr. Gilbert M. Plympton for appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, dismiss-

ing the appellant's bill. The suit was for the infringement of a patent. Rodmond Gibbons was the patentee. His original patent was dated June 6, 1876, No. 178,287. This was surrendered, and a reissue obtained on March 22, 1881, being reissue No. 9616. Gibbons assigned to the appellant. Suit was commenced by the filing of a bill, on June 18, 1884. The answer tendered several defences, among them, that the reissue was void by reason of laches in applying for it, the application not being made until nearly five years after the date of the patent; because it was broader than the original patent, and including in it matters not claimed or described therein; that the patent was void for lack of invention and patentable novelty; and also non-infringement. The patent was for an improvement in pantaloons, and the specification in the original patent was in these words:

"My invention relates to a fastening for the crotch in the fly of pantaloons or similar garments, and it consists in bridging said crotch with a check-piece of cloth or other inelastic pliable material, as hereinafter fully described.

"The object of this invention is to prevent that tension at the crotch ordinarily produced either by continued use of the garment, or by any undue strain caused by the assumption by the wearer of any posture of the body, or by the removal of the garment, calculated to produce such an effect."

And the single claim was: "In combination with the fly of pantaloons or similar garments, an inelastic bridge or check-piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check-piece, instead of at the angle of the crotch itself."

The specification in the reissue reads: "My invention relates to means for strengthening the crotch in the fly of pantaloons, and has for its object to prevent that tension at the crotch of the fly which is ordinarily produced, either by continued use of the garment or by some undue strain upon the latter, caused by the assumption of some posture by the person wearing it or by some mode of removal of the garment from the body calculated to produce such an effect, and which tension

frequently operates to rupture either the cloth or the seams, or both, at the vicinity of the said crotch.

"To this end my invention consists in the use, in connection with the fly, of a check-piece or strip of cloth or other inelastic pliable material, arranged to bridge over and protect from tensional strain the crotch of said fly, as will be hereinafter more fully described;" and these were the claims:

"1. The combination, with the fly of a pair of pantaloons or other similar garment, of an inelastic bridge or check-piece arranged across the crotch of the fly, and operating substantially as described, to receive any strain occasioned by the spreading apart of the fly, and which would otherwise be exerted upon the crotch of the fly.

"2. In combination with the fly portion of a pair of pantaloons or other similar garment, a check-piece made integral with the button-hole strip of the fly, and adapted to prevent any tension at the crotch that might operate injuriously upon it."

On proofs, the case went to final hearing before Judge Shipman, who, on the 14th of May, 1887, filed an opinion adverse to the appellant, and directed a dismissal of the bill. On a rehearing, a further opinion was delivered, the two opinions being found in 31 Federal Reporter, pages 816 and 818; and on August 4, 1887, the decree was entered, which, after reciting the hearing and rehearing, reads: "Now, upon due consideration of the same, and the court being of opinion that the second claim of reissued patent No. 9616, granted to Rodmond Gibbons on the 22d day of March, 1881, is invalid, unless it is limited to the bridge or check-piece of the original claim, and with that construction there is no infringement: It is ordered, adjudged, and decreed that the bill of complaint in said cause be, and the same hereby is, dismissed," etc.

It will be seen from this decree, and more fully from the opinions, that the conclusion of the trial judge was that the second claim of the reissue was an enlargement of the single claim of the original patent, and therefore invalid; or if not and it could be properly construed as describing the same thing, that that which was done by the defendant was no in-

fringement. It is unnecessary to review these opinions or determine whether there be, as the court found, any such variation and enlargement. There is a more grievous and radical defect in the appellant's case. There is not in the matter described and exhibited in any of the specifications or claims any invention within the meaning of that word as developed in recent decisions of this court, *Hollister* v. *Benedict & Burnham Man'f'g Co.*, 113 U. S. 59; *Thompson* v. *Boisselier*, 114 U. S. 1, 11; *Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388; *McClain* v. *Ortmayer*, *ante*, 419; and for that reason both patents, original and reissue, were void.

What is it that the patentee claims to have invented? Formerly the button and button-hole strips in the fly of pantaloons were separate pieces, whose lower ends being placed face to face were sewed together, and thus formed the crotch. Of course, then, any strain at the crotch was resisted by only the direct strength of the thread. The idea of the patentee was to add to the strength of the thread the strength of a piece of cloth, and this he did by a strip crossing the crotch as a bridge, and running up along the button and button-hole strips and fastened to them respectively. The strain, therefore, at this place would be resisted both by the thread and this strip of cloth, or inelastic bridge, as the patentee called it. A similar result was obtained when either one of these strips, the button or button-hole, was made longer than the other, and the longer one, instead of running downward into the crotch, was turned at that place and used as a bridge across it, and then ran up along the side of the other strip and was fastened to it. By either of these processes the tension was placed largely upon the strip of cloth, instead of solely upon the thread. But this was no new idea; it is as old as pantaloons themselves. It has been illustrated in the experience of every boy, for in his sports he not infrequently tears his pantaloons; and his good mother, not content with sewing the torn ends together, and thus holding them by the direct strength of the thread, is wont to place underneath a piece of cloth, and fasten it to the main body of the garment for some distance on either side of the tear. In this way the whole strain, which otherwise would be solely

on the threads closing the tear, is largely borne by the new cloth underneath. Surely when this idea is so well known, and has been so practically illustrated for generations, it cannot be that there was any exercise of the skill of an inventor in applying the same process to any part of the pantaloons. If it be said that the strengthening of the stay-piece here applied is not to the closing of a tear, but to a seam at an angle, it may be replied that such particular form of reinforcement is itself no new thing. An illustration is in the seam at the angle made by the fingers and thumb of gloves. As to that, it appears from the testimony that the practice was old of reinforcing the seam by an overlapping piece. Other illustrations are also furnished by the testimony, but it is hardly necessary to refer to these in detail. The matter is familiar to the knowledge of all, and surely the application of this reinforcing strip of cloth to any seam, or in any place where without it the tension would be solely on the threads, cannot be an exercise of the skill of an inventor.

We think, therefore, that the patent sued on was void for want of patentable novelty, and affirm the decree.

Affirmed.

Mr. Justice Bradley and Mr. Justice Gray did not hear the argument or take part in the decision of this case.

FIRE INSURANCE ASSOCIATION, LIMITED *v.* WICKHAM.

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

No. 59. Argued October 28, 1891. — Decided November 16, 1891.

Parol testimony is admissible to show the circumstances under which a written instrument was executed, or that it was, in fact, without consideration.

Where the facts clearly show that a certain sum is due from one person to another, a release of the entire sum upon payment of part is without

Statement of the Case.

consideration, and the creditor may still sue for and recover the residue: but, if there be a *bona fide* dispute as to the amount due, that dispute may be the subject of a compromise.

When a claim not yet due is prepaid in part by the debtor, such prepayment may operate as a discharge of the whole claim if both parties intended it to be a consideration for such discharge; and whether both parties so intended is a question for the jury.

Circumstances attending the execution of a receipt in full of all demands, may be given in evidence to show that by mistake it was made to express more than was intended, and that the creditor had, in fact, claims that were not included.

The plaintiff took out fire insurance policies upon a vessel in 10 companies to the amount of $40,000 in all. The vessel took fire, and, in order to save it, it was scuttled and sunk, and the fire thus extinguished. It was then raised, taken to port, and repaired. The loss by fire, exclusive of the expense of raising the vessel, etc., was $15,364.78. The owner made claim upon the insurers for this amount for "loss and damage by fire and water as per agreement," stating that he would make further claims "for expenses of raising the propeller," and was "preparing the statement of such expenses to submit with his subsequent claim." The companies declined to pay such subsequent claim, but paid in advance the amount of the loss by fire so stated, taking receipts, expressed to be in full of all claims for loss or damage by fire, and in which it was further stated that the policies were cancelled and surrendered. The parties further signed a paper in which "the loss and damage by fire" was certified at that aggregate amount, "payable without discount upon presentation," and the amount was apportioned among the several companies. In an action brought by the owner to recover from the companies the amount of the claim for raising and saving the vessel, some $15,000, it was *Held*,

(1) That parol evidence was admissible to explain the receipts, and to show that they were not intended to cover the claim for raising, etc.;

(2) That the paper so signed by the parties was not in the nature of a contract on the part of the owner.

The court stated the case as follows:

This case was brought before the court upon a certificate of division of opinion between the circuit and the district judges. The action was begun in November, 1884, upon two policies of fire insurance written by the Fire Insurance Association, defendant, upon the propeller St. Paul, of which defendants in error were owners, one of such policies being for $3500, and the other for $1500. On the same day actions

were begun against six other insurance companies upon their policies on the same vessel, and an order was subsequently made that all the actions so commenced should abide the event and final determination of the one which the plaintiffs should elect to try. The following facts appeared upon the trial: In 1883, the plaintiffs, who were the owners of the propeller St. Paul, engaged in navigating the great lakes, obtained upon her fire insurance policies in ten companies, to the amount of $40,000. Plaintiffs also had $45,000 of insurance by marine policies on the same vessel at the same time. In all of these policies save one, it was provided that in case of loss by fire, the loss should be payable in sixty days after proofs of loss had been filed with the company. On November 10, 1883, while on a voyage from the lower lakes to Lake Superior, a fire broke out in the hold of the vessel, and to save her and her cargo she was scuttled and sunk, and the fire thus extinguished. She was subsequently raised and brought to Detroit for repairs, where she arrived on the 19th of November, and immediately began to discharge her cargo. A few days thereafter, and while her cargo was being unloaded, another fire broke out in her hold, and she was again sunk for the purpose of saving her, and was afterwards raised at considerable expense. On the 15th of December, a written agreement was entered into between the plaintiffs and the adjusting agents of the several insurance companies for the purpose of appraising the amount of loss caused by these fires, with a stipulation that the agreement should be "of binding effect only as far as regards the actual cash value of or damage to such property covered by policies of said companies issued at their various agencies." It was further added that "the property on which loss or damage is to be estimated and appraised is the hull of the propeller St. Paul, including the tackle, awnings, furniture, engine and boiler connections and appurtenances thereto belonging," with a further memorandum, following the signature of Wickham, but preceding those of the insurance companies, that "this agreement does not apply to or cover any question that may arise for saving boat and cargo." The adjustment under this agreement of the

Statement of the Case.

direct loss by fire was completed December 26, and formal proofs of loss were also sent to the several insurance companies in New York, and were received in due course of mail. The amount of the loss according to the report of the appraisers, exclusive of the expense of raising and saving the vessel and cargo thus adjusted, aggregated $15,364.78, and the amount proportioned to the plaintiffs in error was $1920.60. The adjusting agent in sending proof of loss to the companies accompanied the same with the following letter to each of such companies:

"Buffalo, January 12, 1884.

"Gentlemen: I enclose herewith proofs, John W. Wickham, Jr., managing owner, for loss and damage prop. St. Paul, which I trust will be found satisfactory:

"The claim as made covers only the loss and damage by fire and water, as per agreement, on the tackle, awnings, apparel, furniture, etc., of	$1,735 08
And the appraisers' award on hull, engines, mach'y, etc., of	13,629 70
Aggregating in all	$15,364 78

"The assured will make further claims for expenses of raising the propeller, and is now preparing the statement of such expenses to submit with his subsequent claim.

"Yours truly,

"W. D. Allen, *Adjuster.*"

At the trial, it was admitted that the cost of raising and saving the vessel was also upwards of $15,000. The plaintiffs admitted that they had been paid the cost of repairing the vessel, as set forth in the proofs of loss prepared and forwarded to the companies, but claimed that they had not been paid any part of the cost of raising and saving the vessel; that before the commencement of this suit they demanded payment thereof, which was refused, the insurers denying liability therefor; and that the same remained unpaid.

The defendants claimed that the payment of the cost of repairs was made by way of accord and satisfaction of the plaintiffs' entire claim, and offered in evidence the following receipts:

"$1344.42 January 19, 1884.

"Received from the Fire Insurance Association of London, England, thirteen hundred and forty-four $\frac{42}{100}$ dollars, it being in full of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1883, to property insured by policy No. 180,617, Buffalo, New York, agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

"(Signed) JOHN W. WICKHAM, Jr.,
"*Managing Owner.*
"W. B. COMSTOCK,
"per WICKHAM, Jr."

There was also a receipt endorsed upon the policy No. 180,617 as follows:

"January 19, 1884.

"In consideration of four $\frac{47}{100}$ dollars return premium, the receipt of which is hereby acknowledged, this policy is cancelled and surrendered to the Fire Insurance Association (Limited) of England.

"(Signed) JOHN W. WICKHAM, Jr.,
"*Managing Owner.*
"W. B. COMSTOCK,
"per WICKHAM, Jr."

A similar receipt for $576.18 was given by the plaintiffs to the defendant, in form precisely like the first (except as to the number of the policy and the amount), on account of the second policy issued by the association. Similar receipts, all of the same date, except two, which were a few days later, were given to the other companies concerned, all of which

were put in evidence by the defendant. The receipt to the Mechanics' Fire Insurance Company was expressed to be "in full satisfaction of all claims and demands upon said company for loss and damage by fire," etc., . . and "in consideration thereof said company is hereby discharged forever from all further claims by reason of said fire, loss and damage, and said policy of insurance is hereby assigned, with all claim thereunder, to said company, and said policy is hereby cancelled in full and surrendered to said company." The receipt to the London, Liverpool and Globe Insurance Company was for a sight draft, "which, when paid, will be in full compromise and payment of all claims and demands upon said company for loss and damage by fire," etc. The receipts to the other companies did not differ materially from those given to the defendant company.

The defendant also put in evidence the following paper signed by the plaintiffs, marked Exhibit QQ:

"New York, January 19, 1884.

"This is to certify that the loss and damage by fire which occurred on the 23d day of November, 1883, to the steamer St. Paul, is this day adjusted for the sum of fifteen thousand three hundred and sixty-four and $\frac{78}{100}$ dollars ($15,364.78), payable without discount upon presentation of the policies to the several companies interested by the assured, and apportioned among the several companies as follows, viz.:

	Insures	*Pays*	
Continental, of New York.	$7,500 00	$2,880 90	
London & Liverpool & Globe.....	6,000 00	2,304 70	—Paid.
Fire Insurance Association	3,500 00	1,344 42	—Paid.
Queen's, of England	7,000 00	2,668 84	—Paid.
Fire Ins. Ass'n, 2d policy.	1,500 00	576 18	—Paid.
Security, of New Haven.	2,500 00	960 30	—Will remit.
Exchange, of New York..	2,500 00	960 30	—Paid 1, 19, '84
Mechanics', of New York.	2,500 00	960 30	—Paid 1, 19, '84
German, of Pa.....	2,500 00	960 30	—Will remit.

Statement of the Case.

Prescott Insurance Co. . .	2,500 00	960 30—Remitted.
Greenwich, of New York.	2,000 00	768 24—Paid 1, 19, '84
	$40,000 00	$15,364 78

"(Signed) JOHN W. WICKHAM, Jr.,
"*Managing Owner.*
"W. B. COMSTOCK,
"per JOHN W. WICKHAM, Jr.
"John K. Oakley,
"J. H. Wellman,
"*Committee.*"

The defendant having rested, the plaintiffs, in rebuttal, offered evidence tending to show that in January, 1884, Wickham went to New York; and that on the 18th of January, a meeting of the companies interested in the loss was held at the board rooms in New York, at which meeting Messrs. Wellman and Oakley were appointed a committee to confer with the plaintiffs in regard to such loss. Of this meeting Wickham had no notice and was not present. That on the following day Wickham met Wellman and Oakley, and was notified by them that they were appointed as such committee, and that the companies were ready and willing to pay the expenses of making the repairs occasioned by the fire, as set forth in proofs of loss hereinbefore mentioned.

That Wickham called attention to the claim for raising and saving the vessel, stating that he expected to get a contribution to such expense from the owners of the cargo of the vessel upon a general average, and for the sake of settlement offered to share the balance of such expense with the fire insurers in the proportion that the uninsured interest in the steamer bore to the amount insured; that the committee replied that the companies were not liable for such expense, and that they had no authority whatever to consider the claim for raising and saving the steamer, and thereupon gave to Wickham the following paper, marked Exhibit PP, stating to him that the same was a record of the proceedings of the meeting at which they were appointed such committee, and that their

Statement of the Case.

authority was limited by the terms of the resolution adopted at such meeting and set forth in said exhibit and that they could not go beyond it or consider this claim for raising and saving the vessel even if they were disposed to do so.

The paper referred to is as follows:

"EXHIBIT PP.

"Board Rooms, January 18, 1884.

"Meeting of the companies interested in loss of propeller St. Paul.

Present:

Continental	$7,500 00
Fire Insurance Association	5,000 00
Queen's	7,000 00
Exchange	2,500 00
Mechanics', New York	2,500 00
Greenwich	2,000 00
	$26,500 00

"Organized by Mr. Wellman, chairman.

"Communication from John M. Murray, adjuster, at Detroit, in relation to expenses incurred in saving propeller St. Paul.

"On motion, duly seconded —

"That the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claim as set forth in the proofs of loss. Carried.

"Meeting adjourned.

"(Signed) G. W. MONTGOMERY.

"On motion, the action of the meeting be referred to a committee of two for the purpose of conference with the owner. Carried.

"Chair appointed Mr. Oakley and Mr. Wellman."

A part of this paper was in the handwriting of Wellman.

Plaintiff offered evidence tending to show that the committee further stated that the companies were satisfied with the adjustment and proofs of loss, and were ready and willing to pay the cost of making the repairs to the steamer, necessitated directly

by the fire, without discount, and would waive any rights they might have under the policies making the loss payable in sixty days from the time the proofs were furnished. The plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of such claim spoken of except by Wickham when he offered to settle, as hereinbefore stated, which offer was declined by the committee, as above stated, upon the ground that they had no authority to consider the matter.

Plaintiffs also offered evidence to show that, at such interview, Mr. Oakley, in behalf of the Mechanics' Insurance Company, gave to Wickham a check for the amount of the loss adjusted as aforesaid against the company, being $960.30, and Wickham then signed the aforesaid receipt for that amount to the company; and after the receipts were signed and delivered, the paper, Exhibit QQ, was prepared under the direction of Oakley and given to Wickham to exhibit to the representatives of other companies, to show the amount of the adjusted loss which had been apportioned against the companies respectively.

The defendant objected to the introduction of this parol testimony as tending to contradict the receipts and drafts given in evidence and the certificate of January 19th, Exhibit QQ, showing the apportionment of the loss to be paid by the several companies, upon the ground that such evidence was not admissible in the absence of fraud, misrepresentation and mistake. These objections were overruled by the presiding judge, and the evidence was received and submitted to the jury.

Upon the question of the admissibility of this testimony, however, there was a difference of opinion between the Circuit and the District Judges; and the following question was certified for the opinion of this court: "On the facts stated in the foregoing record, was the parol testimony offered in evidence by the plaintiffs admissible to vary and contradict the certificate of January 19th, Exhibit QQ, and the receipts and drafts hereinbefore set forth?"

This testimony having been introduced, the defendant offered evidence tending to contradict the same, and to show that the

Argument for Plaintiff in Error.

whole matter arising out of the loss was intended to be compromised and settled by what took place between the parties at the meeting in New York. There was no evidence that the agreement, Exhibit QQ, or the receipts and discharges executed by the plaintiffs, were obtained by any fraud or misrepresentation of the defendants or their agents. The amount thus paid to the plaintiffs upon the settlement in New York was the exact amount claimed in the proofs of loss, but it was paid about fifty-five days before the same was due and payable, as by the terms of all the policies, save one, the amount of the loss was not payable until sixty days after the proofs of the loss were furnished to the insurance companies, and this was not earlier than January 14. In the charge to the jury, the court instructed them that this payment before the amount became due was a good consideration for the settlement and discharge of the whole claim, if such settlement were actually made, and if it were so understood and agreed by the parties. The defendant claimed that the certificate and apportionment of January 19, together with the receipts and drafts, as a matter of law, showed a full settlement of the entire claim, and an accord and satisfaction thereof. The plaintiffs claimed that the settlement related solely to the loss covered by the proofs of loss, and was not intended to, and did not, embrace the claim for raising the vessel and cargo, and saving the same. The question what the parties intended by said settlement was submitted to the jury under the charge of the court, and upon such parol testimony and papers a verdict was rendered for the plaintiffs for the sum of $2297.65, and a judgment for this amount was accordingly entered. A second question was certified, as to whether the defendant was entitled to a verdict under the facts in said record therein set forth; but upon a motion to dismiss, this court held the question to have been improper. 128 U. S. 426.

Mr. C. I. Walker for plaintiff in error.

There was a good consideration for these receipts; contracts of cancelment and discharge and accord and satisfaction. Assuming that the insurance companies were liable for all the

losses occasioned by fire, such losses were not payable until sixty days after the filing of proofs of loss in the offices of the several companies. These proofs were forwarded from Buffalo on Saturday, January 12, 1884, and could not have been received at the offices in New York before Monday, January 14. Most of the payments were made on the 19th of January, five days after such proofs of loss were filed, and fifty-five days before any payments became due thereon. The last payments were made January 31, nineteen days after the filing of such notice, and forty-one days before the payments became due. The payment of the money in advance of its being due was a good consideration for the discharge of the entire claim; although the payments were for a much less sum than was actually due. *Pinnel's Case*, 5 Rep. 117; *Brooks* v. *White*, 2 Met. 283; *S. C.* 37 Am. Dec. 95; *Smith* v. *Brown*, 3 Hawks, 580; *Boyd* v. *Moats*, 75 Iowa, 151.

The plaintiffs, for the purpose of varying and contradicting the papers thus given in evidence by the defendants, introduced parol testimony, all of which was objected to by the defendants in the absence of fraud, misrepresentation and mistake.

There is really no conflict of authorities upon the general rule as to the introduction of parol testimony to affect written contracts. The doctrine, as very clearly stated by Judge Story, is as follows: "Parol evidence is not admissible to contradict, qualify, extend or vary written instruments, and the interpretation of them must depend upon their own terms." 2 Story's Eq. § 1531.

Nowhere has this doctrine been more clearly recognized than in the decisions of this court. In an early case, Chief Justice Marshall said: "It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to a written instrument." *Hunt* v. *Rousmanier*, 8 Wheat. 174. See also *Bank of the United States* v. *Dunn*, 6 Pet. 51, 56; *Brown* v. *Wiley*, 20 How. 442, 447; *United States* v. *Childs*, 12 Wall. 232, 244, 245; *Specht* v. *Howard*, 16 Wall. 564; *Burnes* v. *Scott*, 117 U. S. 582; *Boffinger* v. *Tuyes*, 120 U. S. 198, 205.

Argument for Plaintiff in Error.

The cases are very numerous in the state courts where the same doctrine has been clearly stated and enforced. *Corse* v. *Peck*, 102 N. Y. 513; *Brewster* v. *Potruff*, 55 Michigan, 129; *Highstone* v. *Burdette*, 61 Michigan, 54.

Of course there are exceptions to and qualifications of this rule. Thus, as stated by Judge Story and Chief Justice Marshall, that in cases of fraud, misrepresentation or duress, this may be shown by parol testimony for the purpose of showing the contract to be void and of no effect. So, if a written contract has been executed and delivered, but with a clear and distinct understanding that it was not to have effect until a certain condition had been performed or until a certain event had happened, this may be shown by parol. *Ware* v. *Allen*, 128 U. S. 596; *Reynolds* v. *Robinson*, 110 N. Y. 654. These cases are upon the clear and sensible doctrine that no contract was ever actually made, or had taken effect.

Another clearly recognized exception is, that oral testimony is admissible to contradict or vary the terms of simple receipts for money, and this upon the ground that they are informal, and are not in the nature of contracts, and, as said by Parsons, they are hardly "an instrument at all," and have little more force than an oral admission of the party receiving. 2 Parsons on Contracts, 555; 2 Whart. Ev. 920, 1064; Greenleaf's Ev. § 305.

If a receipt is connected with a contract, the receipt may be varied or contradicted by parol, but not the contract. The authorities upon this subject are very clear.

In the argument in the court below, the counsel for the plaintiffs insisted, that by the decisions of the State of New York, a contract or receipt like the one in question can be contradicted in all its parts. We have examined the New York cases cited, and we submit that a careful examination will show that they are in harmony with our position in this case, and we call attention to them. See *Egleston* v. *Knickerbacker*, 6 Barb. 458, 466; *Coon* v. *Knap*, 4 Selden, 402; *S. C.* 59 Am. Dec. 502; *Creery* v. *Holly*, 14 Wend. 26; *Kellogg* v. *Richards*, 14 Wend. 116; *Ryan* v. *Ward*, 48 N. Y. 204; *Smith* v. *Holland*, 61 N. Y. 635; *De Lavallette* v. *Wendt*, 75 N. Y. 579.

None of the later cases in other States are inconsistent with the earlier New York cases. *Tisloe* v. *Graeter*, 1 Blackford, 363; *Dale* v. *Evans*, 14 Indiana, 288; *Alcorn* v. *Morgan*, 77 Indiana, 184; *Fay* v. *Gray*, 124 Mass. 500; *Goss* v. *Ellison*, 136 Mass. 503; *Brown* v. *Cambridge*, 3 Allen, 474; *Kansas City & Olathe Railway* v. *Hicks*, 30 Kansas, 288.

There are many cases that hold, where a contract and a receipt are combined in the same written instrument, that while the simple receipt may be varied by parol testimony, the contract connected therewith cannot thus be affected. *Lowe* v. *Young*, 59 Iowa, 364; *Hewett* v. *Chicago, Burlington &c. Railway*, 63 Iowa, 611; *Bemis* v. *Becker*, 1 Kansas, 226, 240; *Edgerly* v. *Emerson*, 3 Foster (23 N. H.) 555, 564; *S. C.* 55 Am. Dec. 207. So in relation to bills of lading and warehouse receipts. *Graves* v. *Harwood*, 9 Barb. 477, 481; *O'Brien* v. *Gilchrist*, 34 Maine, 554; *S. C.* 56 Am. Dec. 676; *Stewart* v. *Phœnix Ins. Co.*, 9 Lea, 104; *Smith* v. *Brown*, 3 Hawks, 580.

Mr. F. H. Canfield and *Mr. Joseph H. Choate* for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

As we held in this case on the motion to dismiss, (*Fire Insurance Association* v. *Wickham*, 128 U. S. 426,) that the second question was improperly certified and could not be answered, the only question now presented for decision is the first, namely: "On the facts stated in the foregoing record, was the parol testimony offered in evidence by the plaintiffs admissible to vary and contradict the certificate of January 19, Exhibit QQ, and the receipts and drafts hereinbefore set forth?"

We have no disposition to overrule or qualify in any way the general and familiar doctrine enforced by this court in repeated decisions, from the case of *Hunt* v. *Rousmanier*, 8 Wheat. 174, decided in 1823, to that of *Seitz* v. *Brewers' Refrigerating Company*, *ante*, 510, decided at the present term, that parol testimony is not admissible to vary, contradict, add

to or qualify the terms of a written instrument. The rule, however, is subject to numerous qualifications, as well established as the general principle itself, among which are that such testimony is admissible to show the circumstances under which the instrument was executed, or that it was in fact without consideration.

It was not seriously contended in this case that the defendant was not legally liable upon its policies for the expenses, clearly incidental to the fire, of raising and saving the vessel, as well as for the direct injury to the vessel in consequence of the fire, and if the plaintiffs were induced to settle their claims for one-half the amount that was due them, and there was no consideration for the relinquishment of the other half, this suit will lie for the recovery of the amount. The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void. As was said by Chief Justice Waite in *United States* v. *Bostwick*, 94 U. S. 53, 67: "Payment by a debtor of a part of his debt is not a satisfaction of the whole, except it be made and accepted upon some new consideration:" although it was subsequently held in *Baird* v. *United States*, 96 U. S. 430, 431, that if the debt be unliquidated and the amount uncertain, this rule does not apply. "In such cases the question is, whether the payment was in fact made and accepted in satisfaction." The authorities upon this point are numerous and decisive. *Pinnel's Case*, 5 Rep. 117; *Fitch* v. *Sutton*, 5 East, 230; *Harriman* v. *Harriman*, 12 Gray, 341, 343; *Redfield* v. *Holland Ins. Co.*, 56 N. Y. 354; *Ryan* v. *Ward*, 48 N. Y. 204; *American Bridge Co.* v. *Murphy*, 13 Kansas, 35; *White* v. *Jor-*

dan, 27 Maine, 370; *Bailey* v. *Day*, 26 Maine, 88; *Weber* v. *Couch*, 134 Mass. 26; *Hoakes* v. *Beer*, 9 App. Cas. 605.

