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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

DECEMBER TERM, 1860.

By BENJAMIN C. HOWARD,
COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

VOL. XXIV.

WASHINGTON, D. C.
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PROCEEDINGS

IN RELATION TO THE

DEATH OF THE LATE JUDGE DANIEL.

TUESDAY, DECEMBER 4, 1860.

On the opening of the court this morning, Mr. BLACK, the Attorney General of the United States, made the following remarks:

"May it please your Honors: I am compelled, most reluctantly, to inaugurate our sitting in these new apartments by referring to a great misfortune which you and I, and all of us, have suffered during the vacation. Since the close of the last term, the seat which should have been occupied by Mr. Justice DANIEL has been made vacant by his death. The place in this court which knew him for nearly nineteen years will know him no more forever. I speak with entire sincerity when I say, that I wish the duty of making this announcement had been cast upon some one better able to do his memory justice.

"I knew him only as a Judge, and my personal acquaintance with him, even in that capacity, began after his health and spirits had been broken by the saddest bereavements; when all his work was done in the midst of pain and trouble; and when the light of all his days was clouded with sickness and sorrow.

"Born of a family which had furnished to Virginia some of the boldest defenders and ablest counsellors that graced her early history, he inherited the spirit of true patriotism, and loved his native State with a fervor of devotion which never wavered or changed or cooled to his latest hour. He was brought up among that class of great Virginians whose influ-

ence, half a century ago, pervaded the whole country, and whose opinions were everywhere accepted as the standard of political orthodoxy. Of that old school he was among the last, perhaps the very last survivor, who mingled with its founders upon a footing of equality, and received the precepts of wisdom from their own lips. It may be that the time is almost upon us when the American people will learn the value of the lessons they taught.

"Judge DANIEL'S attachments were not confined to Virginia. He had a large affection for the whole Union, and looked with alarm upon what he regarded as the signs of its gradual decay. He indulged, and always expressed, a just pride in the great structure which his fathers had helped to rear; and he did not attempt to conceal a corresponding dislike for those who were undermining its foundations. These sentiments account for the fact that his judgments in this court are marked in a rather uncommon degree by frequent recurrence to the fundamental principles of the Government, and by a steadfast defence of the Constitution, strictly interpreted, and by earnest exhortations to walk in the good old paths.

"He held the pen of a ready writer. He was a ripe scholar and a good one. The evidences will be found all over his opinions that he was a man of thorough education and cultivated literary tastes. His tenacious memory retained without effort the classical acquisitions of his youth. His style, though it sometimes seemed ambitious, was never inflated. His imagination was too well balanced by his judgment to lift him above, or carry him above, or carry him beyond his subject, but it gave great vigor to his logic, and added much to the momentum with which he reached his conclusions.

"I need not say to you, his brethren, who knew him long and intimately, that he was a man of perfect integrity. The laws of this country were never administered by any judge who had a higher moral tone, or who was influenced by purer motives. Indeed, his attachment to the right, as he apprehended it, was so true, and his consequent hatred of the wrong was so intense, that he was sometimes in danger of going too directly to his purpose and treating with too much contempt the obstacles that intervened. But love of justice, even in excess, is not only the first of judicial virtues, but the noblest

feeling of the human heart. The fault that is born of such a virtue gives its possessor a new title to our admiration. It is scarcely a paradox to say that a temper like that is more perfect than a better one.

"He not only lived like an honest man, but he died like a Christian, in the unshaken hope that his audit would stand well. He knew that it was 'not all of life to live, nor all of death to die;' but he had fought the good fight, he had kept the faith, and he was ready to be delivered.

"A meeting of the Bar was held yesterday, at which certain resolutions on this melancholy subject were passed, and I was directed to lay them before the court. Your honors will permit me to express the hope that you will place on your records, in some enduring form, this evidence of the high estimation in which Judge DANIEL was held by the legal profession, and that you will add the testimony of the court itself to his exalted worth as a man and a judge. Of such a character it is fit that the dignity should be vindicated and the value made known. Let not the just man go to his grave unhonored; for these are not the times when we can lose the benefit of a great example."