In this case there were two distinct and separate claims of similar amount, namely, $15,364.78, one of which was for the direct loss and damage to the property insured by the fire, and the other was for the incidental cost of raising the propeller and her cargo. The plaintiffs assumed, upon the face of the receipts, to settle with the defendant for both of these claims by the payment of the exact amount of one of them. In other words, they assumed to settle for a moiety of their entire claim — a claim the legality and justness of which was so far beyond dispute that it could hardly fail to be recognized by the agents of the insurance companies who were present at the meeting in New York. That they intended and supposed they were making a settlement of the plaintiffs' entire claim against them is probably true. But, aside from the parol testimony given by Wickham of the conversation at the meeting, the admissibility of which is the question in dispute, there was some evidence tending to show that the plaintiff Wickham may have supposed that he was settling only for the direct loss by the fire in the agreement for the survey or appraisement of the damages signed by both parties, which provided that it should not "apply to or cover any question that may arise for saving boat and cargo." There were also other circumstances tending to show that the agents of the companies might have known that Wickham supposed he was settling only for the direct loss. First, in the letter of Allen, the adjuster, who, in transmitting proofs of loss to the various companies, stated that "the assured will make further claims for expenses of raising the propeller, and is now preparing the statement of such expenses to submit with his subsequent claim." And secondly, in the memorandum of the meeting of the companies, January 18, Exhibit PP, in which, after reading a communication from an adjuster at Detroit in relation to the salvage expenses, a motion was carried "that the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claim as set forth in the proofs of loss." These items of testimony are in-

consistent with the idea that the agents of the companies did not know of the further claim, and are also pertinent upon the question whether Wickham understood that he was settling that claim.

(1) But assuming that the receipts upon their face show a complete settlement of the entire claim for one-half the total amount, what was the consideration for the release of the other half? The only one that is put forward for that purpose is that payment was made five days after proofs of loss were furnished, or fifty-five days before anything was actually due by the terms of the policy. That prepayment of part of a claim may be a good consideration for the release of the residue is not disputed; but it is subject to the qualification that nothing can be treated as a consideration that is not intended as such by the parties. Thus in *Philpot* v. *Gruninger*, 14 Wall. 570, 577, it is stated that "nothing is consideration that is not regarded as such by both parties." To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In *Kilpatrick* v. *Muirhead*, 16 Penn. St. 117, 126, it was said that "consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." See also 1 Addison on Contracts, 15; *Ellis* v. *Clark*, 110 Mass. 389. Now evidence of what took place at the meeting, if admissible for no other purpose, was competent as bearing upon the question whether the prepayment was mentioned or treated as an inducement or consideration for the release of the residue of the claim. It certainly

was not so stated in the defendant's plea, which set forth that the defendant "paid to said plaintiffs a valuable consideration, to wit, the sum of $1920.60, in full accord and satisfaction, etc., . . . for losses and damages by fire, at the several times in said plaintiffs' declaration set forth, . . . which valuable consideration or sum of money, so paid as aforesaid, was then and there accepted and received by said plaintiffs of and from said defendant in full payment, satisfaction, release and discharge of the said two policies of insurance, . . . and in consideration of said money so paid and received as aforesaid said plaintiffs then and there released in writing the said defendant," etc. There is no mention here of the prepayment of this sum as a consideration for the release of the residue. The oral testimony upon this point was conflicting; the plaintiffs swearing that the committee stated that the companies were ready and willing to pay the cost of making repairs, and would waive any right they might have under the clause making the loss payable in sixty days from the time the proofs were furnished. There is no doubt that this right to delay payment was a stipulation which the insurer could waive at his option, *Insurance Company* v. *Norton*, 96 U. S. 234, 240, and if, as the plaintiffs stated, the insurance companies did exercise this option, and agree to waive their right to the sixty days, the prepayment cannot be regarded as a consideration to support the alleged compromise. It is a familiar doctrine that parol evidence is competent to show a want of consideration. 1 Greenl. Ev. secs. 284, 304.

The court charged the jury upon this point that the payment of the policy fifty-five days in advance of the time when the same would become due, without discount for interest, was, by itself, a sufficient consideration for waiving the plaintiffs' further claim in the policies, if it was understood as such.

The question was a proper one for the jury to pass upon, the charge was sufficiently favorable to the defendant, and their conclusion, whether correct or not, cannot be the subject of review here.

(2) Aside from this, however, the circumstances attending the execution of a receipt in full of all demands may be given

in evidence to show that by mistake it was made to express more than intended, and that the creditor had in fact claims that were not included. Thus in *Simons* v. *Johnson*, 3 B. & Ad. 175, which was an action of covenant, defendant pleaded a release, which recited that various disputes were existing between the parties, and that actions had been brought against each other which were still pending, but that it had been agreed between them, that, in order to put an end thereto, the defendant should pay the plaintiff £150, and that each should release the other from all actions, causes of action and claims brought by him, or which he had against the other, and the instrument then proceeded to release "all claims, demands, actions whatsoever." It was held that parol evidence was admissible to show that the claim upon the covenant was not intended to be included in the release, Littledale, J., saying: "There can be no doubt that the matter contemplated in this release was the actions there referred to, and parol evidence was admissible to show that the subject matter of the present action was not involved in them." Other cases to the same effect are: *Lawrence* v. *Schuylkill Navigation Co.*, 4 Wash. C. C. 562; *Payler* v. *Homersham*, 4 M. & S. 423; *Jackson* v. *Stackhouse*, 1 Cowen, 122; *Grumley* v. *Webb*, 44 Missouri, 444; *Price* v. *Treat*, 29 Nebraska, 536; *St. Louis, Wichita &c. Railroad* v. *Davis*, 35 Kansas, 464.

The appraisement, the letter of Allen transmitting the proofs of loss and the memorandum of the meeting of the underwriters' agents are all corroborative of the testimony of the plaintiffs that the committee replied to Wickham, when he asked them for a contribution for the expenses of raising and saving the vessel, that the companies were not liable for such expenses, and that they had no authority whatever for considering the claim for raising and saving the steamer. If this be true, it requires no argument to show that the claim for salvage service was not intended to be included in the receipts.

There is no doubt that when a receipt also embodies a contract the rule applicable to contracts obtains, and parol evidence is inadmissible to vary or contradict it. But the only

clause in these receipts which can possibly be claimed to partake of the nature of a contract is that providing for a cancellation and surrender of the policy. There was a similar provision endorsed on the policies. These, however, were inserted in pursuance of a clause in the policy to the effect that the insurance might be terminated at any time, at the option of the company, upon giving notice to the insured; and that in such case he should be entitled to claim a ratable proportion of the premium for the unexpired term for which the policy was to run. The court instructed the jury correctly upon this point, that if they found that the policies were surrendered in consideration of the unearned premiums stated in the receipts, endorsed on the policies, the surrender was no defence; and while it had a tendency to show the plaintiffs' relinquishment of all their rights under the policy, it was not conclusive, if the jury found that it was made in consideration of the unearned premiums.

There was nothing in the nature of a contract on plaintiffs' part in the certificate of settlement, Exhibit QQ; it was a mere admission that the loss and damage by fire had been adjusted at a certain sum, and should be construed in connection with the submission of December 15, which showed that it did not apply to any question that might arise for saving boat and cargo.

The question certified should, therefore, be answered in the affirmative, and as this was the opinion of the presiding judge, and the case was submitted to the jury upon that theory, the judgment of the court below will be

Affirmed.

Mr. Justice Bradley and Mr. Justice Gray did not hear the argument nor take part in the decision of this case.

LAU OW BEW, Petitioner.

ORIGINAL.

No. 12. Original. Submitted November 2, 1891. — Decided November 16, 1891.

Only questions of gravity and importance should be certified to this court by the Circuit Courts of Appeals, under the provisions of the act of March 3, 1891, c. 517, § 6.

Whether the Chinese restriction acts, in the light of the treaties between the United States and China, apply to a Chinese merchant, domiciled in the United States, who temporarily leaves the country for purposes of business or pleasure, *animo revertendi*, is such a question of gravity and importance.

Wan Shing v. *United States*, 140 U. S. 424, explained.

The case is stated in the opinion.

Mr. J. Hubley Ashton and *Mr. Thomas D. Riordan*, for the petitioner, submitted on their brief.

No one opposing.

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

This is an application, upon notice, for a writ of *certiorari* requiring the United States Circuit Court of Appeals for the Ninth Circuit to certify to this court for its review and determination the case of Lau Ow Bew *v.* The United States, in which a final judgment was rendered by that court against the applicant on the 7th of October, 1891. The application is accompanied, in accordance with subdivision 3 of Rule 37, by a certified copy of the entire record of the case.

The petition states that the applicant is a person of the Chinese race and a natural-born subject of the Emperor of China, who is now, and for the past seventeen years has been, a resident of the United States and of no other country, having his domicil in the city of Portland and State of Oregon, where during all that time, he has been a merchant engaged in the

wholesale and importing business; that on the 30th of September, 1890, he left the United States on a temporary visit to his relatives in China, with the intention of returning as soon as possible; and that he did return on the steamship Oceanic, which arrived at San Francisco on the 11th of August, 1891.

That at the time of his departure he procured satisfactory evidence of his status in the United States as a merchant, under the regulations in that regard of the Treasury Department, adopted July 3, 1890, and on his return he presented his proofs to the collector of the port of San Francisco, who acknowledged their sufficiency and admitted that petitioner was entitled to the protection of the treaty between the United States and China, concluded July 28, 1868, 16 Stat. 739, and the supplemental treaty concluded November 17, 1880, 22 Stat. 826, and the act of Congress entitled "An act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, 22 Stat. 58, c. 126, as amended July 5, 1884, 23 Stat. 115, c. 220; but refused to permit petitioner to land, on the sole ground that he had failed and neglected to produce the certificate of the Chinese government mentioned in section six of the aforesaid act, as amended.

The petition further states that thereupon, on the 14th of August, 1891, petitioner filed a petition in the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus* to obtain his discharge from detention, alleging, among other things, that he was a merchant domiciled as aforesaid, and that it was claimed by the master of the steamship that he could not be allowed to land under the provisions of the sixth section of the act aforesaid as amended; and that the master of the steamship produced petitioner before the court on August 15, 1891, and made return to the writ that he held the petitioner in his custody "by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese restriction act."

An intervention was filed on behalf of the United States, alleging that petitioner was lawfully detained because he had

failed to produce to the collector of customs, or to any other authorized officer, the certificate of identification required by the act of 1882 as amended by the act of 1884. The return to the writ and the intervention were traversed by the petitioner.

The case was thereupon heard and determined upon the following agreed statement of facts:

"1st. That the said Lau Ow Bew is now on board the SS. Oceanic, which arrived in the port of San Francisco, State of California, on the 11th day of August, A.D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

"2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

"3d. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

"4th. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

"5th. That said firm does a business annually of $100,000, and pays annually to the United States government large sums of money, amounting to many thousands of dollars as duties upon imports.

"6th. That on the 30th day of September, A.D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanic on the 11th day of August, A.D. 1891.

"7th. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the

certificate of the Chinese government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884."

On the 14th of September, 1891, the Circuit Court rendered judgment that the petitioner be remanded to custody. An opinion was filed by the learned District Judge holding the Circuit Court, from which it appears that the judgment in the case proceeded upon the ground of the controlling effect of the decision of this court in *Wan Shing* v. *United States*, 140 U. S. 424. From this judgment an appeal was prosecuted to the Circuit Court of Appeals, which, on the 7th of October, 1891, declined to certify any question of law in the case to this court for instruction, and affirmed the judgment of the Circuit Court.

By section five of the act of Congress, entitled, "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, 26 Stat. 826, 828, c. 517, it is provided that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts directly to this court in certain specified cases, including any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and by section six, that the Circuit Courts of Appeals established by the act shall exercise appellate jurisdiction to review final decisions in the District and Circuit Courts in all other than the previously enumerated cases, unless otherwise provided by law, and that the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; as, also, in all cases arising under the patent laws, the revenue laws, and the criminal laws, and in admiralty cases; and that the Circuit Courts of Appeals may at any time certify to this court any questions or propositions of law concerning which such court desires instruction, for proper decision, whereupon this court may either give its instruction on the questions and propositions certified or may

require the whole record and cause to be sent up for consideration, and thereupon decide the whole matter in controversy as if it had been brought here for review by writ of error or appeal. And it is further provided by that section that any case in which the judgment of the Circuit Court of Appeals is made final may be required by this court, by *certiorari* or otherwise, to be certified to it for review and determination, as if it had been brought here on appeal or writ of error.

It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error.

Assuming, for the purposes of the present motion, that the Court of Appeals had jurisdiction, it will be perceived from what has been stated that the disposition of the case involves the application of the Chinese restriction acts to Chinese merchants domiciled in the United States who temporarily leave the country for purposes of business or pleasure, *animo revertendi*, in the light of the treaties between the government of the United States and that of China.

By the treaty between the United States and China of 1868, all Chinese subjects were guaranteed the right, without conditions or restrictions, to come, remain in, and leave the United States, and to enjoy all the privileges, immunities and exemptions enjoyed by the citizens of the most favored nation. 16 Stat. 740, Art. vi. The treaty of November 17, 1880, put no limitation upon this right, so far as Chinese other than laborers were concerned. 22 Stat. 826. To what extent was any limitation intended by the acts of 1882 and 1884, drawn into consideration here, bearing in mind the general rule that repeals by implication are not favored? The sixth section of the act

of 1882, as amended by the act of 1884, 22 Stat. 58, 23 Stat. 115, provided that "every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled," in the mode stated, and the certificate therein provided for is made the sole evidence, as to those to whom the section is applicable, to establish a right of entry into the United States. Manifestly, the question whether this section should be construed, taken with the treaties, to apply to Chinese merchants already domiciled in the United States, and to whom no intention of voluntarily surrendering that domicil can be imputed, is one of great gravity and importance.

The status of domicil in respect of natives of one country domiciled in another is a matter of international concern, and the acts of Congress are to be considered, in view of general and settled principles upon that subject, in arriving at a conclusion as to the operation upon the treaties with China, designed by Congress in those enactments. Was it intended that commercial domicil should be forfeited by temporary absence at the domicil of origin, and to subject resident merchants to loss of rights guaranteed by treaty if they failed to produce from the domicil of origin that evidence which residence in the domicil of choice may have rendered it difficult, if not impossible, to obtain? We refrain from particular examination of the point involved, and refer to it only so far as necessary to indicate its importance.

In the case of *Wan Shing* v. *United States*, 140 U. S. 424, Wan Shing came to this country at the age of sixteen, remained two years, and then returned to China, where he passed seven years. Upon his own evidence he appeared to be not a merchant but a laborer, and not to have gained a commercial domicil in this country; but if he had, his departure at the age of eighteen and his absence for seven years, without any apparent intention of returning, brought him, in our judgment, within the category of those required to produce the certificate of identification of the government of his origin or of which he was the subject. Upon that state of facts, the precise

inquiry arising on this petition did not present itself for definitive disposition, and we do not feel justified under the circumstances in declining to afford the opportunity for its full discussion, as now specifically pressed upon our attention.

While, therefore, this branch of our jurisdiction should be exercised sparingly and with great caution, we are of opinion that the grounds of this application are sufficient to call for our interposition.

Let the writ of certiorari issue as prayed.

MARSHALL *v.* HOLMES.

ERROR TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT OF THE STATE OF LOUISIANA.

No. 28. Argued April 6, 7, 1891. — Decided November 9, 1891.

Numerous judgments at law were rendered in the state court in favor of the same party, against the same defendant; in each case, the judgment was for less than five hundred dollars, but the aggregate of all the judgments was over three thousand dollars. After the close of the term, the defendant against whom the judgments were rendered, filed a petition in the same court for the annulment of the judgments upon the ground that, without negligence, laches or other fault upon the part of the petitioner, they had been fraudulently obtained. Subsequently the petitioner filed a proper petition and bond for the removal of the case into the Circuit Court of the United States. The application was refused and the state court proceeded to final judgment. *Held,*

(1) Upon the filing of a proper petition and bond for the removal of a cause pending in a state court, such cause, if removable under the act of Congress, is, in law, removed so as to be docketed in the Circuit Court of the United States, notwithstanding the state court may refuse to recognize the right of removal;

(2) As all the judgments in law were held in the same right and against the same parties, and as their validity depended upon the same facts, the defendant therein, in order to avoid a multiplicity of actions, and the vexation and costs arising from numerous executions and levies, was entitled to bring one suit for a final decree determining the matter in dispute that was common to all the parties; and as, under the rules of equity, such a suit could be brought in a court of the United States, the aggregate amount of all the

Statement of the Case.

judgments sought to be annulled was the value of the matter in dispute; consequently, the cause was removable so far as the amount involved was concerned;

(3) A Circuit Court of the United States in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a Federal court if the judgment had been rendered by it and not by a state court, as a decree to that effect does not operate upon the state court, but upon the party.

(4) Where a suit in equity is, in its general nature, one of which a Circuit Court of the United States may rightfully take cognizance, upon removal, it is not for a state court to disregard the right of removal upon the ground simply that the averments of the petition or bill in equity are insufficient or too vague to justify a court of equity in granting the relief asked. It is for the Federal court, after the cause is docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case is made which entitles the plaintiff to the relief asked.

Barrow v. *Hunton*, 99 U. S. 80; *Johnson* v. *Waters*, 111 U. S. 640; and *Arrowsmith* v. *Gleason*, 129 U. S. 86, distinguished from *Nougue* v. *Clapp*, 101 U. S. 551, and *Graham* v. *Boston, Hartford & Erie Railroad*, 118 U. S. 161.

The court stated the case as follows:

On the 20th day of April, 1885, the plaintiff in error, Mrs. Sarah E. Marshall, a citizen of New York, filed in the Eighth District Court for the Parish of Madison, Louisiana, a petition for injunction, representing that David Mayer, one of the defendants in error, had then recently obtained, in a suit in that court, a judgment against her for the sum of $127.50; that in pursuance of an agreement that judgment in one suit should be decisive of other suits, in the same court, between the same parties and relating to the same subject matter, judgments had been entered against her, in his favor, in other actions, twenty-three in number, for sums aggregating $3089.31. Each judgment was for less than $500.

The petition alleges that all the judgments were obtained on false testimony and forged documents, and that equity and good conscience required that they be annulled and avoided for the following reasons:

Statement of the Case.

"That your petitioner, as usufructuary of the plantation Cabin Teele, in your said parish, employed one Elijah Boyd as an agent on the said plantation to collect the rents and ship the cotton received; that the said Boyd died in the year 1884, and that said Mayer, pretending to have a contract with said Boyd, by which your petitioner was bound to him as a furnisher of supplies *in solido* with the several defendants named in the suits hereinbefore mentioned, brought said suits and made petitioner a party defendant thereto; that petitioner answered in the several suits that said Boyd, if he made any such contract as alleged, had no power, right or authority to do so; that a trial was had of the suit No. 607, and the said Mayer introduced evidence of the existence of a letter from your petitioner to the said Boyd authorizing him, the said Boyd, to make a contract by which her lien as lessor on the crops produced by the several defendants and other tenants on said plantation should be waived in favor of the said Mayer or of others as furnishers of supplies to said tenants; that upon such evidence so offered, and of the existence of which petitioner could not possibly be aware and of which she had no knowledge until subsequent to the trial, judgment was rendered against her in said suit and in the several other suits mentioned. Your petitioner shows that the said Boyd, who was an agent, with only a general power of administration, had no authority to bind her or to waive her lien as lessor in order to procure supplies for the several defendants and other tenants, and that the pretended letter authorizing him to make such contract, if it ever had an existence, which petitioner denies, was a false and forged document, not written and not signed by her; that your petitioner has never authorized the said Boyd or any other person whatsoever to waive her lien as lessor in favor of the said Mayer or any other furnisher of supplies, and has never written the pretended letter or any other letter to the said Boyd or to any other person whatsoever containing such authority; that, to the contrary, as soon as she was informed after the death of said Boyd that he had made such pretended contract and other contracts by which it was sought to bind her, she instructed

her agents and attorneys to take immediate steps to disavow the authority of said Boyd to make such contracts; that the testimony of said Mayer as to the existence of said pretended letter is false and in pursuance of a conspiracy to defraud petitioner, or that said pretended letter, if it ever had an existence, is a false and forged document; that this testimony and much more testimony necessary to establish the falsity of said evidence upon which said judgments were obtained and the forgery of said pretended letter to said Boyd was unknown to petitioner at the time of the trial and could not have been known to or anticipated by her, and has been discovered by her since the rendition of said judgments in said suit and since the lapse of the legal delays within which a motion could be made for a new trial, and that there has been no laches on her part in failing to show the falsity of such evidence and the forgery of such pretended letter on the trial of the cause."

Such was the case made in the petition. The relief asked was an injunction against Mayer and the defendant in error, Holmes, sheriff of the parish, restraining them from executing the above judgments or any of them; that Mayer be cited to answer the petitioner's demand; that the judgments be annulled and avoided as obtained upon false testimony and forged documents; and that the petitioner have general and equitable relief.

A writ of injunction was issued as prayed for; and upon a supplemental petition, showing Mayer to be a non-resident of Louisiana, a *curator ad hoc* was appointed to represent him.

Mayer appeared and filed exceptions and pleas of estoppel and *res adjudicata.*

Subsequently, June 5, 1885, Mrs. Marshall filed a petition, accompanied by a proper bond, for the removal of her suit into the Circuit Court of the United States, upon the grounds that she was a citizen of New York, and the defendants respectively were citizens of Mississippi and Louisiana; that the controversy was wholly between citizens of different States; and that it could be fully tried and determined between them. The court made an order refusing the application for removal. The pleas were referred to the merits, and ordered to stand as

an answer. Mayer answered, reiterating the allegations of the pleas previously filed by him, excepting to the petition as not disclosing any cause of action, denying each averment of the petition not admitted in the pleas, and praying that the plaintiff's demand be rejected.

Upon the trial of the case judgment was rendered, dissolving the injunction, and authorizing Mayer to execute the judgments enjoined. Judgment was also rendered in his favor, on the injunction bond, for ten per cent on the amounts enjoined (special damages as attorney's fees) and for twenty per cent on such amounts as general damages. An appeal by the plaintiff to the Supreme Court of Louisiana was dismissed for want of jurisdiction in that court to review the judgment. It was held that the appeal should have gone to the proper State Court of Appeals. 39 La. Ann. 313. Thereupon, an appeal was prosecuted to the Court of Appeals for the Second Circuit of the State of Louisiana, where the original judgment, after being amended by reducing the general damages to ten per cent, was affirmed. From that judgment Mrs. Marshall prosecuted the present writ of error.

Mr. A. Q. Keasbey for plaintiff in error. *Mr. Wheeler H. Peckham* filed a brief for same.

Mr. Charles H. Boatner for defendants in error.

First. The amount involved was not sufficient to justify the removal of the cause, and the Circuit Court properly denied it.

Complainant has, according to the allegations of her bill, twenty-three causes of action, but no one of them involves a value of as much as five hundred dollars.

The causes of action which she sets forth are not contradictory, and, therefore, under the laws of Louisiana, may be emulated or joined in the same suit, but for jurisdictional purposes each distinct cause of action must stand for itself. Thus, while one may in the same suit assert the ownership of a horse and also claim that defendant owes a sum of money,

the value of the horse cannot be added to the sum of money to make either original or appellate jurisdiction.

The supreme court of Louisiana very tersely says: "Common sense and logic alike point to the rule that a cause not appealable in amount to this court for the review of the judgment rendered therein cannot be made appealable here to review the judgment rendered in action of nullity in the same cause." *Marshall* v. *Holmes*, 39 La. Ann. 313, 315. The same principle applies in questions of removal.

Second. The removal should not have been allowed, because the complainant practically seeks to have the Federal court review the judgment of the state court in causes which were exclusively within the jurisdiction of the state court and which that court has finally decided.

In *Barrow* v. *Hunton*, 99 U. S. 80, 85, the court says: "The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof."

An examination of the case under consideration shows that David Mayer instituted twenty-three suits against as many tenants on complainant's plantation. She was made a party defendant in each case and judgment prayed against her for the amount due by her codefendant. One of these cases was selected as a test case and tried, the plaintiff introducing all the evidence on which he relied to prove that Mrs. Marshall had authorized her agent to make contracts with persons furnishing her tenants necessary supplies, by which she waived in their favor her superior lien as lessor.

The state court has, therefore, in each of these cases, considered Mrs. Marshall's denial of authority and decided against her. She now seeks, by cumulating twenty-three distinct demands in one suit, to have this court review the judgments which have been rendered against her. This cannot be done. *Nougué* v. *Clapp*, 101 U. S. 551; *Graham* v. *Boston, Hartford & Erie Railroad*, 118 U. S. 161.

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

Opinion of the Court.

After the filing of the petition for removal, accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different States, the state court was without authority to proceed further if the suit, in its nature, is one of which the Circuit Court of the United States could rightfully take jurisdiction. If, under the act of Congress, the cause was removable, then, upon the filing of the above petition and bond, it was in law removed so as to be docketed in that court, notwithstanding the order of the state court refusing to recognize the right of removal. *Steamship Co.* v. *Tugman*, 106 U. S. 118, 122; *St. Paul & Chicago Railway* v. *McLean*, 108 U. S. 212, 216; *Stone* v. *South Carolina*, 117 U. S. 430; *Crehore* v. *Ohio & Miss. Railway*, 131 U. S. 240.

Is the right of removal affected by the fact that no one of the judgments against the plaintiff in error exceeded the amount — five hundred dollars exclusive of costs — limited, by the act of 1875, for the jurisdiction, whether original or upon removal, of a Circuit Court of the United States, in suits between citizens of different States? We think not. The judgments aggregate more than three thousand dollars. They are all held by Mayer, and are all against Mrs. Marshall. Their validity depends upon the same facts. If she is entitled to relief against one of the judgments, she is entitled to relief against all of them. The cases in which they were rendered were, in effect, tried as one case, so far as she and Mayer were concerned; for the parties stipulated that the result in each one not tried should depend upon the result in the one tried. As all the cases not tried went to judgment in accordance with the result in the one tried; as the property of Mrs. Marshall was liable to be taken in execution on all the judgments; as the judgments were held in the same right; and as their validity depended upon the same facts, she was entitled, in order to avoid a multiplicity of actions, and to protect herself against the vexation and cost that would come from numerous executions and levies, to bring one suit for a decree finally determining the matter in dispute in all the cases. And as, under the rules of equity obtaining

in the courts of the United States, such a suit could be brought, the aggregate amount of all the judgments against which she sought protection, upon grounds common to all the actions, is to be deemed, under the act of Congress, the value of the matter here in dispute.

According to the averments of the original petition for injunction filed in the state court — which averments must be taken to be true in determining the removability of the suit — the judgments in question would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case evidently intended to be presented by the petition is one where, without negligence, laches or other fault upon the part of petitioner, Mayer has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution. While, as a general rule, a defence cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is the settled doctrine that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332, 336; *Hendrickson* v. *Hinckley*, 17 How. 443, 445; *Crim* v. *Handley*, 94 U. S. 652, 653; *Metcalf* v. *Williams*, 104 U. S. 93, 96; *Embry* v. *Palmer*, 107 U. S. 3, 11; *Knox County* v. *Harshman*, 133 U. S. 152, 154; 2 Story's Eq. Jur. §§ 887, 1574; *Floyd* v. *Jayne*, 6 Johns. Ch. 479, 482. See also *United States* v. *Throckmorton*, 98 U. S. 61, 65.

But it is contended that it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of the judgments at law; and that Mrs. Marshall could obtain the relief asked only in the court in

which the judgments at law were rendered. Is it true that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may not, in any case, deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, the circumstances being such as would authorize relief by the Federal court, if the judgment had been rendered by it and not by a state court?

A leading case upon this subject is *Barrow* v. *Hunton*, 99 U. S. 80, 82, 83, 85. That was a suit in one of the courts of Louisiana to annul a judgment rendered in a court of that State, upon the ground that it was founded upon a default taken, without lawful service of the petition and a citation, and because, prior to the judgment, the party seeking to have it set aside had been adjudged a bankrupt. The case was removed to the Circuit Court of the United States, and was subsequently remanded to the state court. This court held that the jurisdiction of the Circuit Court depended upon the question whether the action to annul the judgment was or was not in its nature a separate suit, or only a supplementary proceeding so connected with the original suit as to form an incident to it, and to be substantially a continuation of it. It said: "If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States courts could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes*, 92 U. S. 10, the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may

be somewhat nice, but it may be affirmed to exist. In the one class, there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class, the investigation of a new case, arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

Referring to the provisions of the Louisiana Code of Practice authorizing an action to annul a judgment obtained through fraud, bribery, forgery of documents, etc., the court said that it was not disposed to allow the fact that, by the local law, an action of nullity could only be brought in the court rendering the judgment, or in the court to which the judgment was taken by appeal, to operate so far as to make it an invariable criterion of the want of jurisdiction in the courts of the United States. "If," the court said, "the state legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiæ*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it." As that proceeding was equivalent in common-law practice to a motion to set aside the judgment for irregularity, or to a writ of error *coram vobis*, and as the cause of nullity related to form only, the case was held not to be cognizable in the courts of the United States.

The rules laid down in *Barrow* v. *Hunton* were applied in *Johnson* v. *Waters*, 111 U. S. 640, 667, and *Arrowsmith* v. *Gleason*, 129 U. S. 86, 101. In *Johnson* v. *Waters*, this court upheld the jurisdiction of the Circuit Court of the United States, by a decree in an original suit, to deprive parties of the benefit of certain fraudulent sales made under the orders of a Probate Court of Louisiana, which court, by the law of that State, had exclusive jurisdiction of the subject matter of the proceedings out of which the sales arose. After observing

that the Court of Chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings, the court said: "In such cases, the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it." In *Arrowsmith* v. *Gleason*, the grounds of the jurisdiction of the Circuit Court of the United States to entertain an original suit — the parties being citizens of different States — to set aside a sale of lands fraudulently made by the guardian of an infant, under authority derived from a Probate Court, are thus stated: "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As the case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect

would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.

It was contended at the bar that the cases of *Nougué* v. *Clapp*, 101 U. S. 551, and *Graham* v. *Boston, Hartford & Erie Railroad*, 118 U. S. 161, 177, announce a different rule. We do not understand those cases to proceed upon any ground inconsistent with the principles announced in the cases above cited. It is true that in *Nougué* v. *Clapp* the Circuit Court of the United States was asked to set aside a decree of a state court, as well as a sale had under it, upon the ground that the decree was obtained and the sale conducted pursuant to a fraudulent conspiracy, to which the person obtaining the decree, and who became the purchaser at the sale, was a party. Here the resemblance between that case and the one before us ends; for in *Nougué* v. *Clapp* it did not appear, nor was it alleged, that the facts constituting the fraud were not, before the rendition of the decree, within the knowledge of the party seeking its annulment, or could not have been discovered in time to bring them in some appropriate mode to the attention of the court while the decree was within its control. For aught that appears, that suit was brought simply to obtain a rehearing in the Circuit Court of the United States, sitting in equity, of issues that were, or, by proper diligence, could have been, fully determined in the suit at law in the state court. The relief there asked could not have been granted consistently with the rule that equity will not interfere with a judgment at law, even where the party has an equitable defence, if he could, by the exercise of diligence, have availed himself of that defence in the action at law to which he was a party. This requirement of diligence is, as it ought to be, enforced with strictness.

The case of *Graham* v. *Boston, Hartford & Erie Railroad* does not differ in principle from *Nougué* v. *Clapp*.

The case before us is unlike the two last cited. While the court, upon final hearing, would not permit Mrs. Marshall,

being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner. It was not, however, for the state court to disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained.

For the reasons stated, we are of opinion that this suit was removable from the state court; and that the court below should have reversed the judgment of the Eighth District Court in and for the Parish of Madison, and remanded the cause to the latter court with direction to set aside all orders made after the filing of the petition and bond for the removal of the suit into the Circuit Court of the United States, and to proceed no further in it.

The judgment is reversed, and the cause remanded for such proceedings as are consistent with this opinion.

JOHNSON *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* JOHNSON.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Nos. 60, 71. Argued October 30, 1891. — Decided November 16, 1891.

Under a written contract J. was to build a road for a railroad company for $29,000, and to have possession of the road and run and use it till he should be paid. He completed the road, but was not paid, and, while in possession, was forcibly ejected by the company. In an action against it for forcible entry and detainer he had judgment. Meantime, another company purchased the road, but before that, by a written agreement between J. and the first company, the amount due him under the contract was fixed at $25,000. The judgment was affirmed by this court, but before any judgment was entered on its mandate, the second company tendered to J. the $25,000 and interest, which he refused, and it then filed a bill in equity, for a perpetual injunction against J. from taking possession of the road, and obtained an order for a temporary injunction, on paying the money tendered, into a depository of the court, to its credit, with the right to J. to receive the money when he pleased. J. defended the suit on the ground that the agreement as to the $25,000 was conditional and temporary and that the condition had not been fulfilled. The court decreed that on the plaintiff's paying into court the costs of the suit, and $1000 for the expenses of J. in preparing to take possession of the road, a perpetual injunction should issue. Both parties appealed. *Held,*

(1) The agreement as to the $25,000 was binding on J.; and its terms could not be varied, by showing a contemporaneous verbal understanding that the $25,000 was to be paid in cash in a limited time;

(2) The tender and the payment into court changed the condition of affairs, and the right of J. to possession of the road ceased;

(3) The case was distinguishable from that of *Ballance* v. *Forsyth*, 24 How. 183; and like that of *Parker* v. *The Judges*, 12 Wheat. 561;

(4) The appeal by the plaintiff did not involve an amount sufficient to give this court jurisdiction.

THE court stated the case as follows:

Statement of the Case.

On the 23d of April, 1879, A. H. Johnson, of Helena, Arkansas, and the Iron Mountain and Helena Railroad Company, an Arkansas corporation, entered into a written agreement, whereby Johnson, in consideration of $29,000 to be paid to him as thereinafter stipulated, agreed to complete the grading, tieing, culverting, clearing and grubbing on the company's railroad between its junction with the Arkansas Midland Railroad, eight miles west from Helena, and the town of Marianna, in Lee County, Arkansas, a distance of about eighteen miles, to furnish certain cross-ties and square timber, to lay the iron rails, and to place the road between those points in good running order, the rails, fastenings, spikes, and switches to be furnished by the railroad company, and the road to be completed on or before September 1, 1879, $1000 to be paid as each mile of the road was completed and ready for the running of locomotives and cars thereon, and the balance when the track should be laid and the superstructure completed to Marianna, and ready for the running of locomotives and cars. It was further agreed that all moneys which might be collected by a committee of citizens appointed on behalf of certain citizens of Helena, who had subscribed money to aid in building the railroad, should be paid by said committee to Johnson in discharge *pro tanto* of the contract; that, until the $29,000 should be fully paid, Johnson should have the possession of the road and the right to run, use and control the same, but such right of possession should cease and determine, and Johnson should deliver up possession of the road to the company, as soon as the $29,000 should be fully paid to him; that the company might at any time terminate the contract by paying to Johnson the value of the work then done by him; and that, in estimating the value of the work, the whole value, to the town of Marianna, should be fixed at $29,000, and the proportion then performed by Johnson was to be paid for at the rate of $29,000 for the whole. There was a provision for arbitration in case the parties should not agree as to the value of the work, and the company agreed to furnish to Johnson the iron rails, fastenings and spikes, from time to time, as rapidly as he might be ready to lay the same.

Statement of the Case.

Having completed the road, and not having been fully paid according to the contract, Johnson, in September, 1880, was forcibly dispossessed by the president of the company. He brought his action against the company for forcible entry and detainer, in the District Court of the United States for the Eastern District of Arkansas, and, while it was pending, and on the 26th of October, 1882, the St. Louis, Iron Mountain and Southern Railway Company, an Arkansas corporation, became the purchaser of the road from the Iron Mountain and Helena Company, and on the 15th of December, 1882, took possession of the entire line of the latter company, extending from Forest City to Helena, and including the eighteen miles of track in question, and was afterwards made a party to said action. In that action, a judgment was rendered in favor of Johnson, on March 14, 1883, and on a writ of error from this court by the company it was affirmed (119 U. S. 608) on January 10, 1887.

Johnson took no immediate steps to get possession of the eighteen miles of road under his judgment. Before the purchase of the property by the St. Louis, Iron Mountain and Southern Railway Company, and on October 6, 1881, and while the forcible entry and detainer suit was pending, Johnson and the Iron Mountain and Helena Company entered into the following agreement:

"It is agreed between A. H. Johnson and the Iron Mountain and Helena Railroad Company as follows, viz. That the amount due said Johnson for constructing that part of said Iron Mountain and Helena Railroad between the former junction with the Arkansas Midland Railroad and the town of Marianna, under a contract executed in April, 1879, is the sum of $25,000 at this date; and it is further agreed that the suit now pending in the United States District Court for the Eastern District of Arkansas, at Helena, is to be continued at the October term, A.D. 1881.

"(Signed) IRON M'T'N AND HELENA R.R. Co.,
"Per WM. BAILEY, *Pres't*
"A. H. JOHNSON."

The suit referred to in that agreement was the suit for forcible entry and detainer brought by Johnson. Before any judgment was entered on the mandate of this court, and on August 24, 1887, the St. Louis, Iron Mountain and Southern Company tendered to Johnson $33,825, being the $25,000 mentioned in the agreement of October 6, 1881, and interest on the amount at the rate of six per cent per annum from that date to the date of the tender; which tender Johnson refused.

On this state of facts, the St. Louis, Iron Mountain and Southern Company filed a bill in equity against Johnson, as a citizen of Ohio, in the District Court of the United States for the Eastern District of Arkansas, setting forth the contract of April 23, 1879, and the other facts hereinbefore stated, the fact that the plaintiff had been made a party defendant to the forcible entry and detainer suit, the affirmance of the judgment in that suit by this court, the agreement of October 6, 1881, the fact of the tender of the $33,825, and that Johnson was preparing to take actual possession of the eighteen miles of track, so as to cut off the plaintiff from all use of its line of railway from Marianna to Helena. The bill prayed for an injunction to restrain Johnson from any interference with the eighteen miles of track, and for a perpetual injunction against him from attempting to take possession of it or interfere with it.

On the filing of the bill, an order was made by the court, that on the payment by the plaintiff into the German National Bank of Little Rock, Arkansas, the depository of the court, to the credit of the court, of the $33,825, and the payment to the clerk of all costs in the forcible entry and detainer suit, a temporary injunction should issue, enjoining Johnson from issuing any process to put the plaintiff out of the possession of the eighteen miles of track, or disturbing its possession thereof, until the further order of the court in the premises; and that Johnson might receive said sum from the depository at his pleasure, without prejudice to any of his rights, and particularly his right to receive any further sum that might be due him, and for which he had a lien on the eighteen miles of

track, or a right to the possession of the same as security therefor.

Johnson appeared in the suit and put in an answer to the bill, setting up that the agreement of October 6, 1881, was not in the nature of an account stated, but was, and was intended to be, conditional and temporary, and that the condition had not been fulfilled. To this answer there was a replication, and proofs were taken.

On final hearing, the court made a decree that, on the plaintiff paying into the registry of the court the costs of the suit, and $1000 for the amount expended by Johnson in necessary preparations to take possession of the eighteen miles of track and operate the same as required by law, Johnson should be perpetually enjoined from executing the judgment at law in his favor for the possession of the eighteen miles; and that, if the plaintiff should fail to pay those sums into the registry of the court, for the use of Johnson, within ninety days from the date of the decree, the temporary injunction should be dissolved, and Johnson might sue out proper process and execute the judgment at law in his favor for the possession of the eighteen miles of road. Both parties took appeals to this court.

Mr. John J. Hornor and *Mr. A. H. Garland* for Johnson.

I. The appellant in an action of forcible entry and detainer instituted by him against the Iron Mountain and Helena Railroad, (to which appellee on its own motion had been made a party defendant in the District Court of the United States for the Eastern District of Arkansas, at Helena, and had taken upon itself the defence of said suit,) was adjudged entitled to the possession of said railroad, and a writ of restitution was ordered to be issued to place him in possession thereof, and the right was given to him to use, operate and control it, until paid in full the sum due him under the contract. The bill contains no allegation that anything has arisen since the institution of said suit or rendition of said judgment which rendered it inequitable that said judgment should not be enforced.

Argument for Johnson.

Equity will interpose to restrain the execution of a judgment upon the suggestion of fraud, accident, mistake or surprise in procuring it. In the case at bar there is not only no suggestion of fraud, accident, mistake or surprise, but, on the contrary, the sole issue in the action at law was the right of appellant under his contract to keep possession of the road, and all the defences which legal acumen could bring forward to defeat this right were invoked. The bill suggests nothing which had arisen since the judgment in the action at law by which the appellant had forfeited, either at law or in equity, the right of possession given him by the contract, and confirmed by the judgment. Even if the application had been made to restrain the prosecution of the action of forcible entry and detainer, no injunction would have been granted unless it appeared that certain manifest irreparable injury would have followed the withholding the relief. *Crawford* v. *Paine*, 19 Iowa, 172; *Lamb* v. *Drew*, 20 Iowa, 15; *Hamilton* v. *Hendrix*, 1 Bibb, 67, 70; *McGuire* v. *Stewart*, 1 T. B. Mon. 189.

This principle of law is peculiarly applicable to the case at bar because appellee had utterly failed and refused to obtain any adjustment of the amount due during all the period when the right of possession was being litigated by it. As soon as it is adjudged a trespasser it demands a settlement upon its own terms, and, failing to obtain it, cries out that it, as well as the public, will suffer irreparable injury if a court of equity does not maintain it in its wrong doing, and actually not only tendering a less amount than the terms of the contract agreed should be paid, but a less amount than was actually due on its own interpretation of the contract.

A court of conscience will not place a wrong-doer in a better position than he has placed himself. It will leave him exactly where it finds him. *Creath* v. *Sims*, 5 How. 191, 205; *Sample* v. *Barnes*, 14 How. 70.

A court of equity will not protect a party in the enjoyment of that which he has obtained by a violation of law and thereby enable him to benefit by his own wrong. *Collett* v. *Jones*, 7 B. Mon. 586; *Howard* v. *Current*, 9 B. Mon. 493.

II. The relation between the parties was contractual and

the bill seeks through a court of equity to relieve appellee from the effects of the contract merely because the enforcement will now prove a hardship.

Mere hardship or inconvenience will not authorize a court of equity to set aside the terms of a written contract. *Etting* v. *United States Bank*, 11 Wheat. 59; *Stettheimer* v. *Killip*, 75 N. Y. 282.

Nor will a court of equity relieve a party from an improvident or foolish contract, if entered into without fraud or misrepresentation on the part of the other contracting party. *Moffat* v. *Winslow*, 7 Paige, 124.

III. The appellee is a trespasser in possession, after full defence made by it to the action at law for such trespass.

It has been judicially determined in the case of *Iron Mountain & Helena Railroad* v. *Johnson*, 119 U. S. 608, that not only a railroad, but this identical railroad, comes within the provisions of the statute of the State of Arkansas on the subject of forcible entry and detainer. It is alleged in the bill that Johnson is only entitled to the possession as security for his debt. If this be true, then under the laws of Arkansas all that the appellees were required to do before suing out the writ of unlawful detainer and replevying this railroad was to tender to Johnson in possession the amount due under the contract as construed by them. Under the statute the remedy for the appellees to recover possession after any unlawful holding over by Johnson, was as summary as this court adjudged it to be in favor of appellant when he was forcibly ejected from it. The remedy at law was full, complete and adequate and was the remedy provided by law when the contract was entered into in 1879. And as such must have been in contemplation of the parties who executed such contract. *Pritchard* v. *Norton*, 106 U. S. 124.

IV. Neither the bill, the order of the judge granting the injunction nor the decree perpetuating it, settled in any manner the rights of the parties under the contract of April 23, 1879. A sum of money is simply substituted as appellant's security, instead of possession of the road, as provided in the contract.

Mr. John F. Dillon for the St. Louis, Iron Mountain and Southern Railway Company. *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* were with him on the brief.

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

It is contended by Johnson that the court below had no jurisdiction to grant the injunction prayed for in the bill, because he had been adjudged, in the suit for forcible entry and detainer, to be entitled to the possession of the 18 miles of the road, and a writ of restitution had been ordered to issue to place him in possession thereof; that it is not alleged that anything had arisen since the institution of the forcible entry and detainer suit or the rendition of the judgment in it, which made it inequitable that such judgment should be enforced; that the relations between the parties were entirely contractual, and Johnson was seeking nothing not provided for by the contract of April 23, 1879; that the bill in this suit does not allege that such contract was obtained by fraud, accident, mistake or surprise; that the plaintiff in this suit is a trespasser in possession, after full defence made by it to the forcible entry and detainer suit, and, without restitution, seeks, through the interposition of a court of equity, to retain the fruits of its trespass and nullify the judgment at law; and that the bill in this suit does not seek to settle the rights of the parties under the contract of April 23, 1879, nor does the decree thereon settle such rights, but the order of injunction and the decree nullify such contract by substituting a sum of money as security to Johnson, instead of possession of the road, as provided therein.

But we are of opinion, as contended by the plaintiff, that, on the evidence in the case, the agreement of October 6, 1881, was a settlement of the amount due to Johnson, and was and is binding upon him. The tender by the plaintiff to Johnson of the $33,825, followed as it was by the payment into the German National Bank of that sum, on August 26, 1887, to the credit of the court, as appears by the record, changed the

condition of affairs, and entitled the plaintiff to the relief by injunction asked for, because it showed that the contract of April 23, 1879, had been fully complied with by the plaintiff, as the successor of the Iron Mountain and Helena Railroad Company, and that Johnson had no further right to the possession of the road. The $25,000, with interest from October 6, 1881, was substituted for the $29,000; and the contract of April 23, 1879, is to be read as if the sum of $25,000, instead of $29,000, had been mentioned in it. Johnson was to have possession of the road, and the right to run, use and control it, only as security for the payment of the money, and was to deliver up possession of it to the Iron Mountain and Helena Company, of which the plaintiff is the successor, as soon as the money should be paid. It was paid, by the tender and deposit of the $25,000, with interest, and the right of Johnson further to retain possession of the road, or to interfere with it, ceased.

This case is not like that of *Ballance* v. *Forsyth*, 24 How. 183. There this court had, in *Ballance* v. *Forsyth*, 13 How. 18, affirmed a judgment in ejectment against Ballance. After the mandate went down from this court, Ballance filed a bill in equity, setting forth the same titles that were involved in the ejectment suit, and praying relief, on certain special grounds, by enjoining the execution of the judgment. The bill was dismissed, and this court affirmed the decree, on the ground that Ballance could not appeal from the judgments of the Circuit Court and of this court to a court of chancery, on the relative merit of the legal titles involved in the controversy, which they had adjudicated. But in the present case the relief in equity does not involve a reëxamination of the merits of the original controversy, but is based on grounds arising subsequently to, and independently of, such controversy.

The question raised as to the jurisdiction of the court below in this suit is disposed of by the ruling in *Parker* v. *The Judges*, 12 Wheat. 561, where, while a writ of error was pending in this court, a bill in equity was filed in the court below, and an injunction issued to stay proceedings on the judgment.

After the judgment had been affirmed here, an order was issued by this court to show cause why that court should not issue an execution on the judgment. It was contended that an injunction could not be awarded while the record was before this court on a writ of error. This point was thus disposed of, Chief Justice Marshall delivering the opinion of the court: "We do not think this a valid objection. The suit in chancery does not draw into question the judgments and proceedings at law, or claim a right to revise them. It sets up an equity independently of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal." See also *Marshall* v. *Holmes*, *ante*, 589, and cases there cited.

Although the agreement in regard to the $25,000 was made October 6, 1881, and the judgment in the forcible entry and detainer suit was not rendered until March 14, 1883, such agreement could have constituted no defence to that suit. It was the tender of the money which laid the foundation for the injunction suit, and, although the money might have been tendered at an earlier day, the delay in tendering it deprived the company of no rights and conferred none on Johnson. As was said by this court in the forcible entry and detainer suit, (119 U. S. 608, 612,) the questions there raised by the company in regard to the original contract of April 23, 1879, and to the right of Johnson to hold possession of the road, were immaterial. Equally, the equitable right involved in the present suit could not have been material in the former suit, even if such right had then existed.

The written agreement of October 6, 1881, is full and complete; and its terms cannot be varied, qualified or contradicted by showing, as is sought to be done, a contemporaneous verbal understanding that the $25,000 mentioned in the agreement was to be paid in cash in a limited time, or satisfactory securities delivered in a limited time, or the written contract

was to be void. The agreement of October 6, 1881, is, on its face, an absolute one, that the amount due to Johnson under the prior contract of April 23, 1879, was the sum of $25,000 on October 6, 1881; and it cannot be reduced by parol evidence to a mere offer that in a certain contingency Johnson would accept the sum specified in full for the sum provided in the original contract.

As to the appeal by the plaintiff, which calls in question so much of the decree as imposes upon it the costs of the suit and the payment of the $1000, that appeal must be dismissed, because it does not involve an amount sufficient to give this court jurisdiction of it.

In No. 60 the decree is affirmed with costs against Johnson; and in No. 71 the appeal is dismissed for want of jurisdiction.

Mr. Justice Lamar dissenting.

I concur in the judgment dismissing the appeal in No. 71 for want of jurisdiction, but I dissent from the judgment and opinion of the court, just announced, affirming the decree of the court below in No. 60. As I see the case, it is a bill in which the complainant, (The St. Louis, Iron Mountain and Southern Railway Company,) asks the aid of a court of equity to relieve it from the execution of a judgment of a court of law, affirmed by this court, upon the ground that it would be against conscience to execute that judgment in obedience to the mandate of this court. I do not say that a court of equity cannot interfere in such a case. But, as has been remarked by Lord Redesdale, "bills of this description have not of late years been much countenanced." 2 Story Eq. Jur. § 888. In general, such jurisdiction is exercised only in a case where the equity of the applicant is free from doubt — such equity, for instance, as that the judgment was obtained by fraud, accident or mistake; or that the applicant had a good defence to the action at law of which he could not avail himself in a court of law, or was prevented from doing so by the act of the adverse party, or by some accident unmixed with negligence or fault

in himself; or that the right, upon which the relief he asks in equity, arose after the judgment at law was obtained, and independently of it, and which would not have constituted a defence in the suit at law. *Marshall* v. *Holmes*, *ante*, 589, and cases there cited. I do not think that the state of facts which appears in this record presents such a case. It is more like the case of *Ballance* v. *Forsyth*, 24 How. 183. In that case, Ballance brought an action of ejectment against Forsyth and obtained a verdict and judgment for the recovery of the land in dispute. The judgment was affirmed by this court. 13 How. 18. After the mandate went down from this court, Ballance filed a bill in equity, setting forth the same titles that were involved in the suit at law, and praying relief on certain special grounds. Mr. Justice Campbell, who delivered the opinion of the court, said: "This is a bill filed by the plaintiff to enjoin the execution of a judgment in the Circuit Court, upon which a writ of error had been taken to this court and affirmed. The cause in this court was between the same parties, and the decision of the court is reported in 13 How. 18. The plaintiff sets forth the claims of the respective parties, and insists that his is the superior right, and that he is entitled to have the property. *But it is not allowable to him to appeal from the judgment of the Circuit Court and Supreme Court to a court of chancery upon the relative merit of the legal titles involved in the controversy they had adjudicated.*"

These few sentences aptly characterize the case under consideration. The two cases, in their essential features, are very similar. In the one cited, the relative merits of the legal titles to the property in dispute were involved. In this, the relative claims of right to the possession of the property in dispute are involved. There is one difference between them. The applicant for relief in this case comes into court an adjudged trespasser and wrong-doer, asking for relief from the legal effects of his own wilfully illegal act. In speaking of the complainant as a trespasser and wrong-doer, I am sustained by the statement in the bill itself, to the effect that, whilst the action of forcible entry and detainer was pending, the complainant bought the property of which the appellant was dispossessed,

took possession thereof and became a maintainer of the defendant in the suit, and was itself made a party to said suit.

The special equities upon which Forsyth, in the case just referred to, asked for relief, are not enumerated in the report of the case. But in this case we find none of the equities which courts of chancery have recognized as justifying an interposition by injunction to restrain the execution of a judgment. It is not pretended that the judgment in the action at law was obtained by fraud, mistake or accident. It is not denied that that judgment was rendered after a fair, legal, protracted and warmly contested trial. There is not an averment that the judgment is even erroneous in law or that it worked an unjust hardship on the railroad company.

The bill alleges no fact or circumstance which has occurred since the rendition of the judgment by the District Court and this court, which would make its execution against conscience. The only equity it assumes to set up is the irreparable damage and injury which it alleges would be caused to the railroad company by reason of its being a common carrier and a United States mail carrier over the railroad in question, whose duties it would be unable to perform if not allowed to retain possession and use of said railroad. The answer to this claim is, that the irreparable mischief was as imminent when the action at law was pending as it is now. Nor was there any fact which being a good defence, either legal or equitable, pending the action, of which it was prevented from availing itself by any agency of the opposite party or by any accident unmixed with its own negligence or fault.

I do not think that the written agreement of October 6, 1881, between the appellant, Johnson, and Bailey, (the president of the railroad company,) merits consideration as a ground of equitable relief, in view of the peculiar circumstances which attended its execution. That writing was entered into whilst the possessory suit was pending and before the complainant was made a party thereto. If it is a valid ground for equitable intervention now, it was then; and the complainant could have filed his bill on the equity side of the court, praying that the action be suspended until the equities of the case could be adjusted, and thus have prevented the judgment from being

obtained. Instead of pursuing such a course the complainant waited about seven months after the judgment was affirmed by this court, when, assuming that the written agreement, so called, was the sole measure of the rights of Johnson under the judgment, it tendered him the sum named in that agreement, and upon his refusal to accept the same as a full satisfaction, instituted this suit, asking the court to aid it in retaining its illegal and ill-gotten possession of the property in the controversy. The same remark applies to the tender by the company to Johnson of $25,000. It was not such a fact, arising after the judgment, and independent of it, as constitutes in itself alone a right to invoke the aid of a court of equity; but it was an act closely connected with that judgment, not independent of it, resorted to as a means of avoiding the execution thereof by offering the $25,000 as a substitute for its satisfaction; in no aspect of it does that tender, relied on as the foundation of this suit, create the clear and unquestionable equity which alone can justify a court of chancery in suspending the execution of a judgment, for the express purpose of giving its sanction and protection to a possession acquired by an unlawful forcible entry and detainer. The undisputed facts of the case are, that the appellee purchased from the original transgressor, who had ousted Johnson of his rightful possession of the railroad property, took possession and continued in the wrongful occupancy and use of it; contested the action of forcible entry and detainer brought by Johnson until judgment was rendered in his favor, awarding to him restitution of the possession of the property, which, on a writ of error from this court, was affirmed; and now when it asks for a decree enjoining Johnson from taking the possession thus adjudged to him, equity demands that before the preventive remedy of injunction can be invoked, there must first be an actual restoration of the injured party to his original rights.

I think the decree of the court below should be reversed, and the cause remanded with direction to dismiss the bill and dissolve the injunction.

Mr. Justice Gray was not present at the argument and took no part in the decision.

Syllabus.

MOLINE PLOW COMPANY *v.* WEBB.

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

No. 1227. Submitted October 19, 1891. — Decided November 9, 1891.

An action was brought upon three promissory notes with interest payable annually, each providing that if not paid when due it was to bear the rate of interest of the principal, "it being expressly agreed that in default of payment of interest when due the principal is to become due and collectible." Each note recited the fact that it was secured by a deed of trust executed to a named trustee on certain described property. The deed described the notes and declared: "provided, however, it is agreed that if at any time said interest shall remain unpaid for as much as ninety days after the same shall become due and payable then the whole debt as well as the interest shall become and be due and payable, and further it is understood and agreed that if said note first falling due shall remain unpaid thereafter for as much as six months then the whole debt is to be and become due and payable, and this trust, in either event, to be executed and foreclosed, at the option of said third party." It also contained a clause to the effect that if the money due on the notes was not paid "according to the tenor and effect of said notes in hand, and according to the terms, stipulations and agreements of this instrument," the deed should remain in force, and the trustee, or in the event of his death or refusal to act, "then at the request of the holder of said notes, the sheriff . . . may proceed to sell said described property, or any part thereof, at public vendue, to the highest bidder for cash, . . . and shall receive the proceeds of said sale, out of which shall be paid, first, the costs and expenses of executing this trust, including compensation to said trustee, or said sheriff for his services, and next to the said third party or holder of said note whatever sum of money may be due thereon, and the remainder, if any, shall be paid to the said parties of the first part, or their legal representatives." The statute of Texas provided that "actions for debt where the indebtedness is evidenced by or founded upon any contract in writing, must be commenced and prosecuted within four years after the cause of action accrued, and not afterwards." The case was heard by the court, and a general finding made. No bill of exceptions was signed. *Held*,

(1) The error in this case was one of law, apparent on the record, and need not have been presented by bill of exceptions;

(2) Construing the notes and the deeds as contemporaneous agreements, relating to the same subject matter, the limitation of four years under the law of Texas ran from the dates named in the respective notes, as the dates of maturity, and not from the date of the

Statement of the Case.

default in the payment of interest; otherwise, if the option given to the payee or holder by the deed of trust, to make them due upon such default, had been exercised by the payee or the holder.