To which Mr. Chief Justice TANEY made the following reply:

"The court cordially assent to the resolutions adopted by the Bar and officers of the court, and to the just tribute paid to the memory of our deceased brother by the Attorney General when presenting them. Mr. Justice DANIEL was constantly associated with the labors and duties of this court for nineteen years; and some of us have been accustomed for that long period of time to meet him on the bench and at the private consultations and conferences among the members of the court; and we all feel that he well deserves to be remembered for the many high and excellent qualities which he constantly displayed both as a man and a judicial officer. The members of the Bar who have been engaged in the argument of cases before this tribunal can bear witness to the attention and urbanity with which he uniformly listened to them. And the members of the court who so often met him and heard him when assembled in their private conferences well know the patient and earnest industry with which he investigated and considered every case before he formed his judgment upon it.

His published opinions, delivered from this bench, will show his legal learning and careful and extensive research; and also the firmness and independence with which he maintained the opinions he had deliberately formed, and which he believed to be right.

"His death has made our first meeting in this new hall a sad and painful one; and we shall direct the proceedings of the Bar and officers of the court and the address of the Attorney General to be placed on the records of the court as a mark of the sincere respect and regard of this tribunal, of which he was so long a member; and shall adjourn until to-morrow without engaging to-day in any of the ordinary business of the court."

The proceedings of the meeting are in the following words:

"At a meeting of the members of the Bar and officers of the court, held in the Supreme Court room on Monday, the 3d day of December, 1860, the Hon. Jefferson Davis, of Mississippi, was called to the chair, and John A. Rockwell, Esq., of Connecticut, appointed secretary.

"On motion of Edwin M. Stanton, Esq., it was resolved that a committee of three gentlemen be appointed by the Chair to prepare and report to the meeting resolutions on the occasion of the lamented death of the Hon. PETER V. DANIEL, one of the Associate Justices of the Supreme Court of the United States.

"Whereupon the chair appointed the Hons. J. M. Mason, S. F. Vinton, and P. Phillips, to constitute the committee.

"Hon. J. M. Mason, on behalf of the committee, reported to the meeting the following resolutions, which were unanimously adopted:

"*Resolved*, That the members of the Bar and officers of the Supreme Court of the United States deeply deplore the death of the Hon. PETER V. DANIEL, who, for the period of nineteen years, had filled an honorable position on the bench of the Supreme Court, which he adorned by his simple purity of character, his learning, industry, and courtesy of manner.

"*Resolved*, That they will cherish an affectionate remembrance of his many virtues and eminent worth as a judge, a patriot, and a man, and they will wear the usual badge of mourning during the residue of the term.

"*Resolved*, That the Chairman and Secretary of this meeting

transmit a copy of these proceedings to the family of the deceased, and assure them of our sincere condolence on account of the bereavement which they have sustained.

"*Resolved*, That the Attorney General be requested to present these proceedings to the court, with a request that they be entered on the minutes.

JOHN A. ROCKWELL, *Secretary*.

SUPREME COURT OF THE UNITED STATES.

Hon. ROGER B. TANEY, Chief Justice.
Hon. JOHN McLEAN, Associate Justice.
Hon. JAMES M. WAYNE, Associate Justice.
Hon. JOHN CATRON, Associate Justice.
Hon. SAMUEL NELSON, Associate Justice.
Hon. ROBERT C. GRIER, Associate Justice.
Hon. JOHN A. CAMPBELL, Associate Justice.
Hon. NATHAN CLIFFORD, Associate Justice.

Jeremiah S. Black, Esq., Attorney General, during a part of the term; and, for the residue,
Edwin M. Stanton, Esq., Attorney General.

William Thomas Carroll, Esq., Clerk.

Benjamin C. Howard, Esq., Reporter.

William Selden, Esq., Marshal.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1860.