THE court stated the case as follows:

This action was brought October 31, 1889, to recover the amount due on three promissory notes, each for the sum of two thousand dollars, executed January 21, 1882, by John A. Webb and J. W. Webb, composing the firm of John A. Webb & Bro., and payable, with interest from date at eight per cent per annum, to S. W. Wheelock or order on the first days, respectively, of November, 1885, 1886 and 1887. The original petition alleged that the notes prior to their maturity were endorsed, in due course of trade, to the Moline Plow Company, a corporation of the State of Illinois.

The first of the notes was in this form: "$2000. Austin, Texas, January 21, 1882. On or before the first day of November, 1885, we promise to pay to S. W. Wheelock, or order, at Austin, Texas, two thousand dollars, for value received of him, with interest from this date till paid at the rate of eight per cent per annum, said interest being due and payable annually, and if not paid when due to bear the same rate of interest as principal, it being expressly agreed that in default of payment of interest when due that the principal is to become due and collectible. This note is secured by a deed of trust, this day executed by us to E. A. Wright, trustee, on 10 feet off of the east side of lot No. 3, all of lot No. 4 and 23 feet off of west side of lot No. 5, all in block No. 68, on East Pecan street, in the city of Austin. John A. Webb, J. W. Webb, composing firm of Jno. A. Webb & Bro." The following payments were endorsed on the note: $6.48, October 19, 1883; $250, February 3, 1888; $250, September 15, 1888. The other two notes differed from the first one only in their dates of maturity.

The deed of trust referred to in the notes conveyed the real estate therein described in trust for the following purposes: "Whereas, the said first parties [Webb & Co.] are indebted to the said third party [the payee] in the sum of six thousand

($6000.00) dollars evidenced by three promissory notes of even date with these presents, executed by said first parties to said third party each for two thousand ($2000.00) dollars and due respectively on the first of November, 1885, the first of November, 1886, and the first of November, 1887, each bearing interest at the rate of eight per cent payable annually, on the said 21st day of January of each year; provided, however, it is agreed that if at any time said interest shall remain unpaid for as much as ninety days after the same shall become due and payable then the whole debt as well as the interest shall become and be due and payable, and further it is understood and agreed that if said note first falling due shall remain unpaid thereafter for as much as six months, then the whole debt is to be and become due and payable, and this trust, in either event, to be executed and foreclosed, at the option of said third party." It also contained a clause to the effect that if the money due on the notes was not paid "according to the tenor and effect of said notes of hand, and according to the terms, stipulations and agreements of this instrument," the deed should be void, and the trustee, or in the event of his death or refusal to act, "then, at the request of the holder of said notes, the sheriff . . . may proceed to sell said described property, or any part thereof, at public vendue, to the highest bidder for cash, . . . and shall receive the proceeds of said sale, out of which shall be paid, first, the costs and expenses of executing this trust, including compensation to said trustee, or said sheriff, for his services, and next to the said third party or holder of said note whatever sum of money may be due thereon and the remainder, if any, shall be paid to the said parties of the first part, or their legal representatives."

To the original petition (which described the notes generally without setting out either them or the deed of trust) the defendants demurred, and at the same time answered, denying all and singular its allegations, and pleading in bar of the action the statute of Texas providing that actions for debt, where the indebtedness is evidenced by or founded upon any contract in writing, must be commenced and prosecuted within

four years after the cause of action accrued, and not afterwards. 2 Sayles's Texas Civil Statutes, Art. 3205.

The plaintiff, by way of answer to the plea of limitation, filed a supplemental petition, exhibiting, as part of it, the notes in suit, the deed of trust, and the following communication from the defendants to its attorneys:

"Austin, Texas, Feb. 3, 1888.

"West & McGown, Austin, Texas.

"Dear Sirs: We will pay you $250.00 in cash and $250.00 on Sept. 15, '88, if you will stay suit on the Moline Plow Co. claims until Jan., '89. In the event of our failure to pay $250.00 in Sept., your obligation to stay till Jan. 1, '89, will be at an end. If we do, we are to have till Jan. 1, '89, to raise $1000.00 and take up the first note, due Nov. 1, '85.

"Jno. A. Webb & Bro."

The supplemental petition proceeded upon two grounds: 1. That the owner and holder of the notes never having exercised the option of declaring them due and payable in advance of the dates specified in them, namely, the first days of November, 1885, 1886 and 1887, limitation would not bar an action until four years after those respective dates. 2. That by the two payments of February 3, 1888, and September 15, 1888, the defendants recognized the notes as subsisting obligations; such payments, it was alleged, being made and accepted for the sole purpose of giving the defendants time to settle the notes, and being especially based on the agreement of February 3, 1888, which, the plaintiff insists, was both an acknowledgment that the debt evidenced by the notes was just, due and unpaid, and a promise to pay it. The latter proposition was based upon the statute of Texas, providing that "when an action may appear to be barred by a law of limitation, no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgment be in writing and signed by the party to be charged thereby." 2 Sayles's Texas Civil Statutes, Art. 3219.

Argument for Defendants in Error.

By way of reply to the supplemental petition the defendants answered that they never in any manner acknowledged the notes sued on to be binding and subsisting obligations; that neither the notes nor the deed of trust gave plaintiffs any option as to the maturity of the notes; that if plaintiffs had any option whatever it related only to the property described in the deed of trust; and that no part of the interest on the notes was paid within ninety days after the same became due, whereupon the notes, both as to principal and interest, became due more than four years before the institution of this suit; consequently, it was insisted, all right of action on them was barred by limitations.

A jury having been properly waived the case was heard by the court, which found that the notes sued on were barred by the statute of limitations of four years; that the new promise, dated February 3, 1888, applied only to the extent of $1000 from January 1, 1889, and no more; and to that extent was binding on defendants.

Judgment was accordingly rendered for the plaintiff against the defendant for $1090, with interest from the date of the judgment, and the plaintiff sued out this writ of error.

Mr. Henry Wise Garnett for plaintiff in error.

Mr. Martin F. Morris for defendants in error.

I. The findings of the court are conclusive in this case. Those findings are either general or special. On the part of the defendants, it is respectfully submitted that the findings are merely general findings of the issues in favor of the defendants, except to the extent of $1000; and general findings of a trial court are not and cannot be the subject of review here.

The issues made by the parties were three: 1st. The general issue, which need not be regarded here. 2d. The plea of limitations. 3d. The question of a new promise. The finding of the court upon the second and third issues was "that the notes sued on were barred by the statute of limitations of four years," and "that the new promise, dated February 3,

1888, applied only to the extent of $1000 from January 1, 1889, and no more." These certainly are general findings. They are not determinations of any special facts tending to determine the issues, but general determinations of the issues themselves; and, if they are general findings, the uniform and repeated decisions of this court are to the effect that they cannot be reviewed here, except on the rulings of the court made in the progress of the trial. *Norris* v. *Jackson*, 9 Wall. 125; *Cooper* v. *Omohundro*, 19 Wall. 65; *Otoe County* v. *Baldwin*, 111 U. S. 1; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Santa Anna* v. *Frank*, 113 U. S. 339.

And as there are no bills of exceptions, and no rulings of the court during the trial in any way excepted to, there is no review possible in any aspect of the case.

II. But whether the findings are general or special, they are conclusive of the facts found. Only in the case of special findings can the court review the sufficiency of the facts found to support the judgment. *Mercantile Ins. Co.* v. *Folsom*, 18 Wall. 237; *Dickinson* v. *Planters' Bank*, 16 Wall. 250; *Boardman* v. *Toffey*, 117 U. S. 271.

Now, if these findings are special findings of fact, and they are to be taken as conclusively true, it cannot reasonably be contended that the judgment was not what it ought to have been. It is too plain for argument that the judgment could not have been otherwise than as it is.

III. We can scarcely suppose that this court will go behind the findings in this case, whether those findings are general or special. There is nothing on which to base a review of the correctness of those findings. The testimony in the case is not given; nor is there any statement of its purport. There are no exceptions to rulings of the court in the progress of the trial, and it nowhere appears what those rulings were.

But even if we supposed, in opposition to the plain statement of the record, that there was no testimony or evidence in the case, and that the case was submitted upon the pleadings alone and the exhibits which are made part of them, the findings of the court even then are right and proper. It is very evident that the whole alleged indebtedness, under the

special terms of the collateral agreement, had become due and payable when the first default of interest occurred, especially as the notes themselves by their terms were payable "on or before" a certain specified time — that is, at any time at the option of the maker. The holder could have brought suit for the whole indebtedness when that default occurred; and the courts of Texas have uniformly held that the statute begins to run from the time when the plaintiff could sue. *Walling* v. *Wheeler*, 39 Texas, 480.

And as to the alleged acknowledgment and new promise contained in a letter written by the defendants, under date of February 3, 1888, if that letter is to be taken as proved merely by being made an exhibit to a pleading, and if there was no other proof on the subject, it is evident that the court was entirely right in restricting the effect of this letter to the sum of one thousand dollars. It would be a most violent construction that would torture this letter into an admission of indebtedness and a willingness to pay to a greater extent than that; for, under the decisions of the courts of Texas, (*Coles* v. *Kelsey*, 2 Texas, 541; *S. C.* 47 Am. Dec. 661, is the leading case on the subject), which are in entire harmony and conformity with the doctrine of this court upon the subject, an acknowledgment of debt, in order to amount to a new promise, must express willingness to pay, and certainly an expression of willingness to pay $1000 is neither an expression nor an implication of willingness to pay more than $1000.

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

Although the record recites that the case was heard upon the pleadings and evidence, it does not appear that any oral testimony was introduced. No bill of exceptions was signed, and the finding by the court was general, stating only its conclusions of law. The defendant, therefore, contends that there is nothing before this court for review.

This position cannot be sustained. The notes, upon which the action is based, and the deed of trust filed with and made

a part of the supplemental petition — their execution not having been denied by the defendants under oath — are to be taken, without proof, as genuine instruments notwithstanding the general denial in the original answer of all and singular the allegations of the petition. 1 Sayles's Texas Civil Statutes, Art. 1265, and authorities cited in 2 Peticolas's Index-Digest of Texas Civil Cases, p. 1024. We have seen that the notes matured, respectively, on the first days of November, 1885, 1886 and 1887. As this action was brought within less than four years after November 1, 1885, the defence of limitation — although it was stipulated in each note that on default in the payment of interest at maturity the principal was to become due and collectible — is without foundation as to any of the notes, unless the principal of each note became due, without regard to the wishes of the payee or holder, either immediately upon default in paying interest, or after the expiration of ninety days from such default. Whether that view be sound or not depends upon the terms of the note and the deed of trust, and could not be affected by the testimony of witnesses. In refusing judgment for the entire amount of the notes, less the admitted credits, the court below necessarily proceeded on the ground that, independently of any option upon the part of the plaintiff, the notes became absolutely due and collectible at one or the other of the dates just mentioned, and consequently the action on them was barred. If this is error, it is one apparent on the record, and need not have been presented by a bill of exceptions. *Balt. & Potomac Railroad* v. *Trustees 6th Presby. Church*, 91 U. S. 127; *Bennett* v. *Butterworth*, 11 How. 669, 675; *Young* v. *Martin*, 8 Wall. 354, 357; *Clinton* v. *Missouri Pacific Railway*, 122 U. S. 469, 474.

We are of the opinion that the court erred in not rendering judgment for the full amount of the notes, less the sums admitted in the petition to have been paid. *Walling* v. *Wheeler*, 39 Texas, 480, is cited by the defendants in support of the opposite view. But that case only announces the general rule that limitation begins to run from the time the plaintiff could sue.

A leading case in the Supreme Court of Texas on this sub-

ject is *Harrison Machine Works* v. *Reigor*, 64 Texas, 89. That was an action upon promissory notes, payable at different dates, each containing an agreement to the effect that "a failure to pay that note when due should mature both notes." The note first falling due was not paid at maturity, and more than four years elapsed without suit. The question was presented whether limitation on the note last falling due commenced upon default in the payment of the one first maturing. It was held that it did, the court saying: "That the effect of the agreement was to authorize suit or give a right of action upon the last note at the same time that it could be commenced upon the first cannot be doubted. By the express terms of our statute of limitation it commences to run from the time when the cause of action accrues. It is immaterial from what cause a note becomes due so far as the right of the holder to enforce it by suit is concerned. . . . If the holder of a note may, at his option, treat the claim as due at a later date than the maker has agreed that it shall mature, and thus prescribe a different date at which it shall be barred, the evidence for its enforcement may be preserved, whilst that for its resistance may be destroyed, and thus the purpose of the statute be wholly defeated." After referring to *Hemp* v. *Garland*, 4 Q. B. 519, as sustaining that view, but recognizing the fact that that case had been somewhat criticised on the ground that the facts brought it within the principle that no one is bound to take advantage of a forfeiture, Wood on Limitations, 296, the court proceeds: "Admitting this to be a correct view, it cannot affect the present case. Here no option was left to the creditor; he was forced to treat the debt as due. It is true he was not obliged to bring suit upon it upon default in payment of the first note; neither is any creditor compelled to sue upon a claim so soon as it becomes due. But the statute was put in motion without consulting his wishes, by the very terms of the contract, which neither party had any right to change without the consent of the other. When suit is left to the option of the creditor, and he fails to bring his action for the whole debt upon the non-payment of one instalment, the debtor may possibly be authorized to construe this as an ex-

ercise of option in favor of postponing the maturity of the unpaid instalments. He may be justified in supposing that if he had incurred a forfeiture, the creditor had elected not to take any advantage of it, and may be chargeable with knowledge that limitation would be computed accordingly. But if the creditor cannot postpone the maturity of the debt, and hence cannot waive the forfeiture, if such it can be termed, the debtor cannot, of course, be charged with notice that he has done so."

Accepting this decision as giving the rule to be observed in the interpretation of the local statute, it remains to inquire whether, upon the mere default in payment of interest, or upon such default continuing for ninety days, limitation began to run, without regard to any option upon the part of the payee or the holder of the notes. In determining whether the payee or the holder of the notes was compelled to treat them as due and collectible upon such default, we are to look at the deed of trust, and treat it and the notes as one instrument, or as contemporaneous agreements relating to the same subject matter. The deed refers to the notes, and is itself referred to in each note, and may be examined to ascertain the real intention of the parties. Looking alone at the first clause of the notes, there would be some ground, under the case last cited, for holding, with respect to each note, that it would become due and collectible, without regard to the wishes of the holder, immediately upon default in paying interest. But this could not have been intended, because the deed of trust, referring to the several notes, provides for the whole debt, as well as the interest, becoming due and payable, if at any time the interest shall remain unpaid, after maturity, for as much as ninety days. We think, however, that the words in the deed of trust, "at the option of said third party," the payee or holder of the notes, refer not only to a foreclosure, but equally to the clauses in the notes and in the deed of trust relating to the maturity of the principal, in the case of a default in the payment of interest. In other words, the principal, in either of the contingencies named, might become due and payable in advance of the time specifically named in

the respective notes, at the option of the payeee or holder. If this be not the correct interpretation, it would follow that the payee or holder of the notes, notwithstanding the words "at the option of said third party," — which words are admitted to have given an option, at least, as to the foreclosure of the deed of trust — would be compelled to bring his suit for forclosure within four years from default in the payment of interest at maturity, or at least within four years after the expiration of ninety days from such default. We say this, because it was the law of Texas, when the notes in suit were executed, that if the debt secured by a mortgage or deed of trust was barred, the creditor was without remedy by foreclosure. *Ewell* v. *Daggs*, 108 U. S. 143, 147; *Eborn* v. *Cannon's Adm'r*, 32 Texas, 231; *Blackwell* v. *Barnett*, 52 Texas, 326. Subsequent decisions, it is true, may have modified this doctrine, but only to the extent of holding that, although an action for the debt may be barred by limitation, a court of equity, the debt being unpaid, will not enjoin a trustee from executing a power of sale given in the deed securing the debt, *Goldfrank, Frank & Co.* v. *Young*, 64 Texas, 432; and that a sale by the trustee, under such a power, after the debt is barred by limitation, will pass a good title free from the lien of a subsequent purchaser who has notice of the incumbrance. *Fievel* v. *Zuber*, 67 Texas, 275, 278. In our judgment, the parties intended to give the holder of the notes an option after default in the payment of interest, not only to declare the principal due, but to foreclose the deed of trust, in advance of the dates of maturity named in the notes and deed. That option not having been exercised when or after the several defaults occurred, limitation began to run on the several notes only from their respective dates of maturity, as specified in them, namely, the first days of November, 1885, 1886 and 1887.

It results that plaintiff was entitled to judgment as claimed in his original petition. In view of this conclusion, it is unnecessary to consider whether the defendants made any acknowledgment or promise which, under the statute of Texas, as construed by the Supreme Court of that State, (*Gathright* v.

Wheat, 70 Texas, 740; *Krueger* v. *Krueger*, 76 Texas, 178,) would remove the bar of limitation, if we should assume that limitation began to run from default in paying interest, or upon the expiration of ninety days after such default.

The judgment is reversed, and the cause remanded with directions to grant a new trial, and for further proceedings consistent with this opinion.

Mr. Justice Brewer concurs in the judgment.

Mr. Justice Gray did not take part in the decision of the case.

WILLCOX & GIBBS SEWING MACHINE COMPANY *v.* EWING.

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

No. 64. Argued October 29, 1891. — Decided November 16, 1891.

A contract of agency, which leaves the agent free to terminate his relations with the principal upon reasonable notice, must be construed to confer the same right upon the principal, unless provisions to the contrary are stipulated.

A provision in a contract, otherwise terminable upon reasonable notice, that a violation of the spirit of the agreement shall be a sufficient cause for its abrogation, does not imply that it can be abrogated only for sufficient cause.

The plaintiff in error by contract appointed the defendant in error "its exclusive vendor" for its machines in a defined territory; agreed to sell the machines to him at a large discount from its retail New York prices; and not to "knowingly supply its goods at a discount to go within that territory." The defendant in error accepted the appointment; agreed to pay for the machines at the discount rate; not to sell them below the said retail rate; and not to solicit orders within the territory of other agents. *Held*, that the agreement constituted him agent within the defined territory.

The court stated the case as follows:

This writ of error brings up for review a judgment based upon a verdict for $15,000 as the damages which a jury found

were sustained by the defendant in error, Ewing, on account of an alleged breach of a written contract between him and the Willcox and Gibbs Sewing Machine Company, the plaintiff in error, of date October 15, 1874. The case depends upon the construction of that contract.

On the 16th of May, 1867, the parties entered into a written agreement, reciting that the company's "agency" for Philadelphia and vicinity had been conducted by Ewing, and that a settlement of accounts had been made whereby the assets of such agency had been transferred to him. In view of that settlement, and to secure the interests of both parties, it was agreed, for considerations mutually satisfactory, that the company should furnish Ewing such Willcox and Gibbs sewing machines as he might order, at a discount of forty per cent from its list price so long as the list remained unchanged, and three dollars per machine in addition to that forty per cent; that whenever the price was changed due notice was to be given Ewing, and a discount made upon the basis of the then cost of a machine to the company and its then retail price, which should bear the same proportion that the above discount and three dollars per machine bore to such cost and retail price; and that parts of, and attachments to, the machines should be furnished at a discount of forty per cent, and cabinet work, needles and any attachments that cost the company more than sixty per cent of its retail price, at net cost. In consideration of the premises Ewing agreed to continue the business, then established in Philadelphia, of the sale of these sewing machines, and, in good faith, to devote his entire time and energy to its advancement and improvement, and to the increase of the sale of the machines, as fully and energetically as he had done the previous year; and so long as he faithfully did so and in good faith kept at least the sum of $25,000 actively employed therein, the company "agreed to continue, and in equal good faith, carry out all the provisions" of the agreement.

The company agreed to convey to Ewing, by proper writing, the lease of the property in Philadelphia in which the business was then carried on, to be used for the purposes stated in the

contract. In consideration of the premises, and so long as Ewing faithfully performed the agreement on his part, he was to have the exclusive sale of the Willcox and Gibbs sewing machine, its attachments and parts, in certain defined portions of Pennsylvania, New Jersey, West Virginia and Ohio; the company reserving the right to sell their machines and accessories at their retail prices only to go into such territory. It was also provided that "the agency, or, in other words, the interest in the Willcox and Gibbs sewing machine business" conveyed to Ewing was not to be sold or assigned by him without the company's consent, but such consent was to be given if the party was acceptable to it.

On the day of the execution of the above agreement the company gave this receipt: "Received from Daniel S. Ewing, of Philadelphia, twenty-five thousand three hundred and ninety-eight $\frac{48}{100}$ dollars, which is the balance due this company from the Philadelphia office to the 15th inst., the payment of which by the said D. S. Ewing transfers to him all our interest in the stock, fixtures, book ac., etc., of said office."

Under the date of October 15, 1874, the parties signed a memorandum, in which it was stipulated that a new agreement should be entered into between them containing certain specified terms, "the making of which it is hereby understood shall nullify all former contracts and agreements made prior" to that date. This writing closed with these words: "Above is substantially our mutual understanding of what the new contract is to be." On the same day the new contract — the one in suit — was reduced to writing and signed. It does not vary from the memorandum of the same date in any respect material to the present controversy. As the case depends upon the construction of the last agreement, it is given in full, as follows:

"This agreement, made and entered into this fifteenth day of October, one thousand eight hundred and seventy-four, by and between the Willcox and Gibbs Sewing Machine Company, a corporation duly organized under the laws of the State of New York, of the first part, and Daniel S. Ewing, of the city of Philadelphia, Penn., of the second part, witnesseth:

Statement of the Case.

"The first party hereby appoints, subject to conditions hereinafter expressed, the second party its exclusive vendor for its sewing machines, parts and attachments, in and for the following-named territory, to wit: the city of Philadelphia, Pa. and the adjacent country lying within a radius of ten miles from the city hall of said city. The second party hereby accepts said appointment. The first party will sell for the present to second party its sewing machines and parts thereof at 60 per cent discount from its present New York retail price list, and its needles, attachments, silk and cotton at its lowest wholesale rates. In the event of a change (the liberty to effect which is not herein intended to be restricted) in retail prices or of a general revision of discounts by first party, the second party is to be as favorably considered then in the readjusting and fixing of discount rates to him as is extended to him on present basis of prices. All bills owing from second to first party shall be paid in cash 30 days from date of same. The first party will not knowingly supply its goods at a discount to go within the limits of territory hereby assigned; but the first party reserves the right always to sell its sewing machines, parts and accessories at full retail rates to go anywhere. The established retail prices of first party are to be maintained for retail trade, and the second party is bound to sustain them and will bind all subvendors or agents of his to sustain said established retail prices. Second party will be allowed to fill orders from any locality at full list rates, but trade must not be solicited by his connivance or consent in the territory of other agents, and discounts or any equivalent device therefor must not be allowed in any form on articles herein specified permitted to go out of his own territory. Machines or parts, needles or attachments counterfeiting, infringing or in any degree trespassing upon ours, or in any effect trading upon our name, must not be dealt in or countenanced by second party, but it is hereby agreed that his time, attention and abilities must primarily be devoted to the forwarding of the interest of the party of the first part. If, for any reason, at any time the connection hereby formed shall cease, the first party shall have the right to buy back of its goods

sold to second party all such goods as first party may select, first party to pay therefor same prices as charged second party.

"Second party agrees to purchase from first party during the year 1875 at least $20,000, net, worth of machines, parts and accessories, to be taken in equal monthly parts, and to be paid for as stated herein. Violation of the spirit of this agreement shall be sufficient cause for its abrogation. Permission is granted second party to trade in all former territory occupied by him until such time as first party shall form other connections for occupying the territory not contained in that designated therein as belonging to second party.

"And it is agreed and understood that this appointment or agency is not salable or transferable by second party without obtaining the written consent of first party, but such consent is to be given providing the purchaser or other person is acceptable to said first party. First party consents to renew and extend second party's note, $10,000, maturing January 23–26, 1875, for one year from said date, without interest, upon consideration of this agreement alone. All contracts or agreements made prior to the date first written above are hereby nullified and satisfied."

Subsequently, February 15, 1877, Ewing executed the following receipt, which was endorsed on the contract: "Received, New York, Feb'y 15, 1877, the sum of four hundred and twenty $\frac{52}{100}$ dollars, making the discount up to 55 per cent on all goods received by me since the revision of discounts in August, 1875, same amount being in full for all claims or demands for arrears of discounts, allowances or any other claims I may have up to date hereof. In consideration whereof I also now confirm the within contract, admitting the company's right to revise discounts or prices as in its judgment it may deem proper and just, in conformity with the within contract. D. S. Ewing."

The parties continued to act under the agreement of 1874 until the latter part of 1879. On the 10th day of October of the latter year the company notified Ewing of their purpose to abrogate their agreement at the expiration of sixty days

from that date, saying: "In the meantime, the company will be ready and willing to take off your hands the store now occupied by you, and they will purchase, if you desire to sell, the fixtures contained in the store at a just valuation. They will also purchase all stock which you have on hand which has been obtained from the said company, in accordance with the terms of their contract. Should you be desirous of terminating the said agreement at an earlier period than the time herein designated, the company will join with you in an agreement for such earlier termination of the contract." In reply to this notice, Ewing wrote to the company: "I do not accept notice for the abrogation of the contract existing between us, for the reason that I deny your right thus, or by any arbitrary process, to determine said contract. Should you wish to open negotiations for the purchase of any thing, right or privilege which I hold, that may be of value to you, I shall be pleased to receive communications bearing upon the subject."

At the trial of the present action, brought to recover damages for breach by the company of the contract of 1874, Ewing introduced the agreement of 1867, and gave evidence tending to show the value of the business in that and succeeding years, his faithful performance of the contract, and the damages he had sustained by reason of the alleged breach. To the introduction of that evidence the company objected, but the objection was overruled, and an exception taken. The defendant did not introduce any proof, but insisted at the trial and insists here, that it appeared from the evidence that Ewing, prior to the abrogation of the contract, did not give his time and labor, primarily, for the benefit of its business in his hands.

The defence was based, in part, upon the broad ground that the contract of 1874 was revocable at the will of the company, or, at least, upon reasonable notice to Ewing; and, as by the uncontradicted evidence sixty days' notice was given of the purpose to abrogate it, that the law was for the company. The court refused to so charge the jury, and instructed them, in substance, that the plaintiff was entitled to recover any

damages sustained by reason of such abrogation, unless it was shown that he failed to devote his time, attention and abilities, in good faith and primarily, to forwarding the company's interests as they were involved in the execution of the contract.

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

Mr. Frank P. Prichard for defendant in error. *Mr. John G. Johnson* filed a brief for same.

I. The contract in suit was one of sale, not of agency.

The right conferred upon Ewing was analogous to that conferred upon the licensee of a patent. The nature of such licensee's right has been very clearly considered by this court recently in the case of *St. Paul Plow Works* v. *Starling*, 140 U. S. 184.

Ewing was not constituted an agent to sell on behalf of the defendant, for its account, its machines. It was made his duty to purchase for himself, and to pay for, the machines which he desired to sell. The defendant agreed with him that it would furnish to him, to be sold by him, for his own account, within a designated territory, its machines. It further agreed that within said territory he alone should be allowed to sell the same.

It seems too plain for argument that the agreement by the defendant with the plaintiff was one of sale and not of agency. It not only conferred upon the latter the right to sell, but it excluded others from selling.

Was this agreement one of sale only so long as the defendant desired to sell, or one to sell to him without limit of time?

The agreement by Ewing "to purchase from first party during the year 1875 at least $20,000 net worth of machines, parts and accessories to be taken in equal monthly parts and to be paid for as stated herein," was not one which it was competent for the defendant at will to revoke. This agreement, by itself, is sufficient to show that the provision was

one, not at will, but for a time, and for a time not terminable with the year 1875.

Inasmuch as the contract was not to be at will, it was to have *some* duration. The least extent which can be given it is for the life of Ewing, or during the continuance in business of the defendant. An agreement to run for *some* time, not limited, cannot be otherwise construed.

II. The contract of 1867 was properly admitted in evidence.

The contract of 1867 was admissible in evidence not only as throwing some light upon the question of the value of the contract broken, but also for the purpose of showing the fact that the agreement of 1874 rested upon a consideration.

The contract of 1874 stated that "All contracts or agreements made prior to the first date written above are hereby nullified and satisfied."

It was the right of the jury to know that a consideration had been given. It was impossible to correctly understand the relation established by the contract of 1874 without a knowledge of the situation. It was not claimed that the contract of 1867 was admissible to modify, to alter, or to vary that of 1874, but simply to show that the parties had dealt together previously about the same subject matter, and that the new agreement grew out of such past relation. Though the learned judge did not admit the contract of 1867 for this purpose, we submit that he should have done so.

III. The value paid to the defendant by the plaintiff for the exclusive right to sell its sewing machines in 1867, in connection with the oral testimony, was pertinent to the issue raised as to the amount of damages due the plaintiff.

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

If this action was based upon the agreement of 1867, there would be some ground for holding that the company was obliged, by that agreement, to continue Ewing as agent so long as he performed its stipulations. We are only concerned, however, with the agreement of 1874, which materially differs

from that of 1867, and expressly provides that all prior contracts between the parties "are hereby nullified and satisfied." It is only for a breach of the contract of 1874 the plaintiff sues. Looking at all the provisions of the last agreement, it is clear that Ewing — although bound, while the contract was in force, to devote his time, attention and abilities, primarily, to the interests of the company, within the territory allotted to him — was not compelled to continue in its service for any given number of years, at least after 1875, or indefinitely, but was at liberty after that year, if not before, upon reasonable notice, to surrender his position and quit its service, subject to the company's right to buy back such of its goods sold to him as it might select, and for the prices at which they were charged to him. He may have been entirely satisfied with the manner in which the company acted towards him, and yet may have preferred — it is immaterial for what reason — not to remain in its service after 1875, or to continue in the business of selling sewing machines. We specify the year 1875, because Ewing agreed to purchase, during that year, $20,000 of the company's machines. But he did not bind himself to purchase any given number during subsequent years. It would be a very hard interpretation of the contract to hold that he was bound by the agreement of 1874 to serve the company within the designated territory so long as it kept the contract, and was satisfied with him as its agent. None of its provisions would justify such an interpretation.

If Ewing had the privilege, upon reasonable notice, of severing the connection between him and the company after 1875, upon what ground could a like privilege be denied the company if it desired to dispense with his services? He contends that his life, or the continuance of the company in business, was the shortest duration of the contract, consistently with its provisions, provided he did his duty. This position is untenable. His appointment was made and accepted subject to the conditions expressed in the agreement. No one of those conditions is to the effect that so long as he devoted his time, attention and abilities to the company's business, he should retain his position as its exclusive vendor, within the territory named,

without regard to its wishes. If the parties intended that their relations should be of that character, it was easy to have so stipulated. The only part of the contract that gives color to the theory for which the plaintiff contends, is the part declaring that a violation of the spirit of the agreement "shall be sufficient cause for its abrogation." This clause, it may be suggested, was entirely unnecessary if the parties retained the right to abrogate the contract after 1875, at pleasure, and implies that it could be abrogated only for sufficient cause, of which, in case of suit, the jury, under the guidance of the court as to the law, must judge in the light of all the circumstances. We cannot concur in this view. The clause referred to is not equivalent to a specific provision declaring, affirmatively, that the contract should continue in force, for a given number of years, or without limit as to time, unless abrogated by one or the other party for sufficient cause. It was inserted by way of caution, to indicate that the parties were bound to observe equally the spirit and the letter of the agreement while it was in force.

There was some discussion at the bar as to whether Ewing was, strictly, an agent of the company. We think he was. He was none the less an agent because of his appointment as "exclusive vendor" of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. One clause of the contract prohibits him from soliciting trade, directly or indirectly, in the territory "of other agents;" another, that he will bind "all sub-vendors or agents" to sustain the established retail prices of the company; and still another imposes restrictions upon the sale of his "appointment or agency." The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would induce him to devote his

time, attention and abilities to the company's interests. He was still a mere agent to sell such machines as might be delivered to him under the contract. We perceive nothing in the agreement of 1874 to take the case out of the general rule that "the principal has a right to determine or revoke the authority given to his agent at his own mere pleasure; for, since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer desires his aid." Story on Agency, §§ 462, 463. So far as the company's power of revocation is concerned, the case is not materially different from what it would be if the plaintiff had agreed to sell such machines as were delivered to him at the established retail prices, receiving, as compensation for his services, the difference between those prices and the amount he agreed to pay for them under the contract of 1874. In either case, his relation to the company would be one of agency, that could be terminated at its will or by renunciation upon his part, at least after 1875. Of course the revocation by the principal of the agent's authority could not injuriously affect existing contracts made by the latter under the power originally conferred upon him.

For the reasons stated the court below erred in not instructing the jury, as requested, to return a verdict for the defendant.

The judgment is reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

Mr. Justice Bradley and Mr. Justice Gray did not hear the argument or take part in the decision of this case.

CRAIG *v.* CONTINENTAL INSURANCE COMPANY.

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

No. 88. Argued November 6, 9, 1891. — Decided November 23, 1891.

The provisions of § 4283 of the Revised Statutes relieving the owner of a vessel from liability for a loss occasioned without his privity or knowledge, apply to an insurance company, to which, as insurer, a vessel has been abandoned, and which was charged with negligence in causing the vessel to be so towed that she sank and became a total loss, and the life of an employé on board of her was lost.

The identity of the vessel was not lost, she being officered and manned and having on board a cargo.

The provisions of § 4283 apply to cases of personal injury and death.

The extinguishment of liability may be availed of as matter of law, on the facts, in a suit to recover for the death of the employé.

The provisions of the statute apply to a vessel used on the Great Lakes, she not being "used in rivers or inland navigation," within the meaning of § 4289.

The insurer being a corporation, the privity or knowledge of a person who was alleged to have been guilty of the negligence, and who was not a managing officer of the corporation, or employed directly by it, and whose powers were no greater than those of the master of a vessel, was not the privity or knowledge of the corporation.

THE court stated the case as follows:

This is an action at law brought by Thomas Craig, administrator of the estate of John Carbry, deceased, against the Continental Insurance Company of New York, a New York insurance corporation, and three other insurance corporations, to recover, under a statute of Michigan, (2 Howell's Annotated Statutes of Michigan, §§ 8313, 8314,) $25,000, as damages for the death of Carbry, for the benefit of his mother and his three minor sisters, as next of kin and distributees of his estate, it being alleged that he lost his life through the negligence of the defendants, in December, 1883. It was commenced in the Superior Court of the city of Detroit, Michigan, and was removed by the defendants into the Circuit Court of the United States for the Eastern District of Michigan.

Statement of the Case.

The defendants were insurers against marine risks of a steam propeller called the Enterprise. While on a voyage on the Lakes, she was stranded, November 20, 1883, on rocks at Green Island, in the northern part of Lake Huron. She had on board a cargo of merchandise and a crew of 10 or 12 men. After the stranding, her owners abandoned her to the insurers, and she became the property of the latter. The general agent of the Continental Insurance Company for the Lake region was Mr. Dimock, of Buffalo, New York, who was also a member of the firm of Crosby & Dimock, of that place, who were general agents for several other companies. James J. Reardon, of Buffalo, was employed by Crosby & Dimock as a marine inspector. Among his other duties was that of going, when notified, to the assistance of wrecked and stranded vessels insured by companies represented by Crosby & Dimock, and getting them to a port of safety. On November 29, 1883, Reardon was notified by Crosby & Dimock in regard to the Enterprise, and went with a steam-tug called the Balize, with steam-pumps and engineers, to the assistance of the Enterprise. One of the steam-pumps was in charge of Carbry. Soon after their arriving at the place where the Enterprise was, her crew being still on board of her and in charge of her, the steam-pumps were set up, and she was pumped out and pulled off from the place where she had stranded. This was done under the supervision of Reardon. She was more or less injured by the stranding, but when she was got off she was towed into deep water, and, although she leaked, she was kept free by the use of one pump for about 66 hours, from 10 o'clock Thursday morning until 4 o'clock the following Sunday morning. Part of her cargo had been removed, but it was replaced. Her machinery was disabled, and it was necessary that the Balize should take her in tow, to remove her to a port where she could be repaired. She started in tow astern of the Balize, bound for Detroit, at 4 o'clock on Sunday morning, December 9, 1883, with her cargo on board and a crew of 13 men, including 4 who were in charge of 2 steam-pumps, one of which was under the care of Carbry. Her mate was in command of her. Reardon was on board of the Balize. No trouble was ex-

perienced in the navigation of the Enterprise, until 2 o'clock on the morning of the next day, 22 hours after she had started; and then, while off Point aux Barques and Saginaw Bay, she filled and sank and became a total loss, and Carbry lost his life. He was 22 years of age. The declaration alleged that his life was lost through the negligence of the defendants, in particulars which it specified.

The defendants having, in the state court, separately demanded a trial of the matters set forth in the declaration, the action was, after its removal, tried in the Circuit Court of the United States, before the district judge, Judge Brown, (now of this court,) and a jury; and, under the instruction of the court, a verdict was rendered in favor of the three defendants other than the Continental Insurance Company. The trial proceeded against the latter company, and resulted in a verdict against it for $8000. On motion, and in February, 1886, the verdict was set aside, and a new trial was granted. The opinion of the court on the motion, delivered by Judge Brown, is reported in 26 Fed. Rep. 798. The ground assigned for granting the motion was that the liability of the defendant, if any, was destroyed, because it was subject to the provisions of § 4283 of the Revised Statutes of the United States, and the Enterprise was totally lost during the voyage on which the death occurred. A judgment was then entered in favor of the three defendants other than the Continental Insurance Company.

The new trial was had before Judge Brown and a jury in March, 1886. There is a bill of exceptions, which states that the court instructed the jury to render a verdict in favor of the defendant, which was done. The plaintiff excepted to the instruction of the court. The bill of exceptions contains all the evidence offered on both sides. A judgment in favor of the defendant was rendered in September, 1887, and the plaintiff has brought the case to this court by a writ of error.

It is stated in the bill of exceptions that prior to the sending of the expedition under Reardon to rescue the Enterprise, she had been abandoned by her owners to the Continental Insurance Company, by which she was insured, and had

become its property; and that, by reason of her being sunk at the time Carbry lost his life, she became and was a total loss.

Mr. Don M. Dickinson for plaintiff in error.

Does the limited liability act apply not only for the protection of the owners of a *live* ship in case of her wreck and loss, but also after such wreck and loss of this same ship, for the protection against liability of the underwriters, or any one else, from acts of gross negligence when engaged as salvors of anything of value from wreck or cargo?

If her captain and crew were justified in abandoning the Enterprise (a question for the jury) as a total loss, and if with the means at their command (a question for the jury) they could not have restored her to life, then she lost her character and identity as a ship, and became something else, as truly as a man who dies becomes a corpse. No rights or liabilities pertaining to living men attach to a corpse, and none attach to a total wreck at sea; although there are entirely independent bodies of law dealing with the treatment of dead men and the treatment of wrecks.

If she was a total wreck and the limited liability act applies to the case, then it would also be applicable if the underwriters had towed Carbry out to sea upon any remnant of the ship, or any piece of her, whether it be a hull without a bottom, a bottom without the sides or a plank or two that was under him. In the sense that the underwriters are owners by subrogation, they are the owners of every piece of the wreck, but we submit that they are not the owners in the sense contemplated by this act.

"Ships and vessels" are defined by this court to be "all *navigable* structures intended for transportation." *Cope* v. *Dry Dock Company*, 119 U. S. 625, 629.

Capen v. *Washington Insurance Company*, 12 Cush. 517, was a case involving a question of implied warranty as to the condition of a vessel in marine insurance, taken when the vessel was at sea. The court drew the distinction between a sound,

serviceable ship, and one that has ceased to be a ship by becoming a wreck. It held that while in such a case there was no implied warranty on the part of the insured, that the vessel was seaworthy "in the ordinary sense of the term," either when the policy was written or at the time when, by its terms, the risk commenced, yet there was an implied warranty that the vessel was in existence as a vessel, not lost at the time fixed for the commencement of the risk. It said: If she is at sea; when she has sailed in a seaworthy condition, and is safe, (*salvus*, not lost,) so as to be a proper subject for a contract of insurance at the time the risk attaches; and if the vessel is in such condition, and the implied warranty to this extent is not broken, the policy attaches and is not void. . . . But if the vessel was then lost, *become a wreck or had ceased to exist as a vessel*, or was, if at sea, in a condition or under circumstances in which she could not on her arrival in port be made available by reasonable or suitable repairs and fitting for navigation, then there was no subject for the policy to take effect upon, and the contract would be void.

In *Gardner* v. *Salvador*, 1 Mood. & Rob. 116, 117, the court in discussing the question of whether the ship's character was changed by wreck, says: "If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship, he cannot by selling it turn it into a total loss. If she be in a situation such that, by means which the captain could reasonably use she could not be brought to retain the character of a ship, it is a total loss."

In the case of *The Hendrick Hudson*, 3 Ben. 419, 421, the court discusses the loss of character of a ship in connection with the question of salvage.

The Hendrick Hudson had been a ship, was capable of floating and being towed, but had been converted into a sort of floating saloon. The court (Blatchford, Justice) says: "The fact that the structure has the shape of a vessel, or had been once used as a vessel, or could, by proper appliances, be

again used as such, cannot affect the question. The test is the actual status of the structure, as being fairly engaged in commerce or navigation."

The status as a ship having rights and liabilities under the law as such may thus be lost by misfortune, as by wreck, or by the voluntary act of the owners. A ship which has become "derelict" by *wrecking* (and a ship may become derelict by simple abandonment at sea — Judge Story in *Rowe* v. *Brig* ——, 1 Mason, 372, 373) is one "where there has been an abandonment by officers and crew, without hope of recovery." *The Aquila*, 1 Ch. Rob. 32, 37.

In such a case, if the underwriters had not, as in this case, become the salvors, the right of other salvors might have attached.

Are the negligences of any one in and about the retrieving of value from a *wreck* to be brought within any law relating distinctly and in terms to a "ship" or "vessel"?

Undoubtedly the test as to the wrecked ship must be whether she is capable of navigation by the use of means at hand; if she is not she has lost her character as a ship. And this question is one for the jury, as held in the two cases first above cited. As a matter of fact the evidence was conclusive upon this point. The Enterprise had pounded through many gales, upon the rocks, and had begun to break up so that she perceptibly showed different and independent movements of her bow and stern, of her mast and smokestack; her machinery for steaming was broken up; and she could not navigate or float either by her own means or in tow, as when towed through quiet water, she went to the bottom.

The limited liability act above quoted, stands unaffected for the purposes of this case, by the amendment of June 26, 1884, (23 Stat. 57, c. 121, § 18,) and by the act approved June 19, 1886, extending the provisions of the act to all vessels used on lakes or rivers for inland navigation, etc. 24 Stat. 80, c. 421, § 4.

There is no provision of the act which can be construed as extending the provisions of the limitation so as to include underwriters engaged in salvage.

Section 4286, Revised Statutes, extends the meaning of owners, as used in the act, so as to include "the charterer of any vessel, who shall man, victual and navigate such vessel at his own expense or procurement."

We submit therefore:

First, That the limited liability act cannot be construed to cover the case of underwriters engaged in saving wreckage; and,

Second, That it would have no application for the benefit of the original owners themselves, except for their protection from liability incurred for the cause of, or in and about the original wrecking; not for any common law liability incurred while engaged about recovering wreckage after the wreck is an accomplished fact, the character as a ship finally lost, and the vessel entirely and properly abandoned by the officers and crew.

Mr. F. H. Canfield for defendant in error.

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

The principal contention on the part of the plaintiff is that § 4283 of the Revised Statutes does not apply to the case. That section is as follows: "Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, lost [loss?], damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." It is contended that the statute does not apply, because the vessel had been wrecked and abandoned to the underwriters; that they cannot be relieved under the statute from their liability for negligence while engaged in saving the wreck or the cargo; and that she had lost her identity as a vessel.

Opinion of the Court.

But we are of opinion that her identity was not lost. She was still a vessel. She had lost her own power of locomotion, but she was capable of being towed as a vessel, and was so towed for 22 hours, and until she had accomplished a large portion of her voyage. She was officered and manned, and had on board a cargo. If, during the 22 hours, through the negligence of those on board of her and in charge of her, she had done damage by coming into collision with another vessel and survived, she could have been libelled as a vessel; and she could have been libelled for salvage. She was in the same condition as any vessel which at sea loses her means of propulsion and has to be towed into port.

The fact that, as between her former owner and the insurance company, she had been abandoned as a total loss, does not affect the question. She was abandoned as a total loss to her owner for the purposes of the policy of insurance, but, as in numerous other cases of abandonment, she was abandoned with the privilege to the insurance company of treating her as a vessel and repairing her if it could. Her ownership by the insurance company, resulting from the abandonment, was of the same character as would have been her ownership by any person who had purchased her in her then condition from the former owner. After her abandonment, she entered upon a new career and a new voyage, and § 4283 applies to the liability of the owner of her on such voyage, for damages for the death of Carbry.

It was held by this court, in *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, that the provision of § 4283 applies to cases of personal injury and death, as well as to cases of loss of, or injury to, property. Whatever liability there was on the part of the defendant, was extinguished by the loss of the Enterprise, and the extinguishment of such liability may be availed of in this suit, as matter of law, on the facts of the case. *The Scotland*, 105 U. S. 24; *Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594.

The restriction of the statute by § 4289 to vessels not "used in rivers or inland navigation," does not apply to the Enterprise, because she was used on the Great Lakes. *American*

Trans. Co. v. *Moore*, 5 Michigan, 368; *Moore* v. *American Trans. Co.*, 24 How. 1.

The only question remaining is as to whether the loss of Carbry's life occurred with the privity or knowledge of the insurance company, it being contended that the knowledge and privity of Reardon were those of the company. But it was held by this court, in *Walker* v. *Transportation Company*, 3 Wall. 150, in regard to the statute (Act of March 3, 1851, § 1, 9 Stat. 635, now § 4282 of the Revised Statutes) which provides as follows: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner," that, in order to make the owner of a vessel, in case of loss by fire, liable for negligence, it must appear that the owner had directly participated in the negligence. It was there said, that, as the object of the act was "to limit the liability of *owners* of vessels," and the exception was not, in terms, of negligence generally, but only of negligence of the owners, it would be a wrong construction of the act to hold that the exception extended "to the officers and crews of the vessels, as representing the owners;" that § 6 of the act (now § 4287 of the Revised Statutes) showed that it was the purpose of the preceding sections to release the owner from some liability for the negligence and fraud of the master and other agents of the owner, for which those persons were themselves liable and were to remain so; and that, in reference to fires occurring on the vessels to which the statute applied, the owner was "not liable for the misconduct of the officers and mariners of the vessel, in which he does not participate personally." The same rule is applicable to the words "privity or knowledge" in § 4283.

When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. In *Hill Manufacturing Co.* v. *Providence & New York Steamship Co.*, 113 Mass. 495, 499, 500, it was said that the object

of the statute was to exempt the owners of ships from the onerous liability to which they were held by the common law as common carriers or otherwise, for the acts or neglect of their servants or agents, or of third persons, without their own knowledge or concurrence; not to diminish their responsibility for their own wilful or negligent acts; and it was added: "If a loss by fire is caused either by the design or by the neglect of the owners of a ship, the first section of the statute does not limit or take away their common law liability. If the owners are a corporation, the president and directors are not merely the agents or servants, but the representatives of the corporation, and the acts, intentions and neglects of such officers are those of the corporation itself."

The corporation, in the present case, was protected by the statute from loss or damage arising from the fault or negligence of the mate or any of the crew or other employés who were on board of the Enterprise; and *a fortiori* it was protected from loss or damage arising from the fault or negligence of Reardon. The only negligence alleged in the case is that of Reardon, in attempting to tow the Enterprise, in the condition in which she was, to Detroit. But he was not an officer of the corporation, or employed directly by it, but was employed by Dimock, or Crosby & Dimock, the agents at Buffalo. He was at most a mere employé of the corporation. He was not its general agent, nor, so far as appears, had it any knowledge of his appointment. If he was an agent at all, his powers were no greater than those of the master of a vessel, for whose negligence the owner is not liable, even though the privity or knowledge of the master exists. The knowledge of Reardon was not the private knowledge of the corporation.

It is unnecessary to consider any of the other questions discussed at the bar, and the judgment is

Affirmed.

THOMPSON *v.* BAKER.

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

No. 72. Submitted November 4, 1891. — Decided November 16, 1891.

A conveyance by a debtor in Texas of his real estate there, made with intent to delay, hinder or defraud his creditors, being void as to the latter under the statutes of that State, a judgment sale and transfer of such property, in an action commenced by the levy of an attachment upon it as the property of the debtor, made after the fraudulent sale, is upheld in this case as against a *bona fide* purchaser from the fraudulent grantee, taking title after the levy of the attachment.

This was an action of trespass to try the title to a tract of land in Clay County, Texas, containing seventeen hundred and twenty-nine acres, more or less. The dispute was between Thompson, who was the plaintiff below, and Schuler. Each party claimed under Baker. Schuler pleaded not guilty, alleging, by way of reconvention, that he was the owner in fee and entitled to a judgment for the land, with damages, and writ of restitution. The court tried the case, making a special finding of facts, in accordance with the agreement of the parties, upon which judgment was entered in favor of Schuler.

The history of the title, as shown by that finding, was as follows: Baker, August 30, 1884, conveyed the land, with general warranty, to one Ledbetter, the deed reciting a consideration of $8225 evidenced by three promissory notes, each for one-third of that sum, and due, respectively, on the first days of September, 1885, 1886 and 1887. The grantee was a nephew of Baker, and a single man, living on the land with his uncle, and having there 40 head of cattle. After the deed, he continued to live with Baker, who had 300 head of cattle on the land. But their value is not stated; nor does it appear to what extent Baker was indebted, or what other property, if any, he had in the State subject to execution.

The deed of August 30, 1884, was made to defraud the creditors of the grantor, particularly Schuler, who, at its date,

held the note of Baker and others for $10,000. It was never delivered to Ledbetter, but was put on record by Baker, September 29, 1884.

A few days before that deed was recorded, namely, on the 24th day of September, 1884, Schuler instituted suit on his demand of $10,000 against Baker and others in the District Court of Clay County, Texas, and, on the same day, sued out an attachment, which was levied upon the land in controversy as the property of Baker. That suit, on Schuler's application, was removed into the Circuit Court of the United States for the Northern District of Texas, in which court the transcript was filed December 4, 1884. On the next day, December 5, 1884, Schuler sued out in that court another writ of attachment, which was levied the same day on the land in dispute as the property of Baker.

On May 9, 1885, Ledbetter made and delivered to J. N. Israel a general warranty deed, conveying the land to the latter, and reciting a consideration of $10,000 cash. On the same day, Baker executed a release of his vendor's lien. The deed and release were both acknowledged on the day last named. Two days later, May 11, 1885, Baker executed to Israel a quit-claim deed for the land. No consideration was paid by Israel to Baker or to Ledbetter for their respective conveyances, which were recorded May 14, 1885.

On the 1st day of August, 1885, Thompson loaned to Israel the sum of $5000, for which the latter executed his note secured by mortgage on this land. Default in performing the stipulations of the mortgage having occurred, Thompson brought suit against Israel in the court below to foreclose it. The finding does not show when that suit was instituted, but it was commenced after Schuler's action was brought.

In Schuler's suit, the court below rendered judgment, January 12, 1886, against Baker and others for the debt sued on, "with foreclosure of the attachment lien." The judgment recites that "the attachment lien, as it existed December 5, 1884, is foreclosed;" the writ issued in the state court not being mentioned in it. Upon the above judgment an order of sale was issued. The sale took place June 1, 1886, Schuler

becoming the purchaser, and receiving a deed from the marshal, which was recorded June 4, 1886.

Subsequently, June 16, 1886, Thompson obtained a decree in his suit, under which the land was sold on the 3d of August, 1886. He became the purchaser at the sale, receiving from the marshal a deed, which was recorded in September, 1886.

When Thompson made the loan to, and took the mortgage from, Israel, he had no knowledge of the fact that the latter paid nothing for the conveyances from Baker and Ledbetter, nor of the fraudulent intent with which Baker conveyed to Ledbetter, nor actual notice of any defect or infirmity in the title.

The writs of attachment in the action of Schuler *v.* Baker, etc., the court found, "were properly sued out, issued and levied, and by proper officers, and the lien on the land in controversy, under the writ of December 5, 1884, was duly and regularly foreclosed." It was also found that "the foreclosure proceedings under the mortgage from Israel to Thompson were regular."

Neither Thompson, Ledbetter nor Israel were parties to Schuler's suit, nor was Schuler a party to Thompson's suit.

Such is the case made by the finding of facts.

The statute of Texas, relating to frauds and fraudulent conveyances, declares that "every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor;" also, that "every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon a consideration deemed valuable in law, shall be void as to prior creditors unless it appears that such debtor was then

possessed of property within this state sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." Sayles's Texas Civil Statutes, vol. 1, Art. 2465, p. 807, Art. 2466, p. 809; Rev. Stats. Texas, 1879, p. 363.

Mr. D. A. McKnight for plaintiff in error.

This suit is between two purchasers at execution sales of the same land, each holding the marshal's deed, and the true ownership may properly be determined in an action of trespass to try title. *St. Louis &c. Railway Co.* v. *Whitaker*, 68 Texas, 630.

Thompson, the plaintiff, claims that Baker's deed passed his title prior to Schuler's attachment lien, and that he therefore has the elder title, which, on the pleadings, entitles him to judgment; that the deeds, from Baker down to Israel, were untainted by fraud or other invalidity; and that, if they were tainted by invalidity, he nevertheless acquired a good title as an innocent purchaser for value.

The argument for the plaintiff is primarily founded on two propositions of law, fixing the scope and effect of an agreed statement of facts, namely, that in this court, as in the court below, the agreed statement embodies "the ultimate facts or propositions which the evidence is intended to establish," *Burr* v. *Des Moines Railroad & Navigation Co.*, 1 Wall. 99; and is held "to present questions of law alone for the consideration of the court." *Supervisors* v. *Kennicott*, 103 U. S. 554. Upon these "ultimate facts," in connection with the pleadings, it is submitted that the court below erred in its application of the law, and that judgment should have been rendered for the plaintiff.

I. The conclusion of law should have been that the plaintiff's title is superior because the facts show it to be the older, and on the pleadings the defendant could not attack its validity.

Baker's deed, being recorded prior to Schuler's attachment lien, vested a *prima facie* elder title in the plaintiff.

Both parties deraign from Baker as a common source of title. But the plaintiff starts with Baker's deed to Ledbetter, dated August 30, 1884, and recorded September 29, 1884; whilst the defendant starts with the marshal's deed, recorded June 4, 1886, under a sale made June 1, 1886, upon the foreclosure of an attachment levied December 5, 1884. An attachment lien becomes effective at date of the levy. Rev. Stats. Texas, Art. 179.

But it is to be observed that the defendant is not now in court for the purpose of enforcing either or both of the attachment liens which he placed on the land, but as a stranger to that suit, and a mere purchaser under the lien actually foreclosed. The lien of the attachment levied on September 24, 1884, on the writ from the state court, was never foreclosed as required by the statute. Rev. Stats. Texas, Art. 180.

Hence the lien acquired prior to the recording of Baker's deed was abandoned, and at the execution sale the defendant took nothing under it. *Cook* v. *Love*, 33 Texas, 487. He bought only the execution debtor's interest at date of the levy of December 5, 1884, (*Jones* v. *Powers*, 65 Texas, 207; *Sullivan* v. *O'Neal*, 66 Texas, 433,) and at said date *prima facie* the title was not in Baker.

In an action of trespass to try title, the *prima facie* elder title prevails. The action of trespass to try title is in principle like an action of ejectment. Rev. Stats. Texas, Art. 4785. In an action of ejectment, proof of a common source of title, with conveyances linking it to the plaintiff, makes out his *prima facie* case. *Roosevelt* v. *Hungate*, 110 Illinois, 595; *Smith* v. *Lindsey*, 89 Missouri, 76. Such is the law in Texas in the action of trespass to try title, the *prima facie* paper title being sufficient. *Montgomery* v. *Carlton*, 56 Texas, 361. Proof of an elder deed entitles the plaintiff to recover, and proof of a title originating prior to the attachment lien is sufficient. *Sebastian* v. *Martin Brown Co.*, 75 Texas, 291. Where there was a plea of the general issue, and also a special plea in reconvention, with allegation of title, as in the case

at bar, the court held the plaintiff entitled to a finding in the absence of proof of a superior right in the defendant. *McNamara v. Meunch*, 66 Texas, 68.

Plaintiff Thompson, then, having proved an older paper title, is entitled to judgment, unless there be some other principle of law arising upon the facts which bars it. To ascertain whether there is such a bar, we will examine each one of the recited facts bearing on the question.

The priority of the marshal's deed to the defendant does not, under the statutes of Texas, impair the plaintiff's title.