Samuel W. Fuller,	*Illinois.*
James O. A. Gerry,	*Florida.*
Henry McCrea,	*Pennsylvania.*
George Morgan Browne,	*Massachusetts.*
Joseph Knox,	*Pennsylvania.*
Thomas Tasker Gantt,	*Missouri.*
A. W. Arrington,	*Illinois.*
William T. Otto,	*Indiana.*
Miles Beach,	*New York.*
Isaac J. Wistar,	*Pennsylvania.*
William Rabe,	*California.*
Simon Gratz,	*Pennsylvania.*
Thomas B. Monroe, Jr.,	*Kentucky.*
John Baxter,	*Tennessee.*
Samuel F. Miller,	*Iowa.*
Leander Holmes,	*Washington Territory.*
George B. Hibbard,	*New York.*
Daniel F. Tompkins,	*New York.*
C. P. Wolcott,	*Ohio.*
A. H. Garland,	*Arkansas.*
William F. Goodwin,	*Wisconsin.*
Daniel Staniford Dana,	*Ohio.*
Robert Leech,	*Ohio.*
Malcolm Campbell,	*New York.*
Joseph B. Heiskell,	*Tennessee.*
George Putnam, Jr.,	*Massachusetts.*
Patrick McLaughlin,	*Maryland.*
Lucius C. Duncan,	*Louisiana.*
B. Howard Shackelford,	*Virginia.*
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J. D. Howland,	*Indiana.*
D. Mooar,	*Kentucky.*
N. J. Emmons,	*Wisconsin.*
William Pinkney Whyte,	*Maryland.*
George M. Lee,	*Ohio.*
Stephen H. Phillips,	*Massachusetts.*
James Malcolm,	*Maryland.*
F. T. Backus,	*Ohio.*
Reuben Hitchcock,	*Ohio.*
B. C. Cook,	*Illinois.*
John M. Palmer,	*Illinois.*
Levi Davis,	*Illinois.*
W. Howard,	*Ohio.*
William Allen,	*Ohio.*
John D. Coalter,	*Missouri.*
Elbridge T. Gerry,	*New York.*
Thomas J. Turner,	*Illinois.*
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Lansing Stout,	*Oregon.*
H. Ward,	*New York.*
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Edward Norton,	*California.*
Frederick Billings,	*California.*
Charles R. Train,	*Massachusetts.*
Richard M. Corwine,	*Ohio.*
W. H. L. Wallace,	*Illinois.*
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Rufus F. Andrews,	*New York.*
Edgar Ketchum,	*New York.*
James Buchanan, Jr.,	*Pennsylvania.*
Charles E. Strong,	*New York.*
John C. Burch,	*California.*
James Foster,	*Missouri.*
Dwight May,	*Michigan.*
Charles W. Tuttle,	*Massachusetts.*
Jacob Butler,	*Iowa.*
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John A Wills,	*Pennsylvania.*
Hull Fanton,	*New York.*
Charles Demonds,	*Massachusetts.*
Florentine W. Pelton,	*Massachusetts.*
Hamilton B. Staples,	*Massachusetts.*
Ira Harris,	*New York.*
Charles G. Myers,	*New York.*
George Wolford,	*New York.*
Calvin Walker,	*New York.*
Lorenzo Sawyer,	*Illinois.*
William H. Armstrong,	*Pennsylvania.*
Clement W. Bennett,	*New York.*
Henry L. Knowles,	*New York.*
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Andrew Lane,	*Connecticut.*
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E. S. Smith,	*Illinois.*
James M. Ashley,	*Ohio.*
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E. P. Bassett,	*Ohio.*
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Henry Baldwin,	*District of Columbia.*
Rufus P. Tapley,	*Maine.*
Nathan H. Starbuck,	*District of Columbia.*
De Witt C. Lawrence,	*District of Columbia.*

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1860.

FRANKLIN MOORE, GEORGE FOOT, AND GEORGE F. BAGLEY, PLAINTIFFS IN ERROR, *v.* THE AMERICAN TRANSPORTATION COMPANY.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

An act of Congress passed on the 3d of March, 1851, (9 Stat. at L., 635,) entitled "An act to limit the liability of ship owners, and for other purposes," provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please.

The seventh section provides that this act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

The exception does not include vessels used on the great lakes. Consequently, where goods were consumed by fire upon Lake Erie, without any design or neglect on the part of the owner of the vessel, he was not responsible for the loss.

The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master and others, and also for loss or damage by collisions, and even from any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight.

THIS case was brought up from the Supreme Court of the State of Michigan, by a writ of error issued under the 25th

section of the judiciary act; the construction of a clause of a statute of the United States (the exception in section 7 of the act of March 3, 1851) being drawn in question, and the decision being against the right set up and claimed by the plaintiffs in error.

The suit was originally commenced in the Circuit Court for the county of Wayne, in the State of Michigan, holden in the city of Detroit, and was brought by the plaintiffs in error, merchants resident in that city, against the American Transportation Company, a corporation created by the State of New York.

The declaration was in assumpsit, and charged the defendants as common carriers by water, of goods and chattels for hire, by canal boats and steam propellers, from New York to Detroit. It then alleged the delivery of about $3,000 worth of groceries on board the propeller at Buffalo, which were not delivered through the burning of the propeller.