In Texas, a purchaser from a party to a suit after levy of the attachment takes subject thereto. *Tuttle* v. *Turner*, 28 Texas, 759; *Hancock* v. *Henderson*, 45 Texas, 479; *Paxton* v. *Meyer*, 67 Texas, 96. The true and the modern doctrine of *lis pendens* is, not that suit is notice, but that the law will not allow parties litigant to defeat the execution of the decree by a sale of the property. *Dovey's Appeal*, 97 Penn. St. 153. A purchaser is chargeable with *lis pendens* when the suit is against his grantor. *Randall* v. *Snyder*, 64 Texas, 350; *Tredway* v. *McDonald*, 51 Indiana, 663. But there is no *lis pendens* when the holder of the legal title is not a party. *Miller* v. *Sherry*, 2 Wall. 237; *Union Trust Co.* v. *Southern Navigation Co.*, 130 U. S. 565. A bill to set aside a conveyance for fraud is not *lis pendens* as to the mortgagee, where the title was of record, and a purchaser of the mortgage title is not affected by it. *Bradley* v. *Luce*, 99 Illinois, 234. And a suit to recover land is not notice to the mortgagee of the defendant before he is made a party to it. *Arnold* v. *Smith*, 80 Indiana, 417.

The reservation of a vendor's lien in Baker's deed does not impair the plaintiff's title, because it was not attachable; it was released of record when the plaintiff acquired his interest; and it is not shown that the purchase money remains unpaid.

In Texas a vendor's lien is not assignable, (*Cassaday* v. *Frankland*, 55 Texas, 452, 460,) it cannot be taken in execution, (*Vickery* v. *Ward*, 2 Texas, 212, 216,) and it cannot be attached (*Adoue* v. *Jemison*, 65 Texas, 680). An express vendor's lien is the equivalent of a mortgage from the vendee to the vendor,

(*Caldwell* v. *Fraim*, 32 Texas, 310; *Baker* v. *Ramey*, 27 Texas, 52; *King* v. *Young Men's Ass'n*, 1 Woods, 386,) and the general rule is that such an interest is not attachable.

The defendant is estopped by his pleadings from attacking the validity of Baker's deed, under which the plaintiff claims title.

II. The conclusion of law should have been that the plaintiff's title was not affected by the nondelivery of Baker's deed mentioned in the agreed statement of fact. Even if it was not constructively delivered by recording it, nevertheless Baker had sold the land and Ledbetter was its real owner, and it was therefore not subject to Schuler's attachment.

III. The conclusion of law on the ultimate facts recited should have been that Baker's deeds to Ledbetter and Israel were not fraudulent conveyances. Even if Ledbetter and Israel were parties to Baker's fraud, the plaintiff was a *bona fide* purchaser for value, without notice, and took a good title against Baker's creditors.

Mr. Sawnie Robertson for defendant in error.

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

The transaction by which Baker attempted to put the title to the land in his nephew was a mere sham. The deed was never delivered to the pretended grantee; and, having been made with the intent to defraud the creditors of the grantor, particularly Schuler, was void, under the statute, as to such creditors. It did not, therefore, as between Schuler, Baker and Ledbetter, stand in the way of Schuler's causing, as he did, an attachment to be levied upon the land as the property of his fraudulent debtor. Equally ineffectual, as against Schuler, was the conveyance by Ledbetter, and the quit-claim deed of Baker to Israel. No consideration of any kind passed from Israel to either of the fraudulent grantors, and those deeds were void as to prior creditors.

So that, on the 1st day of August, 1885, when Thompson took a mortgage from Israel, the land was under a lien created

by Schuler's attachment of December 5, 1884, which was levied upon it as the property of Baker. The deed from Baker to Ledbetter, and the conveyance from Ledbetter to Israel, being void as to Schuler, he had the right to proceed to a decree in his suit without noticing the apparent title, which Ledbetter had, of record, at the time the attachment of December 5 was levied, or the title which the latter attempted, after the levy of that attachment and in fraud of Baker's creditors, to convey to Israel. It results that the rights of Thompson under the mortgage from Israel, and under the decree, sale and purchase in the suit brought by him, having been acquired while the land was under a valid levy by Schuler's attachment of December 5, 1884, as the property of Baker, were subject to whatever rights were acquired by Schuler, as purchaser, under the decree in his suit. Baker being a party to that suit, his interest in the land, levied upon by Schuler's attachment, could not be conveyed by him so as to defeat the final decree in that suit. And no greater rights could be acquired by a purchaser from Baker after the attachment, than Baker himself had. In *Tuttle* v. *Turner*, 28 Texas, 759, 773, which involved the title of one who purchased land after a levy thereon of an attachment, the court said: "If he purchased after the appellees acquired a lien on the lands by levy of the attachment, his rights are subordinate to theirs. The attachment lien being a prior incumbrance, he takes subject to its prior satisfaction. Being a *pendente lite* purchaser, he is affected with notice of the rights of the appellees," etc. So, in *Hancock* v. *Henderson*, 45 Texas, 479, 484, where the contest was between the holder of an attachment lien upon land, and a person who purchased from the grantees of the defendant in the attachment, who, it was alleged, had conveyed the land to such grantees with the fraudulent intent to hinder his creditors, such purchaser having no actual notice of the issuing of the attachment or of the levy, the court said: "That a valid levy created a lien on the land attached, and, when properly returned on the writ into the court from which it issued, is notice to third parties, are propositions which it is not deemed necessary to discuss. . . . It follows that

Statement of the Case.

Mrs. Louisa Hancock [the purchaser after the levy of the attachment] having bought the land under these circumstances, took it subject to the plaintiff's [attachment] lien." To the same effect is *Paxton* v. *Meyer*, 67 Texas, 96, 98. See also *County of Warren* v. *Marcy*, 97 U. S. 96, 105; *Union Trust Co.* v. *Southern Navigation Co.*, 130 U. S. 565, 570; *Murray* v. *Ballou*, 1 Johns. Ch. 566, 576.

For the reasons stated, we are of opinion that the title to the land was in Schuler in virtue of his purchase at the sale in the suit brought by him, and of the marshal's deed to him.

Judgment affirmed.

SMYTH *v.* NEW ORLEANS CANAL AND BANKING COMPANY.

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

No. 75. Submitted November 5, 1891. — Decided November 23, 1891.

The plaintiff in his bill set up in himself a legal title to real estate derived from the State of Louisiana to which it had been listed as swamp or overflowed lands; averred that the respondents claimed the same land under certain old French grants which had been recognized by the Land Office as valid; and prayed that he might be declared to be the owner and put in possession of the premises, and have an accounting for rents and profits. *Held*, that on these averments he had a plain, adequate and complete remedy at law, and that the bill must be dismissed.

The court stated the case as follows:

The controversy involved in this suit arose from conflicting claims of the parties to lands in the suburbs of New Orleans, alleged to be of great value. It seemed from the opinions of the Secretaries of the Interior presented on the hearing, that no regular survey by the Land Department of the government was extended over the city and its suburbs prior to 1871. The surveys previously made were only such as were required to ascertain the boundaries of old grants from the Spanish or

French government. But in 1871 and 1872, under the direction of the Land Department, surveys were extended over the city and adjoining country to Lake Ponchartrain, and township maps of the same were prepared and approved. One of the townships described as township twelve south, range eleven east, disclosed various lands which, being low and wet, fell under the designation of swamp or overflowed lands covered by the swamp-land grant to the State of 1849, and they were listed to the State. Within the township there were extensive improvements, consisting of railroads, gardens, race courses, cemeteries and buildings of various kinds, such as are usually found in the neighborhood of a large city.

When it became known that the lands of the township were held by the Land Department to belong to the State, and, therefore, were open to sale, many parcels were entered by different parties, the complainant in this case being one of them.

It subsequently appeared that certain ancient grants covering the premises, alleged to have been made by the former governments of Spain and France, were brought forward by one of the defendants in this case, the New Orleans Canal and Banking Company, which claimed under them, for itself and its vendees, title to the lands. Proceedings were then taken to obtain a reconsideration of the action of the Land Department, a resurvey of the city and suburbs, and an annulment of the listing of the lands in township 12, south, to the State, as swamp and overflowed.

It would serve no useful purpose to detail at length the various proceedings had under the direction of the Interior Department exercising its supervisory authority over the officers of the Land Department, to correct their alleged erroneous action. They are stated at length in the opinions of the Secretaries. It is sufficient to say that the genuineness and extent of the ancient grants were considered and established. The finding of the lands as vacant swamp and overflowed was set aside, and the listing of the same to the State was cancelled.

The complainant thereupon filed his bill in the Circuit Court

of the United States for the Eastern District of Louisiana, by which he seeks to have his alleged title adjudged to be valid, and possession of the demanded premises decreed to him with the rents and profits for their unlawful use and possession. In the bill he detailed the various steps, taken through the instrumentality of the Land Department, to obtain title to the premises. He set forth that by the Treaty of Paris of April 30, 1803, with the French Republic, the whole province or Territory of Louisiana, comprising the lands designated on the official map of township 12 south, range 11 east, had been ceded to the United States; that the lands had not been previously separated from the public domain; that since their cession the United States had exercised ownership over them and Congress had passed several acts respecting them and, among others, the swamp land act of 1849; and that under them the lands had been selected and listed, as swamp and overflowed land, to the State, and he had become their purchaser. He also averred that he was the sole owner of 2295 acres of the lands by his purchase, of which he had received patents for all but 800 acres, and for this balance he had been prevented from receiving patents by the fraudulent conduct of parties claiming under pretended ancient grants. After reciting various proceedings before the Land Department and in the District Court of the United States respecting the said grants, the bill alleged that the Land Department had decided that these ancient grants were complete French grants needing no confirmation, and obligatory upon it so far as to require it to direct the public surveys to be closed on the lands covered by them. It charged that the various proceedings taken by the department in that respect were invalid and unauthorized; and that from the invalidity and unauthorized character of the proceedings the complainant's right to the lands was not defeated nor impaired. It therefore prayed that the complainant might be declared the owner and put in possession of the premises described, and have an accounting for the rents and profits.

Mr. J. Ward Gurley, Jr., for appellant.

Argument for Appellant.

The facts charged in the bill fully justify maintaining the suit on the equity side of the court. Complainant has not an *adequate* remedy at law. Although complainant may have a legal title, it is not a *complete* legal title to all the lands, and he charges acts of fraud against one of the defendants which have prevented and still prevent him from completing his title to a portion of the lands, and which threaten to injure his title to all the lands. This entitles him to the assistance of a court of equity. *Boyce* v. *Grundy*, 3 Pet. 210, 215. The multiplicity of suits which would be necessary at law is sufficient to maintain the equity jurisdiction. *Crews* v. *Burcham*, 1 Black, 352, 358. At law a separate suit against each defendant would be necessary.

The facts set forth in the bill show that the Banking Company has for fourteen years been harassing complainant and casting clouds upon his title by claiming title under "pretended, false, fraudulent and invalid grants," and by a continued "fraudulent attempt to manufacture a title to said lands," has prevented complainant from completing his legal title to portions of said land, and from obtaining the evidences of said title from the officers of the Land Department, and has caused the officers of that department to close the public surveys upon the lines of said alleged grants, to cancel complainant's patents and to declare said alleged grants to be complete French grants, needing no confirmation, in illegal violation of complainant's rights.

To stop these acts, investigate these frauds, ascertain the exact limits and location of the claim of each defendant and compel an accounting, only the equity powers of the court can afford adequate and prompt relief, without a multiplicity of suits and a great expense.

The case of *Hipp* v. *Babin*, 19 How. 271, chiefly relied upon in the opinion of the Circuit Court, differs widely from the case at bar. In that case there was no array of acts of fraud, no manufacturing of titles, no cancelling of patents, no illegal and conflicting acts and decisions of the Land Department to be reviewed and reversed, no fraudulent acts by defendants preventing complainant from completing his title,

no boundaries of defendants' respective claims to be ascertained, no multiplicity of suits to be avoided, as in the case at bar. Read in connection with the cases hereinbefore cited, the case of *Hipp* v. *Babin* but strengthens the appeal to the equity jurisdiction over the case at bar.

Mr. Henry C. Miller for the New Orleans Canal and Banking Company, appellee. *Mr. J. L. Bradford* for the same.

Mr. Gus. A. Breaux for the Metarie Cemetery Association, appellee.

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

Notwithstanding the statement of the bill respecting the alleged illegal and fraudulent use of the ancient grants produced, and the alleged illegal proceedings of the department, the bill avers the possession by the complainant of a legal title to the premises. Whether that title can be enforced against other claimants will depend of course upon the validity of the ancient grants produced, and of the proceedings by which Louisiana is alleged to have acquired the property. That can be shown in an action at law as well as in a suit in equity.

If the State acquired a good title by the swamp land act of 1849, and the listing of the lands and patents to her, and she sold the premises, as alleged, to the complainant, he can recover them in an action at law, and the rents and profits accrued thereon since the defendants have been in possession, and for that purpose there is no occasion for any proceeding in equity. The 16th section of the Judiciary Act of 1789, which is carried into the Revised Statutes as sec. 723, declares that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law. The allegations as to the illegality of the action of the Land Department, and the fraudulent proceedings of the defendants in bringing forward the pretended ancient grants, are entirely unnecessary to the

maintenance of the action. The facts upon which a title to the premises in controversy rests, or by which such title can be defeated, can be readily shown in an action at law. No discovery is necessary for the intervention of any equitable jurisdiction, nor would there be any avoiding of a multiplicity of suits by maintaining this proceeding in a court of equity. In a single action at law all the facts can be established and all the questions necessary to determine the right to the property can be considered and disposed of. The allegation of fraudulent proceedings respecting the acquisition of the title does not convert an action at law into a suit in equity. The title stated is merely legal, and as was said in the case of *Hipp* v. *Babin*, 19 How. 271, 277, where an ejectment suit in equity was sought to be sustained: "The evidence to support it appears from documents accessible to either party; and no particular circumstances are stated, showing the necessity of the courts interfering, either for preventing suits or other vexation, or for preventing an injustice, irremediable at law." See also *Scott* v. *Neely*, 140 U. S. 106, 110.

The demurrer to the bill was, therefore, properly sustained and the suit dismissed on the ground that the complainant had an adequate remedy at law, such dismissal being without prejudice to any subsequent action at law which the complainant might be advised to bring.

Decree affirmed.

MR. JUSTICE BLATCHFORD took no part in the decision of this case.

McLISH v. ROFF.

ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

No. 1158. Submitted October 13, 1891. — Decided December 7, 1891.

Under section 5 of the Act of March 3, 1891, c. 517, 26 Stat. 826, "to establish Circuit Courts of Appeal," etc., the appeal or writ of error which may be taken "from the existing Circuit Courts direct to the Supreme Court," "in any case in which the jurisdiction of the court is in issue," can be

taken only after final judgment; when the party against whom it is rendered must elect whether he will take his writ of error or appeal to this court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.

The case is stated in the opinion.

Mr. W. O. Davis and *Mr. W. Hallett Phillips* for plaintiff in error.

Mr. W. O. Ledbetter for defendants in error.

Mr. Justice Lamar delivered the opinion of the court.

This was a suit brought in the United States Court for the Indian Territory, Third Judicial Division, by A. B. Roff and W. R. Watkins against Richard McLish, for the recovery of about 640 acres of land situated in the Chickasaw Nation, and belonging to said tribe. In their amended complaint, they alleged that the defendant, Richard McLish, is a member of the tribe of Chickasaw Indians by blood; that both plaintiffs, Roff and Watkins, were born in the United States, and are now, and always have been, citizens of the United States, neither of them ever having renounced their allegiance to the government of the United States, nor taken the oath of allegiance to the government known as the Chickasaw government. The complaint further alleged that both plaintiffs, Roff and Watkins, are members and citizens of the Chickasaw tribe of Indians by intermarriage, and not by nativity or adoption; that, on the 15th day of November, 1865, the plaintiff Watkins, by intermarriage with Elizabeth Tyson, a member of said tribe by blood, became himself a member of said tribe, and that the plaintiff Roff also became a member of the same tribe by intermarriage with Matilda Bourland, the daughter of an adopted member of the tribe, during the year 1867; that, as such citizens of the Chickasaw nation, the plaintiffs had the right to own and did own, on or about the 1st of September, 1888, as tenants in common, the tract of land described in the complaint, and were in the actual possession thereof, but that on that day the defendant McLish entered upon the

said premises and unlawfully ousted the plaintiffs therefrom; and that he unlawfully withholds the same, and has continuously done so up to the time of bringing this suit, to the damage of the plaintiffs, $10,000. They pray for the recovery of the said premises, with the rents, damages and costs; or, if the court holds that they are not entitled to the recovery of the land, that they recover the value of the improvements put thereon, which improvements are set forth in some detail in the complaint, amounting in value, in the aggregate, to $2875.00 by Roff, and to $2200.00 by Watkins.

At October term, 1890, the defendant filed his demurrer to the jurisdiction of the court on these grounds:

(1) It appears from plaintiffs' amended complaint that the parties plaintiff and defendant are citizens of the Chickasaw nation or tribe of Indians, and that the court is without jurisdiction over the parties to this suit, and of this the defendant prays the judgment of the court whether he ought to answer said complaint.

(2) It appears from the amended complaint that plaintiffs acquired their pretended rights as citizens of the Chickasaw nation, and that they claim such rights, because of their said citizenship; and that this is a controversy between citizens of the Chickasaw tribe of Indians, of which the courts of said tribe have exclusive jurisdiction, and of this the defendant prays a judgment of the court that this suit be dismissed.

The demurrer was overruled by the court upon the ground that it had jurisdiction to hear and determine the cause, to which the defendant excepted. The defendant thereupon insisted that the jurisdiction of the court over the suit was at issue, and desiring to remove the cause by writ of error to the Supreme Court of the United States for its decision upon the question of jurisdiction involved, requested the court below to certify the question of jurisdiction involved to that court for review, offering to file a petition for a writ of error, with good and approved security, and asked that the court proceed no further with the cause until the jurisdiction should be decided by the Supreme Court of the United States. The court denied said request and held that it was its duty to proceed with the

trial of the case, notwithstanding the question of jurisdiction, and that the defendant could only appeal upon that question (of jurisdiction) to the Supreme Court of the United States from the final judgment of the court below; and required the defendant to proceed with the trial of the cause upon the merits: to all of which the defendant excepted, tendering his bill of exceptions, and asking that the same be allowed and certified, which was done by the judge of said court. He then sued out a writ of error from this court.

The writ of error is taken under the act of March 3, 1891, 26 Stat. 826, c. 517, which, as we have decided in *In re Claasen*, 140 U. S. 200, went immediately into effect on its enactment. The 13th section of that act placed the United States court in the Indian Territory on the same footing with regard to writs of error and appeals to this court as that occupied by the Circuit and District Courts of the United States.

Sec. 5 of the same act provides:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: *In any case* in which the jurisdiction of the court *is in issue; in such cases the question of jurisdiction alone* shall be certified to the Supreme Court from the court below for decision."

Does this provision authorize an appeal or writ of error to be taken to this court for review of a question involving the jurisdiction of the court below, whenever it arises in the progress of a case pending therein; and does the taking of such appeal or writ of error operate to stay the further proceedings in the cause until the determination by this court of the jurisdictional question? Or, in other words, has this court jurisdiction to review the question before any final judgment in the cause?

The plaintiff in error contends that we have the jurisdiction to review such question, because (1) there is in the section above quoted no express requirement of finality of judgment; and (2) because there is a positive requirement that the question of jurisdiction shall alone be certified to the Supreme Court from the court below for decision.

Opinion of the Court.

It is further argued that the omission of the word *final* in this particular provision, and the repeated use of that word in other sections of the act, in reference to a different class of cases, show the intent of the act to be that the review of the question of jurisdiction should not await the final determination of the case in the court below.

We think that upon sound principles of construction such is not the meaning of the act of Congress under consideration. It is manifest that the words in sec. 5, "appeals or writs of error," must be understood within the meaning of those terms as used in all prior acts of Congress relating to the appellate powers of this court, and in the long standing rules of practice and procedure in the Federal courts. Taken in that sense, those terms mean the proceedings by which a cause, in which there has been a final judgment, is removed from a court below to an appellate court for review, reversal or affirmance. It is true that the Judiciary Act of 1789 limited the appellate jurisdiction of this court to final judgments and decrees, in the cases specified. This, however, in respect to writs of error was only declaratory of a well settled and ancient rule of English practice. At common law no writ of error could be brought except on a final judgment. Bac. Ab. Error, A. 2. "If the writ of error be returnable before judgment is given, it may be quashed on motion." 2 Tidd's Practice, 1162. In respect to appeals there is a difference in the practice of the English chancery courts, in which appeals may be taken from an interlocutory order of the Chancellor to the House of Lords, and the practice of the United States chancery courts, where the right of appeal is by statute restricted to final decrees, so that a case cannot be brought to this court in fragments.

From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, (with the single exception of a provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single

appeal. *Forgay* v. *Conrad*, 6 How. 201, 204. The construction contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed.

It is a matter of public history, and is manifest on the face of that act, that its primary object was to facilitate the prompt disposition of cases in the Supreme Court, and to relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations. That act, in substance, creates a new and distinct Circuit Court of Appeals, in each circuit, to be composed of three judges, namely, the circuit justice when present, and two circuit judges, and also, in the absence of any one of those three, a district judge selected by assignment for the purpose of completing the court.

It then provides for the distribution of the entire appellate jurisdiction of our national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction. But as to the mode and manner in which these revisory powers may be invoked, there is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word *final*, in the 5th section of the act should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the

validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, as the case may be, to this court, independently of any final judgment upon them. The effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, with all the matters in controversy in it, by awaiting the final judgment, could be promptly decided in one appeal.

It is also insisted that sec. 14 of the act in question, repealing sec. 691 of the Revised Statutes and sec. 3 of the act of February 16, 1875, gives a wider scope to the revisory powers of this court, and makes a final judgment unnecessary to the exercise of these powers in the cases specified in said fifth section. We think that that repeal applies, in both sections mentioned, only to the provisions which limit the appellate power of the Supreme Court to cases involving the amounts there respectively specified, namely, $2000 in one and $5000 in the other. If it was the purpose of the act to repeal that part of those sections which refers to final judgments, such intention would have been indicated in express and explicit terms, inasmuch as there were, when the act was passed, other sections and other statutes containing the same limitation of appeals to final judgments.

It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this court, while the case on its merits would be certified to the Circuit Court of Appeals; that the case would be before two separate appellate courts at one and the same time; and that the Supreme Court might dismiss the suit upon the question of jurisdiction while the Circuit Court of Appeals might properly affirm the judgment of the lower court upon the

merits. The fallacy which underlies this argument is the assumption that the act of 1891 contemplates several separate appeals in the same case and at the same time to two appellate courts. No such provision can be found in the act, either in express terms or by implication. The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court.

The writ of error is

Dismissed.

FERRY *v.* KING COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 1377. Submitted November 23, 1891. — Decided December 7, 1891.

In an action against the county treasurer of a county in the State of Washington and the sureties on his official bond to recover moneys received by him officially, rulings of the state court that his settlements with the county commissioners were not conclusive, that that body acted ministerially in settling with him and could not absolve him from the duty to account and pay over, and that the denial by the trial court of an order to furnish a bill of particulars would not be disturbed in the absence of anything indicating that the defendants had been prejudiced thereby, do not deny the validity of the territorial code enacted under the authority of Congress, and confer no jurisdiction in error upon this court.

The validity of a statute is not drawn in question every time that rights claimed under it are controverted; nor is the validity of an authority every time an act done by such authority is disputed.

THE case was stated by the court as follows:

This was an action brought by the county of King in the District Court of the Third Judicial District of the Territory

of Washington, against George D. Hill and his sureties upon his official bond as county treasurer of said county, to recover certain moneys received by him during his official term of two years, commencing the first Monday in January, 1881, which it is alleged he had failed to account for or to pay over to his successor in office.

The complaint set up Hill's election; the execution and approval of the bond, which was set forth *in haec verba;* the taking of the oath and entry upon the office and continuance therein for the full term; the receipt of moneys as treasurer; and the failure to account for and pay over a large sum, which was specified. It was further averred that in the accounts by the treasurer and auditor, and settlements had with the board of county commissioners, the treasurer was charged with a certain amount for which he accounted, when by mistake and error there was overlooked a certain sum, which was named, which should have been charged him, and was not; and that also in the book accounts kept and settlements had the treasurer received certain credits, which were enumerated, some of which credits were by mistake and error larger than they should have been, and the excess of each of these credits was specifically given.

Motions to quash the summons, demurrers to the complaint and motions to make the complaint more definite, were made and filed by the defendants and overruled. The defendants then answered, denying the default of the treasurer, and pleading in addition affirmative defences, alleging various settlements at times prescribed by law between the treasurer and the board of county commissioners, and insisting upon such settlements and the accounts and credits as settled and allowed, as just and true and a complete defence to the action.

Plaintiff replied to the affirmative defences, denying a full or any settlement with the board of county commissioners, and again averring mistake and error, through which the treasurer received credits on account of the particular funds mentioned, to which he was not actually entitled.

Motions were then made to strike out part of the reply, and to make it more definite and certain, and demurrers were also filed thereto, all of which were overruled.

Statement of the Case.

The cause was then referred to a referee to take testimony, and to make and report his findings of fact and conclusions of law, which report having been subsequently made, the defendants moved to set it aside and for a new trial upon the following grounds: "1. Irregularity in the proceedings on the part of the plaintiff in this, that said plaintiff failed to set forth or specify in the pleadings the items of the account sued on, and failed and refused to furnish defendants the items of said account after a proper demand therefor before the trial. 2. Irregularity in the proceedings of said referee in admitting in evidence said account offered by said plaintiff, notwithstanding the failure of said plaintiff to either set forth in the pleadings the items of the account sued on or furnish said items to the defendants after a proper demand therefor before the trial and against defendants' objections, made at the time of the offer of said evidence. 3. Irregularity in the proceedings and abuse of discretion on the part of the referee in admitting in evidence, against defendants' objections, original books, papers and documents which are public records required by law to be and remain in the custody of the auditor of King County. 4. Error in the assessment of the amount of the recovery, the amount as per findings being too large. 5. Insufficiency of the evidence to justify the said findings and decision of the said referee. 6. The said findings and decision of the referee are against law. 7. Error in law occurring at the trial and excepted to at the time by the defendants."

This motion was denied and judgment rendered upon the findings of the referee, in favor of the plaintiff and against the defendants. The Territory having been admitted into the Union, the case was taken on error to the Supreme Court of the State. Prior to this, Hyde, one of the defendants, died, and his executors, failing to join in the writ of error, were made defendants in error. After the cause was docketed in the Supreme Court Hill died, and his executors were substituted.

Eleven errors were assigned by plaintiffs in error as grounds for the reversal of the judgment. These questioned the rulings of the District Court upon the various motions and de-

murrers, and the action of that court in denying the motion of defendants to set aside the report of the referee, and to grant a new trial.

On April 6, 1891, the judgment was affirmed. The opinion of the Supreme Court by Anders, C. J., is returned in the record, and may be found, (in the absence of the official series,) reported in 26 Pacific Rep. 537.

To review this judgment a writ of error was allowed from this court, and the record having been filed, the cause came on on a motion to dismiss or affirm.

Mr. John Paul Jones and *Mr. Reese H. Voorhees* for the motion.

Mr. J. C. Haines opposing.

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

We have carefully examined the record in this case and have failed to find any intimation of the submission of a Federal question to the state court for decision, nor can we perceive that the judgment rendered necessarily involved the disposition of such a question.

Plaintiffs in error seek to maintain the jurisdiction of this court upon the ground that the validity of an authority exercised under the United States was drawn in question in the cause and the decision of the state court was against its validity.

By section 1851 of the Revised Statutes of the United States it is provided that "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

The following are sections of the Code of Washington:

"93. It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof, in

writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof."

"2673. The several boards of county commissioners are authorized and required . . . 5. To allow all accounts legally chargeable against such county not otherwise provided for, and to audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county or appropriated to its benefit."

"2681. The county commissioners of their respective counties shall have power to compound and release in whole or in part any debt due to their county, when in their opinion the interest of their county will not be prejudiced thereby. . . ."

"2695. Any person may appeal from the decision of the board of county commissioners to the next term of the District Court of the proper district. . . ."

"2947. Each county treasurer must attend with his books and vouchers before the board of county commissioners of his county at its May session in each year, and settle his accounts before said board; . . ." Wash. Code, pp. 49, 464, 466, 467, 508.

The contention of plaintiffs in error is, in the language of counsel, that "the legislature of the Territory of Washington, by enacting these sections of the Code of Washington above mentioned, exercised an authority given by section 1851 of the Revised Statutes of the United States, and so acting, the act of the territorial legislature became the act of Congress, and the District Court of the Territory and the Supreme Court of the State, in deciding against the validity of the several clauses of the code, decided against the validity of an authority exercised under the United States."

But we do not understand that the validity of these sections of the code was denied in any respect.

The Supreme Court held that the settlements of the treasurer with the board of county commissioners were not conclusive; that the board exercised no judicial power in making

them, but acted merely ministerially; that there was no law authorizing the board to absolve the treasurer from the performance of the duty to account and pay over; and that the settlements were only *prima facie* evidence and could not be pleaded as an estoppel. As to the alleged failure to furnish a copy of the items of account mentioned in the complaint, the court held, for reasons given, that the provisions of the statute had been substantially complied with; and as to the denial by the District Court of an order for a bill of particulars, that that was a matter largely discretionary with the trial court and its ruling would not be disturbed in the absence of anything indicating that the defendants were prejudiced thereby.

In all this there was no denial of the validity of the provisions of the code, nor of the validity of an authority exercised under the United States in the enactment of these sections.

The Supreme Court did indeed say that the territorial legislature could not have clothed boards of county commissioners with judicial powers in view of section 1907 of the Revised Statutes of the United States, whereby the whole judicial power was elsewhere reposed, but the opinion proceeded upon the ground that the legislature had not attempted to do so.

We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. *Snow* v. *United States*, 118 U. S. 346, 352; *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210; *Cook County* v. *Calumet & Chicago Canal and Dock Co.*, 138 U. S. 635.

The validity neither of statute nor authority was primarily denied here and the denial made the subject of direct inquiry, nor was there any decision whatever against the validity of statute or authority.

The writ of error is *Dismissed.*

FERRY *v.* KING COUNTY. Error to the Supreme Court of the State of Washington. No. 1378. Submitted November 23, 1891. Decided

December 7, 1891. MR. CHIEF JUSTICE FULLER remarked that the same questions were presented in this case as in that just decided, and it must take the same course.

Writ of error *Dismissed.*

Mr. John Paul Jones and *Mr. Reese H. Voorhees* for the motion to dismiss.

Mr. J. C. Haines opposing.

MYERS *v.* GROOM SHOVEL COMPANY.

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

No. 70. Argued November 4, 1891.—Decided December 7, 1891.

Letters patent No. 208,258, granted September 24, 1878, to Henry M. Myers for an "improvement in handle sockets for shovels, spades and scoops" are void for want of novelty in the alleged invention covered by them, that invention having been anticipated by the "Ames California spade."

THE case is stated in the opinion.

Mr. W. Bakewell for appellant.

Mr. Francis T. Chambers for appellee.

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

This was a bill exhibited by Henry M. Myers against The Groom Shovel Company, in the Circuit Court of the United States for the Western District of Pennsylvania, for infringement of letters patent No. 208,258, dated September 24, 1878, for "improvement in handle sockets for shovel, spades and scoops."

The answer denied that Myers was the first inventor, and set up want of novelty; public use and sale for more than two

years before the application; anticipation; and non-infringement.

The Circuit Court held that, in view of the state of the art, if the patent were within the domain of patentable invention, it was so close to the line as to render it fairly disputable whether it might not be assigned to the category of products of mere mechanical skill; and that, however that might be, the invention was not essentially distinguishable in construction from a spade known as the "Ames California spade," which was a clear anticipation of the patented device. A decree dismissing the bill was therefore entered.

The application was made April 20, 1878, and reference to the file wrapper and contents shows that the original claim read as follows: "A shovel, spade or scoop provided with a socket and straps combined and constructed in two pieces for attaching the handle to the blade, substantially as herein described and for the purpose set forth." This claim was rejected as anticipated by patent for shovels, No. 186,520, issued to E. A. Barnes, January 23, 1877. It was thereupon amended by substituting the present claim, which reads: "As an improved means of securing handles to shovels the herein described combined socket and straps, the same being composed of the two straps, C D, forming a union at *g* and terminating in the socket *e*, as shown and described." The application was again rejected on the ground that the amended claim did not possess patentable novelty in view of patent No. 160,170, for shovels, issued to P. B. Cunningham, February 23, 1875, and patent No. 113,805, for tool handles, issued to D. G. Smith, April 18, 1871. The applicant thereupon erased from his specification the words just preceding his claim: "Having thus described my improvement, what I claim as of my invention is," and inserted in lieu thereof the following: "I am aware that a continuous socket for shovels has been made in two pieces, and I am also aware that a solid socket has been formed with handle straps, but in contradistinction to such I claim." The application was then allowed and the patent issued. With the exception of the paragraph thus added by way of amendment, the specification of the patent is identical with that originally filed.

The claim in the Barnes patent was for "a scoop having front and back straps forming a socket for the handle, the back strap of a separate piece from the body or bowl of the scoop, said back strap being riveted on the curve of the bowl, and back of the line of wear, substantially as and for the purpose specified."

The method of construction of this shovel or scoop was the formation of a socket by two straps, between which the wooden handle was fitted in, the straps meeting on their sides, forming a socket throughout their entire length.

The Smith patent was an invention for attaching handles to spades, forks and other implements, consisting in a socket or tubular portion having two straps, which socket and straps received the wooden handle. The socket was called by the patentee a ferrule, and the claim was for the ferrule as described, combined with a ring applied to its end.

The Cunningham patent described a construction similar to that of Smith, but the shovel blade was attached by means of a metal tongue in connection with the straps.

The Myers disclaimer aimed to differentiate the Myers claim from the Barnes continuous socket made of two pieces, and the Smith and Cunningham solid socket formed with extensions or straps, as stated therein. In the Myers patent the wooden handle is secured to the blade of the shovel by two straps, which at their parts next to the shovel blade are bent around the handle to form a socket, the lower part of the wooden handle being received in the socket or ferrule, and the straps extending up upon the body of the handle.

The defendant's expert Hunter, after describing the Barnes, Smith and Cunningham patents, testified that these constructions being old, "the distinction upon which the patent of Myers is based, is that the straps which extend up upon the body of the handle must be bent around the said handle to form a union close to the shovel blade and form a socket, but in which the remaining parts of the straps further up upon the handle shall not meet upon their sides;" and further that, "the Myers construction is substantially identical with what is shown in the Barnes patent if the straps forming the socket

at the upper end of the Barnes patent were slightly spread or extended with less width. It would be the same as the construction shown in the Smith and Cunningham patents if the sockets of the said patents were split longitudinally, as shown in the Barnes patent. The construction shown in the Barnes patent, in which the straps form a socket throughout its entire length, is undoubtedly much stronger than the Myers construction." He concluded, therefore, that there was no particular difference between what was shown and claimed in the Myers patent and what was shown in the prior patents referred to.

As to the Ames California spade, he testified: "The California spade shows a construction in which the handle is secured to the blade by means of two straps, which approach each other at their ends next to the blade and form a union or practical union and make a socket, in which the lower part of the handle is encased. I therefore find the said California spade to have a construction in which the handle is secured by a socket and straps, the two straps forming a union near the blade and terminating in a socket substantially in the manner and for the purpose set out and claimed in the Myers patent. It will be seen from this that the California spade has a construction having all the advantage of the ordinary handle straps combined with the socket, whereby the handle is greatly strengthened and securely attached to the blade, and consequently embodies all the advantages of the Myers construction. The two constructions are practically the same."

We quote thus at length from the testimony of this witness because, after a careful examination of the various exhibits in evidence, we quite agree with his conclusion. Counsel for appellant, referring to the California spade, says: "This spade has heavy straps, which are riveted to the blade of the spade at their lower end, and extend upward to within an inch and a half of the bow of the handle. They taper gradually from the blade upward. They do not, however, form a socket, because, while they nearly meet around the wooden handle near the blade, they are cut in at that point so as to form a ferrule around the wood, but not a socket on the blade."

But there is no description of any socket in the blade in the Myers patent. The specification says:

"In the drawings A represents a scoop blade, which may be of any of the known forms and constructed of the ordinary material. B represents the handle, which is constructed of wood. C and E represent the handle straps, which are cut (in the form shown in Fig. 4) from sheet iron or sheet steel and furnished with openings for the rivets used for attaching them to the blade A and handle B. The straps C and D are then swaged into the form necessary for the upper and lower strap, as indicated in Figs. 1 and 2, so that the edges *ff* in Fig. 4 meet, as at *g* in Figs. 2 and 3, forming the socket *e* (indicated in Fig. 3). The parts *h* and *i* of the straps C and D are then riveted to the blade A. The straps C and D may be forged and plaited with the blade A. The handle B is then fitted into the socket *e* and the straps riveted to the handle as shown in Figs. 1 and 2.

"By constructing handle straps in two pieces of the form shown in Fig. 2 a socket for the reception of the end of the handle is formed, having the advantage of the ordinary handle straps combined with said socket, whereby the handle is greatly strengthened and securely attached to the blade A, and said combined socket and handle straps are constructed with economy of labor and material and with great facility."

The drawings do not show any section of a socket within the blade. The socket shown is formed by riveting the straps to the blade, and the handle does not extend below the socket created by the union of the straps.

As this California spade is in all substantial respects the same as the implement described in the Myers patent, and, as appears from the evidence, was largely made and sold between 1860 and 1870, and had been in stock at the Ames Works, in Massachusetts, for fifteen or twenty years prior to 1886, we entirely concur with the Circuit Court, and the decree is consequently

Affirmed.

Mr. Justice Bradley and Mr. Justice Gray did not hear the argument, and took no part in the decision of this case.

HENDERSON BRIDGE COMPANY *v.* HENDERSON CITY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 1007. Submitted November 23, 1891. — Decided December 7, 1891.

In a suit brought in a state court of Kentucky by the city of Henderson against the Henderson Bridge Company, to recover for taxes assessed by the city on the bridge of the company, which spanned the Ohio River at the city, the Court of Appeals of the State held that the city, as a taxing district, could tax the property of the company, and that, under an ordinance of the city, accepted by the company, the city acquired a contract right to tax the bridge to low-water mark on the Indiana shore, it being within the city limits, in consideration of rights and privileges granted to the company by the ordinance. On a motion to dismiss a writ of error from this court, sued out by the company: *Held*, that although it was claimed in the pleadings, by the company, that the taxing ordinance impaired the obligation of a prior contract with the company, yet as the decision of the Court of Appeals was based wholly on the ground that the proper interpretation of the ordinance first above referred to was that the company voluntarily agreed that the bridge should be liable to taxation, and that did not involve a Federal question, and was broad enough to dispose of the case, without reference to any Federal question, and this court could not review the construction which was given by the state court to the ordinance, as a contract, in view of the constitution and laws of Kentucky, the writ of error must be dismissed.

Held, also, that the taxation of the bridge was not a regulation of commerce among the States, or the taxation of any agency of the Federal government.

THE case is stated in the opinion.

Mr. John G. Carlisle (with whom were *Mr. John L. Dorsey*, *Mr. John Young Brown* and *Mr. Montgomery Merritt* on the brief) for the motion to dismiss.

Mr. William Lindsay opposing.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action, brought in the Henderson Circuit Court of Kentucky, by the city of Henderson, Kentucky, against

the Henderson Bridge Company, a Kentucky corporation, to recover for taxes assessed by the city against the company, for the years 1885, 1886 and 1887, under the authority of various acts of the legislature of Kentucky.

In the petition of the plaintiff, the taxes for 1886 and 1887 are alleged to have been assessed to pay the annual expenses of the city government, the annual expenses of the public schools, interest on railroad aid bonds, interest on school bonds, interest on water works bonds and interest on bonds issued for city purposes. The amount claimed for the years 1886 and 1887, for taxes and penalty, is in the aggregate $44,320, with interest. The petition alleges that under an act of the general assembly of Kentucky, approved February 9, 1872, the bridge company was incorporated and authorized to build a bridge across the Ohio River within the limits of the city of Henderson; that that act lay dormant until September 21, 1880, when the Louisville and Nashville Railroad Company got control of said charter, and a reorganization was effected thereunder; and that the common council of the city of Henderson passed an ordinance, which was accepted in writing by the bridge company on the 11th of February, 1882, a copy of which ordinance is set forth in the margin.[1]

---

[1] An ordinance granting the Henderson Bridge Company certain rights and privileges within the corporate limits of the city of Henderson.

Be it ordained by the common council of the city of Henderson, Kent'y —

SEC. 1. That the Henderson Bridge Company, organized under the act of the general assembly of the Commonwealth of Kentucky, approved February 9, 1872, be, and they are hereby granted the right to construct on or over the centre of Fourth street in the city of Henderson, and of the line thereof extended to low-water mark on the Indiana side of the Ohio River, such approaches, avenues, piers, trestles, abutments, toll-houses and other appurtenances necessary in the erection of, and for the business of, a bridge over the Ohio River, from a point in the city of Henderson to some convenient point on the Indiana side of said river, and for such purposes the use of said Fourth street is hereby granted, subject to the terms and conditions hereinafter expressed.

SECT. 2. That there be, and is hereby, granted to said bridge Co. the right to use the space between Water street in said city and low-water mark in the Ohio R., extending 100 feet below the centre of Fourth street extended, and three hundred feet above the centre of s'd street extended to

The petition alleges that, by an act of the general assembly of Kentucky, approved February 11, 1867, incorporating the

---

the Ohio River, for any purpose required by said company; that said company may erect, or authorize, or cause to be erected, grain elevators within said space above high-water mark, and may construct therefrom to the river such apparatus and machinery as may be necessary to convey grain from boats to such elevators and may have the use of said space for the landing of boats laden with freight for such elevators, and construct floating docks, or use wharf-boats within such space for the accommodation of such boats, and the conduct of the business of such bridge and of the said elevators free of wharfage, subject to the terms and conditions hereinafter expressed.

SECT. 3. That each and all of the rights and privileges herein granted to the said company, their successors or assigns, are on the following terms and conditions, to wit:

1st. That the approach to said bridge on Fourth street shall be of sufficient elevation to admit the passage of all vehicles underneath at points where other streets cross or intersect said Fourth street, and shall be so constructed as to admit the passage of all vehicles on said street as far back as the elevation of said bridge will admit of, except as the same may be obstructed by the necessary supports of such approach, which supports shall be iron trestles or masonry piers.

2d. That all or any damage done to private property, by reason of any privileges granted to said company, shall be paid by said bridge company, and said company shall pay to any owner of private property damaged by reason of any grant herein, any judgment that may be rendered against the city of Henderson on account thereof, and shall hold said city harmless from any loss or damage by reason of injury to private property bordering on said street caused by the erection of such bridge and its approaches.

3d. That any track laid in the space between Water street and low-water mark of the Ohio River mentioned in the second section of this ordinance, or any improvements made thereon, shall be so made as not to interfere with the free use of such space by the public further than the nature of such works and their convenience for the said uses may absolutely require.

4th. That any such elevator, other buildings and appurtenances of said bridge, shall be kept above high-water mark and so as not to obstruct the current of the river, and nothing herein shall be construed to prevent the said city from paving or otherwise improving that part of the river front herein mentioned, or from charging and collecting wharfage from boats or other craft landing thereat, except as herein provided in favor of said bridge company.

5th. That in the event said city shall determine to grade and pave the river front mentioned between the line of high-water mark and the line of low-water mark, the said company shall so change any tracks they may have laid, or fix any improvements they may have made, to conform to and

city of Henderson, its northwestern boundary was fixed at low-water mark on the Indiana side of the Ohio River, and that the bridge was assessed for taxation to such low-water mark, like other property of the city; and it claims a lien upon the bridge, from the beginning of its approach at Main Street in the city, to low-water mark on the Indiana side of the river, for the taxes and the penalty thereon, and, in addition to a judgment against the bridge company for said taxes and penalty, it prays for the enforcement of the lien and a sale to pay the debt, with interest and costs, and the appointment of a receiver.

The answer of the bridge company to the petition alleges that the whole of the bridge between the Kentucky shore and the Indiana shore is over the water of the Ohio River, except the piers or pillars which support the bridge and which are built in, and rest upon, the bed of the river; that the river is a navigable stream, and the entire jurisdiction over it is vested in Congress and the courts of the United States, and the bridge is used only to transport persons and freight in railroad cars between the States of Indiana and Kentucky, and the plaintiff has no jurisdiction over the river or any part

---

with such grade as near as practicable, and the said company shall so arrange said tracks and improvements, in such event, as to make the least possible obstruction to the free passage of vehicles and to such other uses for which said space may be designed.

SECT. 4. That nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city.

SECT. 5. That before any of the rights or privileges hereinbefore granted shall inure to the benefit of, or vest in, the Henderson Bridge Company, said company shall, by proper authority, append to a certified copy of this ordinance their acceptance of, and agreement to abide by, and faithfully keep, the terms and conditions of this ordinance, which acceptance and agreement shall be acknowledged by the proper authority of said company as provided in case of a deed under the laws of Kent'y, and delivered to the clerk of the Henderson city council.

SECT. 6. That this ordinance shall take effect and be in force after the same have been published as approved by law, and after the terms and conditions thereof shall have been accepted and acknowledged as herein provided.

thereof, or over the bridge or the persons or freight transported thereon, except in the matter of executing writs from the police authorities of the city; and that for the plaintiff to assume to tax that part of the bridge would violate the Constitution of the United States, the laws of Congress and the rights of the bridge company in the premises. The answer also sets up that the bridge derives no benefit or protection from the government of the city; and that to subject the bridge company's property to the payment of the claim made, would be to take private property for public use without compensation, and to violate article 5 of the amendments to the Constitution of the United States, and the constitution and laws of Kentucky. It is also averred in the answer that, when the bridge company constructed the bridge, it was the settled law of Kentucky, as decided by its Court of Appeals in *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 189, that so much of the company's bridge and property as was erected and stood across the Ohio River was not liable to municipal or city taxation; and that, relying on the law of Kentucky as being so settled, the bridge company, on the 27th of February, 1884, entered into a written contract with the Louisville and Nashville Railroad Company for the maintenance and operation of the bridge.

A reply was put in to that answer; and subsequently the Louisville and Nashville Railroad Company was made a party defendant, and filed a petition, which was ordered to be taken as its answer to the plaintiff's petition. It alleged that by such contract with the bridge company, the railroad company was to maintain and operate the bridge and a connecting railroad on the Indiana side of the river, in consideration that the bridge company would pay to it yearly $10,000, to be expended in maintenance and repair, and would also pay all taxes legally imposed upon the track and bridge structure. It was further alleged that to grant the plaintiff the relief prayed for, or any part thereof, would be a direct impairment of the obligation of the contract between the railroad company and the bridge company, and would violate the right of the railroad company.

A rejoinder was put in to the reply, joining issue, and the case was heard by the court upon the pleadings and evidence. The court dismissed the petition so far as regarded the taxes claimed for 1885, but as to the years 1886 and 1887 adjudged that the bridge and the approach thereto were subject to taxation for all the purposes and for the amounts claimed in the petition, and that the plaintiff had a lien upon the bridge structure and masonry piers, and the approach thereto, situated within the boundary of the city, extending to low-water mark on the Indiana side of the Ohio River, for $17,384 for the year 1886, and $15,810 for the year 1887, with interest on those sums from the date of the judgment, July 18, 1888, and for costs.

The Circuit Court, in its opinion, held that as the legislature had fixed the limits of the city at low-water mark on the Indiana shore, and had authorized her to tax all property in the city limits which was subject to taxation by the State, the taxable boundary was coextensive with the statutory boundary; that in *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 189, it was not decided that it was *per se* unconstitutional for the legislature to authorize cities to tax bridges which crossed the Ohio River; that all that was decided in that case was that the legislature did not intend to embrace the bridge in that case as subject to city taxation; that in several cases the Court of Appeals of Kentucky had relieved parties from the payment of taxes on agricultural land, where the city limits had been extended without the consent of the owner of the land; but that, in the present case, the bridge company had voluntarily placed its property within the legally established limits of the city, and ought to pay the taxes assessed. Nothing involving a Federal question was considered or decided by the court.

The bridge company and the railroad company appealed to the Court of Appeals, as did also the plaintiff. In June, 1890, the judgment was affirmed by that court, its opinion being reported in 14 S. W. Rep. 85, but, on the application of all parties for a rehearing, the petition of the defendants for a rehearing was overruled and that of the plaintiff was sustained.

The former opinion was withdrawn, the mandate was set aside, a new opinion was delivered, (14 S. W. Rep. 493,) and an order entered declaring that there was no error in the judgment of the Circuit Court, and that that judgment was affirmed, with damages.

In the second opinion, which was delivered October 7, 1890, it was held that all that was decided in *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 189, was that, in order to authorize a city government to subject real estate situated within its corporate limits to taxation for city or municipal purposes only, there must be actual or presumed benefits to such property by the extension of the city government over it; that the Court of Appeals had often distinguished between the power of a city to tax real estate situated within its limits for city or municipal purposes only, and for such district purposes as the legislature might authorize; that the legislature might create a city boundary, or designate any other boundary, without reference to existing civil or political districts, into taxing districts, for local purposes; that the city of Henderson having voted a tax in reference to aiding in building the beforenamed connecting railroad in Indiana, was a taxing district; that the same state of things existed in regard to the tax for school purposes; that after such taxes were voted by the taxing district, the owner of real estate situated therein could not be heard to say that his property was not benefited by the enterprise for which the tax was voted; that although the jurisdiction of the city of Henderson extended to low-water mark on the Indiana shore of the river, she could not tax the property of the bridge company for city or municipal purposes, but as a taxing district she could tax such property; and that the bridge taxed, which was realty, and extended across the Ohio River, was used for profit, and could be benefited by the city and taxed by it as a taxing district.

The court then proceeded to consider the question whether the contract entered into between the city and the bridge company, contained in the ordinance of the city accepted by the bridge company on the 11th of February, 1882, amounted to a contract right to tax the property of the bridge company to

low-water mark on the Indiana shore, the provision of that ordinance in section 4 being as follows: "Sec. 4. That nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city." The court remarked that the bridge company obtained from the city the right to construct its bridge and approaches on or over the centre of Fourth Street, and of the line thereof extended to low-water mark on the Indiana side of the Ohio River, and such approaches, avenues, piers, trestles, abutments, toll-houses and other appurtenances as should be necessary in the erection, and for the business, of a bridge over the Ohio River, from a point in the city to some convenient point on the Indiana side of the river; and, also, that the right to use the land between Water Street in the city and low-water mark on the Kentucky side of the river, extending 100 feet below, and 300 feet above, the centre of Fourth Street extended to the river, was granted to the bridge company for erecting such wharves, elevators and other buildings as should be deemed necessary for the successful operation of the enterprise; and that, in consideration of such grant, section 4 in regard to taxes was inserted in the ordinance. The court then remarked that the bridge company maintained that section 4 of the ordinance meant only to reserve the right to tax such property of the bridge company as was theretofore subject to taxation by the city government, and that, as that part of the bridge which was situated over the water of the river was not theretofore subject to taxation, the reservation related to that part of the bridge which the city previously had the right to tax. But the view taken by the court was that the contract was well considered and prudently drafted by men skilled in that kind of work; that it was not to be presumed that they engaged in a mere *nudum pactum*, but meant to set forth a business transaction; that the bridge company desired rights and privileges which it did not possess, and could not possess without the consent of the city; that the city already had the right to tax the approaches

to the bridge, and it had made no concessions which could possibly be construed as waiving that right; that the right to tax referred to in section 4 was the right to tax "the bridge itself;" that the bridge, as distinguished from its abutments and approaches, was that part which was over the water; that the city, in its municipal capacity, according to the decision in *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 189, had no right to tax that part of the bridge which was over the water; that the city had the right, if such right was asserted and agreed to, to claim that the bridge should be taxed in consideration of the privileges granted to the bridge company; that it must be presumed that that claim of right was asserted and agreed to, and was expressed in section 4 of the ordinance by the term "not waiving the right;" that if the contract did not mean that, it meant nothing; that it was not to be supposed that the contracting parties meant only to reserve a right which they had already, and about which there was no dispute; and that, as the right to tax the bridge to the Indiana shore might be obtained legitimately by contract, and the city granted to the bridge company rights and privileges essential to its enterprise, it was reasonable to suppose that the city would contract for the right thus to tax the bridge company in consideration of granting such rights and privileges. This opinion was delivered as the opinion of the court by Judge Bennett. Judge Pryor dissented from it. Chief Justice Holt delivered a separate opinion, holding that the legislature, by authorizing the imposition and collection of the railroad and school taxes upon the real estate within the city limits, created a taxing district; that the power to collect such taxes, therefore, was conferred upon the city as such taxing district; that the property of the bridge company, being within such district, was liable for such taxes; that, as to the municipal taxes proper, the property of the bridge company was within the corporate limits, and received such benefits from the municipal government as to render it both legally and justly liable for such municipal taxes; and that upon those grounds he concurred in affirming the judgment of the lower court.

The bridge company and the railroad company sued out a

writ of error from this court, to review the judgment of the Court of Appeals.

The bridge company assigns for error (1) that the Court of Appeals erred in overruling its claim that the acceptance of its charter and the construction of its bridge amounted in law to a contract between it and Kentucky, that no part of its bridge, north of low-water mark on the Kentucky shore of the river, ever should be subjected to taxation by the city for municipal or any other purpose; (2) that the court erred in overruling the claim of the bridge company that the tax ordinances of the city were null and void so far as they assessed for taxes the bridge structure north of low-water mark on the Kentucky shore of the river, because those ordinances impaired the obligations of the charter contract of the bridge company with Kentucky, and were repugnant to the Constitution of the United States; and (3) that it erred in overruling the claim of the bridge company that its bridge was exempt from the taxation in question, because it spanned the Ohio River, a navigable stream and interstate river, and was solely a means of interstate commerce, erected under authority from the United States and receiving no protection from the city. The bridge company and the railroad company both of them assign for error that the court erred in overruling their claim that the tax ordinances of the city impaired the obligations of the contract of February 27, 1884, between the bridge company and the railroad company, and were void, because repugnant to the Constitution of the United States.

The city of Henderson now makes a motion to dismiss the writ of error, for want of jurisdiction in this court, on the ground that no Federal question was actually decided by the state court.

Although a Federal question may have been raised in the state court, yet if the case was decided in that court on grounds not involving a Federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction. *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, 46; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Hale* v. *Akers*, 132 U. S. 554, 564, 565; *Hopkins* v. *McLure*, 133 U. S. 380, 386, 387; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307.

Opinion of the Court.

The opinion of the state court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a Federal question, and is broad enough to dispose of the case, without reference to any Federal question. This court cannot review the construction which was given to the ordinance as a contract, by the state court.

There is nothing in the suggestion that the taxation of the bridge is a regulation of commerce among the States, or is the taxation of any agency of the Federal government.

The case of *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 189, was not decided until May, 1883, more than a year after the ordinance of the city of Henderson was accepted by the bridge company, in February, 1882.

The contract of February, 1884, between the bridge company and the railroad company, was made more than two years after the ordinance of February, 1882, came into existence.

Neither the opinion of the Court of Appeals in the present case, nor that of Chief Justice Holt, nor that of the Circuit Court of the State, puts the decision upon any Federal question; and on this writ of error to the state court, we are bound by its interpretation of the contract contained in the ordinance, in view of the constitution and laws of Kentucky, and cannot review that question.

Writ of error dismissed.

Mr. Justice Harlan dissented.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY *v.* ROBERTS.

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

No. 1417. Submitted November 16, 1891. — Decided December 7, 1891.

This court has no jurisdiction to review in error or on appeal, in advance of the final judgment in the cause on the merits, an order of a Circuit Court of the United States remanding the cause to the state court from which it had been removed into the Circuit Court.

McLish v. *Roff*, *ante*, 661, affirmed and followed.

THE court stated the case as follows:

This is a motion to dismiss the writ of error herein for want of jurisdiction, with which is united a motion to affirm the judgment of the court below. The case is this: On the 1st of November, 1890, the defendant in error, John Roberts, brought an action in a state court of Minnesota against the Chicago, St. Paul, Minneapolis and Omaha Railway Company, to recover damages for personal injuries alleged to have been sustained in consequence of the negligence of the company, while he was in its employ as a fireman on one of its locomotives, running between the city of St. Paul and the village of St. James in that State. The damages were laid at $30,000.

The railway company very soon thereafter (the exact date not appearing from the record) filed with the clerk of the state court, without notice to the court at all, its petition and bond for the removal of the cause into the United States Circuit Court for the district of Minnesota on the ground of diverse citizenship of the parties; and on the 3d of November of that year there was filed in the Circuit Court a certified transcript of the record from the state court, under the hand and seal of the clerk of the state court. On the same day the railway company filed an answer in the Circuit Court to the merits of the action. Up to this time there does not appear to have

been any order entered in the state court touching the removal; nor even that the state court was aware of the petition for removal having been filed. Nor does it appear that the Circuit Court's attention had as yet been called to the case.

On the 13th of January, 1891, the plaintiff entered a special appearance in the Circuit Court, for the purpose of objecting to the jurisdiction of that court, and moved that the cause be remanded to the state court for the following reasons: (1) The action was not, and never had been, in the Circuit Court; (2) the action was never removed from the state court; (3) a judgment had been duly rendered and entered in the state court in the cause, in favor of the plaintiff and against the defendant, and within the past fifteen days, and since the filing of a transcript of the record in the Circuit Court, the defendant appeared in the action in the state court, and did therein, on the 3d of January, 1891, move the state court to have the aforesaid judgment against it vacated and set aside, which motion was then pending, upon its merits, in the state court, and argument upon it had been continued, by consent of both parties, until January 17, 1891; and (4) by making said motion and said appearance in the state court, the defendant submitted itself to the jurisdiction of the state court in the action, and thereby waived any and all right which it possessed to a removal of the cause to the Circuit Court.

Argument was had on this motion, and, on the 31st of March, 1891, the Circuit Court entered an order sustaining the motion and remanding the cause to the state court. 45 Fed. Rep. 433. To reverse that order this writ of error is prosecuted.

Mr. J. L. MacDonald, *Mr. W. A. Day* and *Mr. W. P. Montague* for the motions.

Mr. Enoch Totten, *Mr. J. H. Howe* and *Mr. S. L. Perrin* opposing.

The act of March 3, 1891, 26 Stat. 826, c. 517, provides, among other things, as follows:

"SEC. 4. That no appeal, whether by writ of error or other-

wise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals by writ of error otherwise from said District Courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, *and the review, by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established, according to the provisions of this act regulating the same.*

"SEC. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"*In any case in which the jurisdiction of the court is in issue.*"

The jurisdiction of the Circuit Court and nothing else is in issue here. If the removal proceedings taken were ineffectual to divest the state court of jurisdiction, then the Circuit Court was without jurisdiction. The Circuit Court held that these proceedings did not give it jurisdiction, and the writ of error has brought here for review that question, and that question alone. It cannot be said that any other question was in issue in the Circuit Court. When the "copy of the record in such suit" was entered in the Circuit Court a "case" was pending therein, and when the objections to the jurisdiction were presented, the jurisdiction of the court was put in issue. If this writ of error is dismissed, this court must hold that there is one class of cases in which the jurisdiction of the Circuit Court may be denied without a right of review, while the statute says a right of review shall exist in "any case" where that question is involved.

It is argued in behalf of the motion to dismiss that that part of the act of 1888 which makes final the orders of a Circuit Court remanding causes to state courts is not repealed by the act of March 3, 1891. But this cannot be true. The whole system of appellate power is fully covered and regulated

by the last-named act. In addition to this, the fourteenth section expressly repeals all acts and parts of acts inconsistent with that act. It is also argued that if there is a power of review it is in the Circuit Court of Appeals. The Circuit Court of Appeals is empowered by the sixth section to review the final decisions of the District Courts and the existing Circuit Courts "in all cases other than those provided for in the preceding section (*i.e.* section five) of that act," which is the section under which we are proceeding.

It is also argued in support of the motion that the provisions of the act of March 3, 1891, giving this court jurisdiction to review the judgments of the existing Circuit Courts in any case in which the jurisdiction of the court is in issue, were not intended to apply to cases where such jurisdiction depends upon questions of practice; why not? Every proceeding in removal causes may, with propriety, be called a matter of practice. The existence of a few jurisdictional facts is essential to removal, but the act of presenting them to the courts is a matter of practice. Counsel mention, by way of illustration, jurisdictional questions which may arise out of imperfect serving of process. Service of original process is a very important matter to the jurisdiction of every court known to the common law, and we can see no reason why a question of jurisdiction arising out of improper service of process should not be as important as any other jurisdictional question. We look into the statute in vain for any authority or even encouragement for such a distinction.

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

The ground upon which the motion to dismiss is based is, that the writ of error is not only not authorized, but is expressly denied by the second section of the act of Congress approved March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, the last paragraph of which is as follows: "Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and

the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

The question presented for our decision is, Has this court, upon this record, the appellate jurisdiction to review the order of the Circuit Court remanding the cause to the state court?

The case of *Morey* v. *Lockhart*, 123 U. S. 56, 58, was an appeal from an order of the Circuit Court remanding a suit which was begun in, and had been removed from, the state court to the Circuit Court, after the act of March 3, 1887, 24 Stat. 552, c. 373, went into effect. A motion to dismiss the appeal was filed, and was granted by this court, upon the ground that "the order of the Circuit Court remanding the cause to the state court is not a final judgment," citing *Railroad Company* v. *Wiswall*, 23 Wall. 507. The court, in its opinion, delivered by Mr. Chief Justice Waite, after quoting sec. 2 of the act of 1887, said:

"It is contended, however, that the prohibition against appeals and writs of error in the act of 1887 applies only to removals on account of prejudice or local influence; but that cannot be so. The section of the statute in which the provision occurs has relation to removals generally, those for prejudice or local influence as well as those for other causes, and the prohibition has no words of limitation. It is in effect that no appeal or writ of error shall be allowed from an order to remand in 'any cause' removed 'from any state court into any Circuit Court of the United States.'"

In *Richmond & Danville Railroad* v. *Thouron*, 134 U. S. 45, 46, 47, which was an appeal from the order of a Circuit Court remanding the cause to a state court, it was held that an order remanding a cause from a Circuit Court of the United States to the state court from which it was removed is not a final judgment or decree, and that this court has no jurisdiction to review it; and the motion to dismiss the appeal for want of jurisdiction was granted. In the opinion, delivered

by Chief Justice Fuller, the court said: "Before the act of 1875, c. 137, 18 Stat. 470, we held that an order by the Circuit Court remanding a cause was not such a final judgment or decree in a civil action as to give us jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was then, by *mandamus*, to compel the Circuit Court to hear and decide;" citing authorities. "The act of 1875 made such order reviewable (without regard to the pecuniary value of the matter in dispute); but by the act of March 3, 1887, 24 Stat. 552, 555, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 333, c. 866, the provision to that effect was repealed; and it was also provided that no appeal or writ of error should be allowed from the decision of the Circuit Court remanding a cause." And again: "The words 'a final judgment or decree,' in this act, are manifestly used in the same sense as in the prior statutes which have received interpretations, and these orders to remand were not final judgments or decrees, whatever the ground upon which the Circuit Court proceeded;" citing *Graves* v. *Corbin*, 132 U. S. 571.

It is contended by counsel for plaintiff in error that this appeal lies under §§ 4 and 5 of the act of Congress approved March 3, 1891. 26 Stat. 826, c. 517. The fourth section and that part of the fifth relied on read as follows:

"Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals by writ of error otherwise [*sic*], from said District Courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established, according to the provisions of this act regulating the same.

"Sec. 5. That appeals or writs of error may be taken from

the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue."

It is urged that when the copy of the record in the suit in the state court was entered in the Circuit Court a case was pending therein, and when the objections to the jurisdiction were presented, the jurisdiction of the court was put in issue. This provision of the act of 1891 has been passed upon by this court in the case of *McLish* v. *Roff*, just decided, *ante*, 661. In that case the motion to dismiss the writ of error was granted, upon the ground that the provision authorizing appeals or writs of error to be taken direct to this court, "in any case in which the jurisdiction of the court is in issue," does not make an appeal or writ of error allowable before the cause has proceeded to final judgment. It is, therefore, our opinion that the revisory power of this court cannot be invoked on this record although, by the motion to remand, the jurisdiction of the Circuit Court was put in issue.

The writ of error is *Dismissed.*

SINGER MANUFACTURING COMPANY *v.* WRIGHT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 13. Argued April 14, 1891. — Decided December 7, 1891.

The payment, whether voluntary or compulsory, of a tax, to prevent the payment of which a bill in equity has been filed, leaves no issue for the court to pass upon in that case.

Little v. *Bowers*, 134 U. S. 547, followed.

THE court stated the case as follows:

The appellant, the complainant below, is a corporation formed under the laws of New Jersey. The defendant Wright is the comptroller-general of the State of Georgia, and the

defendant Thomas the sheriff of one of its counties, both citizens of that State. The complainant is engaged, in New Jersey, in the manufacture of sewing machines and articles employed in their use. These it sends, and has been in the habit of sending for many years, to Georgia, where it keeps on hand in its buildings a large stock and sells them to consumers, or by sub-agents sent through the State.

In December, 1886, the legislature of Georgia passed an act to raise revenue for the fiscal years of 1887 and 1888, which, among other things, provided for the collection of a license tax from the vendors of sewing machines in the State.

The bill alleges that in this tax the act discriminates between retail dealers who are individuals, and dealers who are companies or wholesale dealers in machines on which the tax required has not been paid by the manufacturing companies, in this, that it requires of the latter the payment of two hundred dollars for the purpose of doing business in the State, and in addition a tax of ten dollars for each agent employed, whilst of the former no tax at all is required. It is, therefore, contended that the act, in this respect, violates the 7th article of the state constitution, requiring uniformity of taxation upon the same class of subjects, and also the last clause in the 1st section of the 14th Amendment of the Constitution of the United States, which declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and thereby imposes a limitation upon all the powers of the State which can touch the individual or his property.

The bill sets forth, in substance, that, notwithstanding these alleged grounds of invalidity in the law, the comptroller general of the State is seeking to enforce the collection of the tax, and has placed, or is about to place, for this purpose, executions in the hands of the defendant Thomas, sheriff of Fulton County. It therefore prays for an injunction staying the proceedings until the further order of the court, and that upon the final hearing the comptroller may be perpetually enjoined from issuing any execution for the collection of the tax.

The comptroller general answered the bill, and upon the

hearing which followed the court denied the injunction and dismissed the bill. 33 Fed. Rep. 121. From its decree the case was brought to this court on appeal.

[Before the case was reached the appellees' counsel represented to the court that the executions issued by the comptroller general for taxes due the State of Georgia, when the bill in said case was filed by the appellant, and to enjoin the collection of which taxes was the relief sought by said bill, had been paid by said appellant since the decree appealed from was rendered — as shown by the certificate of said comptroller general attached, as an exhibit thereto: and moved "that said appeal be dismissed for the reason that abstract questions of law only are now involved in said case, and that the only remedy remaining to said appellant is to bring a suit against the said comptroller general for the recovery of said taxes so paid to him under protest." The argument on this motion was heard with the argument on the merits.]

Mr. Clifford Anderson for the motion, and for the appellees.

Mr. Grosvenor P. Lowrey and *Mr. George Hillyer* (with whom was *Mr. Joseph S. Auerbach* on the brief) opposing, and for the appellant.

The payment of the disputed tax was involuntary, and affords no ground for inferring any waiver or release of errors, or other admission by the appellant, inconsistent with the continued prosecution of its appeal.

I. This court has repeatedly decided that a payment by a party "to release his property from detention" is not a voluntary payment. *Railroad Co.* v. *Commissioner*, 98 U. S. 541; *Cleaveland* v. *Richardson*, 132 U. S. 318.

II. Submission to legal process after exhausting the only remedy in the law which could prevent its issue or enforcement, was no waiver, either of the right to enforce restitution by action or by appeal, or of the right to appeal from the original refusal of the remedy. The complainant resisted first in court and then out of court, and on each occasion to the *then* extent

of its power. Its ill success showed no acquiescence on its part, but was eloquent of resistance, persisted in and intended to be continued. "Resistance to the extent of a man's power," says a distinguished jurist, "is certainly a new kind of waiver." *Avery* v. *Slack*, 17 Wend. 85; *Merriam* v. *Haas*, 3 Wall. 687; *United States* v. *Dashiel*, 3 Wall. 688; *Hayes* v. *Nourse*, 107 N. Y. 577; *O'Hara* v. *MacConnell*, 93 U. S. 150.

III. In the case of an appeal in New Jersey, from a denial of a temporary injunction, it was urged that the act sought to be enjoined had been accomplished. Held, that this did not prevent a review of the order appealed from. *Terhune* v. *Midland Railroad*, 9 Stewart, (36 N. J. Eq.) 318.

IV. The present motion is clearly distinguishable from the case of *Little* v. *Bowers*, 134 U. S. 547. It there appeared that on *certiorari* certain assessments for taxes were confirmed. The Federal question involved in the writ of error in this court was whether these assessments impaired the obligation of a contract.

It appeared on the motion to dismiss that the taxes had been reduced and readjusted under an act passed after the *certiorari*, and this reduced amount had been paid *before* any warrant had been issued for their collection and *several months before such warrant could have been issued*, or any proceedings to compel payment could have been commenced.

This court in dismissing the writ of error held that the taxes were not paid under duress. "Their payment under the circumstances above set forth was in the nature of a compromise by which the city agreed to take and the company agreed to pay a less sum than originally assessed. The effect of this act was to extinguish the controversy between the parties to this suit."

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

We are relieved from a consideration of the interesting questions presented as to the validity of the legislation of Georgia, levying a license tax upon dealers in sewing machines, arising

from the alleged discrimination made between retail dealers who are individuals and retail dealers who are companies, or wholesale dealers in such machines, where the tax required has not been paid by the manufacturing companies, as the taxes, to enjoin the collection of which this suit was instituted, have been paid by the complainant since the decree dismissing the bill was entered. This appears from the certificate of the comptroller general and the representation of the attorney general of the State, accompanied by copies of the writs of execution on which they were collected, with the receipts of the sheriff endorsed thereon. The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion.

This subject was considered somewhat at length in *Little* v. *Bowers*, 134 U. S. 547. The payment of the taxes was, it is true, made under protest, the complainant declaring at the time that they were illegal, and that it was not liable for them; that the payment was made under compulsion of the writs; and that it intended to demand, sue for and recover back the amounts paid. If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action at law. It does not continue in existence the equitable remedy by injunction which was sought in the present suit. The equitable ground for the relief prayed ceased with the payment of the taxes.

The appeal must therefore be dismissed; and it is so ordered.

INDEX.

CASES AFFIRMED.

1. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18. *Pullman's Palace Car Co.* v. *Hayward*, 36.
2. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, followed. *Massachusetts* v. *Western Union Telegraph Co.*, 40.
3. The same questions are presented here that were determined in *McAllister* v. *United States*, 141 U. S. 174, and it is affirmed on the authority of that case. *Wingard* v. *United States*, 201.
4. *Delano* v. *Butler*, 118 U. S. 634, and *Aspinwall* v. *Butler*, 133 U. S. 595, affirmed and applied. *Pacific National Bank* v. *Eaton*, 227.

CASES DISTINGUISHED.

CHINA, TREATIES WITH.

CIRCUIT COURTS OF APPEALS.

COMMON CARRIER.

CONFLICT OF LAW.

CONSTITUTIONAL LAW.

A. OF THE UNITED STATES.

CONTRACT.

CORPORATION.

1. The degree of care required of directors of corporations depends upon the subject to which it is to be applied, and each case is to be determined in view of all the circumstances. *Briggs* v. *Spaulding*, 132.
2. Directors of a corporation are not insurers of the fidelity of the agents whom they appoint, who become by such appointment agents of the corporation; nor can they be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty. *Ib.*

COURT AND JURY.

COURTS OF A STATE.

COURTS OF THE UNITED STATES.

A person appointed by the President, by and with the advice and consent of the Senate, under the provisions of the act of May 17, 1884, 23 Stat. 24, c. 53, § 3, to be the judge of the District Court of the District of Alaska, is not a judge of a court of the United States within the meaning of the exception in section 1768 of the Revised Statutes, relating to the tenure of office of civil officers, and was, prior to its repeal, subject to removal before the expiration of his term of office by the President, in the manner and upon the conditions set forth in that section. *McAllister* v. *United States*, 174.

CRIMINAL LAW.

CUSTOMS DUTY.

1. In fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commer-

EVIDENCE.

EXCEPTION.

EXECUTOR AND ADMINISTRATOR.

FACT.

FEE.

FOOD INSPECTION LAWS.

INTEREST.

See JUDGMENT, 1;
PATENT FOR INVENTION, 16;
USURY, 1.

JUDGMENT.

1. Upon rendering a decree for the plaintiff in a suit in equity, brought in behalf of a State, pursuant to statute, to recover the amount of a tax with interest thereon at the rate of twelve per cent until paid, a sum tendered and paid into court by the defendant, for part of that amount and interest thereon at that rate, is to be applied to the payment of both principal and interest of the sum so admitted to be due; interest at the rate of twelve per cent is to be computed on the rest of the principal until the date of the decree; and from that date interest on the lawful amount of the decree is to be computed at the ordinary rate of six per cent only, notwithstanding the final disposition of the case is delayed by appeal. *Massachusetts* v. *Western Union Telegraph Co.*, 40.
2. In an action in the Supreme Court of New York (the court having jurisdiction of the parties) between two sisters, the defendant being sued in her representative capacity as testatrix of her father's will, the matters in controversy were: (1) whether the plaintiff had accepted or rejected a provision made for her by her father's will; (2) whether she was entitled to recover from her father's estate an amount claimed to be due on account of a fund which came to him as trustee for her, and which he had never accounted for; and (3) whether a certain conveyance of real estate in Tennessee made by the father in his lifetime to the defendant should be adjudged to be fraudulent, and be vacated. That court, after hearing the parties, adjudged (1) that the plaintiff had not accepted the provision so made for her; (2) that the plaintiff was entitled to recover the full amount so claimed; and (3) that the deed was "absolutely null and void from the beginning," so far as it affected the testator's said indebtedness. A litigation in equity then took place in Tennessee, in which the plaintiff and defendant in New York were, respectively, plaintiff and defendant. There were other parties, whose presence was not material to the points here decided. This litigation resulted in the Supreme Court of Tennessee deciding: (1) That the plaintiff had elected to take the share so devised to her; (2) that having so elected she was not entitled to recover on her claim; (3) that the Supreme Court of New York was without power

to adjudge the conveyance by the testator to the defendant of lands in Tennessee fraudulent and void, or to annul the same. *Held:*

(1) That this decree did not give to the judgment of the Supreme Court of the State of New York the full faith and credit to which it was entitled under the Constitution as to the 1st and 2d points so decided.

(2) That, as to the 3d point, the courts of New York had no power to decree that a deed of land in Tennessee was null and void. *Carpenter* v. *Strange*, 87.

JURISDICTION.

A. Of the Supreme Court.

1. A party cannot, by proceedings in the Circuit Court, waive a question of the jurisdiction of that court, so as to prevent its being raised and passed upon here. *Parker* v. *Ormsby*, 81.
2. This case is dismissed by the court because the amount involved is not sufficient to give it jurisdiction. *Reynolds* v. *Burns*, 117.
3. The only question open in a case brought up under the act of February 25, 1889, 25 Stat. 693, c. 236, where the judgment does not exceed $5000, is the question of jurisdiction of the court below. *St. Louis & San Francisco Railway Co.* v. *McBride*, 127.
4. Although it is true as a general rule that where judgment goes for the defendant, the amount of the plaintiff's claim is the test of jurisdiction, this rule is subject to the qualification that the demand shall appear to have been made in good faith for such amount; and if it appear clearly from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim, this court will decline to assume jurisdiction of the case. *Gorman* v. *Havird*, 206.
5. A pleading presenting only a question of error in a judgment of a state court does not go to the jurisdiction. *Griswold* v. *Hazard*, 260.
6. The appeal was dismissed as to the claims of the appellees, which did not exceed $5000. *Kneeland* v. *Luce* (2), 491.
7. This court is bound to assume that decisions of state courts on matters of state law have been made after thorough consideration, and that they embody the deliberate judgment of the court. *Cross* v. *Allen*, 528.
8. Where an action at law was tried by a District Court without a jury, which found the facts and conclusions of law, and entered judgment for the plaintiff thereon, and a bill of exceptions was signed, which stated that the defendant moved the court to direct a verdict for him, on the ground that, as matter of law, no action could be maintained by the plaintiff, and the Circuit Court, on a writ of error affirmed the judgment, and the defendant then sued out a writ of error from this court: *Held*, (1) The Circuit Court could not properly consider any matter raised by the bill of exceptions, nor can this court do so, because the trial was not by a jury nor on an agreed statement of facts; (2) all that the Circuit Court could do was to affirm the judgment of

LETTER.

See EVIDENCE, 3.

LOCAL LAW.

MORTGAGE.

See EQUITY, 6.

MOTION FOR REHEARING.

Upon the rendition of a decree, a petition and motion for a rehearing was filed. At the succeeding term of the court an order was entered, granting a rehearing, which order was entered as of a previous term. The record contained no order showing the continuance of the motion and the petition for rehearing to the succeeding term. *Held*, that the presumption must be indulged, in support of the action of a court having jurisdiction of the parties and the subject matter — nothing to the contrary affirmatively appearing — that the facts existed which justified its action; and, therefore, that the court granted the application for a rehearing at the previous term. *Fowler* v. *Equitable Trust Co.*, 384.

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW, A, 6;
CONTRACT, 1.

NATIONAL BANK.

1. A director of a national bank is not precluded from resignation within the year by the provision in Rev. Stat. § 5145 that when elected he shall hold office for one year, and until his successor is elected. *Briggs* v. *Spaulding*, 132.
2. Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in ninety days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination. *Ib.*
3. Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figureheads: they are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong doing, if that ignorance is the result of gross inattention. *Ib.*
4. If a director of a national bank is seriously ill, it is within the power of the other directors to give him leave of absence for a term of one year, instead of requiring him to resign, and if frauds are committed during his absence and without his knowledge, whereby the bank suffers loss, he is not responsible for them. *Ib.*
5. Applying these principles to this case, *Held*, (1) That the defendant Cushing, having in good faith sold his bank stock and taken proper steps for its transfer, and orally tendered his resignation as a director to the

PAYMENT.

PRINCIPAL AND AGENT.

PRINCIPAL AND SURETY.

While adhering to the rule that any material change in a contract made by the principal without the assent of the surety, discharges the latter, the court is of opinion that the charges set up in this case as a reason for the discharge of the property of the surety were not material and did not operate to discharge it. *Cross* v. *Allen*, 528.

PROMISSORY NOTE.

PUBLIC LAND.

1. Congress, March 3, 1863, granted to Kansas every alternate section of land, designated by *odd* numbers for ten sections in width on each side, in aid of the construction of the following roads and each branch thereof: *First*, a railroad and telegraph from the city of Leavenworth, Kansas, by the way of Lawrence and the Ohio City crossing of the Osage River, to the Southern line of the State in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa River to the point on the Atchison, Topeka and Santa Fé Rail-

road, where that road intersects the Neosho River; *Second*, a railroad from the city of Atchison, Kansas, via Topeka, to the western line of that State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch where the latter road crosses the Neosho, down said Neosho Valley to the point where the road, first named, enters the Neosho Valley. The act provided that in the case of deficiencies in place limits, it should "be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, or parts of sections, designated by *odd* numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of preëmption or homestead settlements have attached." The act also provided that the "sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches" [that is, the *even*-numbered sections within the place or granted limits,] "shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: *Provided*, That actual and *bona fide* settlers, under the provisions of the preëmption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided, also*, That settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding." By a subsequent act, July 16, 1866, for the benefit of the Union Pacific Railroad Company, Southern Branch, there was granted to the State for the use of that company, "every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States has sold, reserved or otherwise appropriated, or to which the

RAILROAD.

See CONTRACT, 8;
EQUITY, 6, 7;
JURISDICTION, E, 2;
RECEIVER, 2.

RECEIVER.

RECEIPT.

REGULATION OF COMMERCE.

REMOVAL FROM OFFICE.

REMOVAL OF CAUSES.

Numerous judgments at law were rendered in the state court in favor of the same party, against the same defendant; in each case, the judgment was for less than five hundred dollars, but the aggregate of all the judgments was over three thousand dollars. After the close of the term, the defendant against whom the judgments were rendered, filed a petition in the same court for the annulment of the judgments upon the ground that, without negligence, laches or other fault upon the part of the petitioner, they had been fraudulently obtained. Subsequently the petitioner filed a proper petition and bond for the removal of the case into the Circuit Court of the United States. The application was refused and the state court proceeded to final judgment. *Held*,

(1) Upon the filing of a proper petition and bond for the removal of a cause pending in a state court, such cause, if removable under the act of Congress, is, in law, removed so as to be docketed in the Circuit Court of the United States, notwithstanding the state court may refuse to recognize the right of removal;

(2) As all the judgments in law were held in the same right and against the same parties, and as their validity depended upon the same facts, the defendant therein, in order to avoid a multiplicity of actions, and the vexation and costs arising from numerous executions and levies, was entitled to bring one suit for a final decree determining the matter in dispute that was common to all the parties; and as, under the rules of equity, such a suit could be brought in a court of the United States, the aggregate amount of all the judgments sought to be annulled was the value of the matter in dispute; consequently, the cause was removable so far as the amount involved was concerned;

(3) A Circuit Court of the United States in the exercise of its equity powers, and where divers citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a Federal court if the judgment had been rendered by it and not by a state court, as a decree to that effect does not operate upon the state court, but upon the party;

(4) Where a suit in equity is, in its general nature, one of which a Circuit Court of the United States may rightfully take cognizance, upon removal, it is not for a state court to disregard the right of removal upon the ground simply that the averments of the petition or bill in equity are insufficient or too vague to justify a court of equity in granting the relief asked. It is for the Federal court, after the cause is docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case is made which entitles the plaintiff to the relief asked. *Marshall* v. *Holmes*, 589.

RESCISSION OF CONTRACTS.

See EQUITY, 5;
LACHES.

SHIPS AND SHIPPING.

See LIMITED LIABILITY.

STATE COURTS.

See REMOVAL OF CAUSES.

STATUTE.

A. STATUTES OF THE UNITED STATES.

See CONSTITUTIONAL LAW, A, 3;
COURTS OF THE UNITED STATES;
CUSTOMS DUTY;
JURISDICTION, A, 3, 10; B, 1, 2; C, 8;
LIMITED LIABILITY, 2, 4, 6;
NATIONAL BANK, 1;
PUBLIC LAND, 1;
RECEIVER, 2.

B. STATUTES OF STATES AND TERRITORIES.

STATUTE OF FRAUDS.

SUPERSEDEAS.

SURVIVAL OF ACTION.

TAX AND TAXATION.

TAX SALE.

1. Where a tax deed in Illinois is relied on as evidence of paramount title, it is indispensable that it be supported by a valid judgment for the taxes, and a proper precept authorizing the sale. *Gage* v. *Bani*, 344.
2. It is well settled in that State that a tax title is purely technical, and depends upon a strict compliance with the statute; and that the giving of the particular notice required by the statute is an indispensable condition precedent to the right to make a deed to the purchaser or his assignee. *Ib.*
3. The owner of land in Illinois, sold for the non-payment of taxes, or of special assessments, is entitled to be informed in the statutory notice whether the sale was for the non-payment of a tax, or of such an assessment; and a notice which informs him that the sale was made "for taxes and special assessments, authorized by the laws of the State of Illinois" is a defective notice. *Ib.*
4. The right of an occupant of land in Illinois, sold for the non-payment of taxes or special assessments, to personal notice of the fact of sale, before the time of redemption expires, is expressly given by the Constitution of Illinois, and is fundamental: and upon a direct issue whether such notice was given, the owner testifying that he did not receive

WILL.

A testator gave all his estate, real and personal, to his executors for the term of twenty years, "in trust, and for the uses, objects and purposes hereinafter mentioned," and authorized them to make leases not extending beyond the twenty years, and to lend money on mortgage for the same period; and, "after the expiration of the trust estate vested in my executors and trustees for the term of twenty years after my decease," devised and bequeathed one-fourth part of all his estate, subject to the payment of debts and legacies, to his widow, one-fourth to his daughter, one-fourth to his brother, and one-fourth to his nephew; gave certain legacies and annuities to other persons; directed his executors to pay a certain part of the income to his brother "until the final division of my estate, which shall take place at the end of twenty years after my decease, and not sooner;" that no part of his estate should "be sold, mortgaged (except for building) or in any manner encumbered, until the end of twenty years from and after my decease, when it may be divided or sold for the purposes of making a division between my devisees as herein directed;" and also that, in the event of any of the legatees or annuitants being alive at the end of the twenty years, there should then be a division of all his estate, "anything herein contained to the contrary notwithstanding; and in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors;" and further provided as follows: "It is my will that my trustees aforesaid shall pay the several gifts, legacies, annuites and charges herein to the persons named in this will, and that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that, if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same manner as if such child or children had actually inherited the same, and, in the event of such person or persons having no children, then to my daughter and her heirs." He also declared it to be his wish that W., one of his executors, should collect the rents and have the general supervision during the twenty years; and further provided that the share devised to his daughter should be conveyed at the expiration of the twenty years, for her sole use, to three trustees to be chosen before her marriage by herself and the trustees named in the will, and the net income be paid to her personally for life, and the principal be conveyed after her death to her children or appointees; and that, in the event of his wife's marrying again, the share devised to her should be held by his trustees for her sole use. *Held*, (1) That the powers con-