The defendants pleaded the general issue, non assumpsit, and, under the Michigan practice, appended to the plea a notice that the statute of March 3, 1851, would be relied on as exempting the defendants. No replication was filed setting up the exception in the last section of said act, because the practice in that State does not permit such a pleading.

The cause was tried twice. At the first trial, the Circuit Judge ruled in favor of the plaintiffs, instructing the jury that that portion of the act giving the exemption claimed by the defendants was not applicable to the case, but that the vessel was engaged in inland navigation, under the exception, as claimed by the plaintiffs; and accordingly, September 11, 1857, the plaintiffs had a verdict of $3,050.70.

The defendant presented a bill of exceptions, and took a writ of error to the Supreme Court of Michigan, where the verdict was set aside and a new trial granted, upon the ground that the propeller, when navigating Lake Erie, was not engaged in inland navigation under said exception, as claimed by the plaintiff, and held by the court below.

The case is reported in 5 Mich., (1 Cooley,) 368. November 16, 1858, the new trial was had; and of course it resulted,

under the decision of the appellate court given above, in a verdict for the defendants.

The plaintiffs then filed their bill of exceptions, given at large in the record, showing that they requested the court to charge "that the act of Congress of March 3d, 1851, had no applicability to the case, inasmuch as the 'Spaulding,' being used principally in navigating between the cities of Buffalo and Detroit, by way of Lake Erie and Detroit river, was engaged in river and inland navigation within the exception in the last clause of section 7 of said act;" and that the court refused so to charge, and charged to the contrary, and the plaintiffs duly excepted.

Upon writ of error by the plaintiffs, the Supreme Court of Michigan affirmed the judgment below, in accordance with their former decision, and the plaintiffs brought the case up to this court.

It was argued by *Mr. Walker* and *Mr. Russell* for the plaintiffs in error, and by *Mr. Hibbard* for the defendants. A motion was made to dismiss the writ for want of jurisdiction, but the arguments upon this point will not be reported, nor upon the point of the constitutionality of the act of Congress.

The argument of *Mr. Russell* and *Mr. Walker* upon the main point, for the plaintiffs in error, was as follows:

The question to be decided is, whether a vessel engaged in navigation and commerce between the port of Buffalo, on Lake Erie, and the port of Detroit, on the river Detroit, is within the meaning of said act of Congress, "used in rivers *or* inland navigation."

While we most cheerfully concede that the intention of the Legislature is to be derived from the language which it has used, yet, in ascertaining that intention, the previous state of the law, the defects to be remedied, and the history of the legislation, may all be appropriately referred to.

Sedgwick on Statutes, 237, 239.

By the common law, the stringent rule in relation to the

liabilities of common carriers was held to be as applicable to common carriers by water as by land.

Morse *v.* Slue, Ventris, 190, (23 Car., 2d.)

Same, Raymond, 220.

Rich *v.* Kneeland, (11 Jac., 1st,) Cro. Jac., 330.

Dale *v.* Hall, 1 Willson, 281, (A. D. 1750.)

The first limitation of the liability of ship owners was by the act of 7 Geo. II, c. 15, A. D. 1734.

It is not easy to determine what at this time was the liability of ship owners by the Continental law, nor was that law uniform; but it is very clear that they were not held to so strict a liability as by the common law. Thus it would seem, that in case of embezzlement or other wrong, by the master or mariners, that the owner was only liable to the extent of ship and freight.

Abbott on Shipping, 395.

Story on Bailments, sec. 488.

Hunt *v.* Morris, 6 Mart. La., 676; 3 Kent., 218.

The act of Parliament referred to provided substantially for the same thing, and thus put English ships upon an equality with foreign vessels. The special occasion of the passage of this act seems to have been the decision in the case of Boucher *v.* Lawson, which held that owners were, under some circumstances, liable for embezzlements committed by the master, without default of the owner.

Abbott on Shipping, 128, 395.

The liabilities of ship owners were still further limited by the act 26 Geo. III, A. D. 1786. By this act owners were exempted from liability in case of robbery, although not committed by the master or persons employed upon the vessel, and also from all responsibility in case of loss or damage by fire.

Abbott on Shipping, 397, 398.

This act seems to have been suggested by the case of Sutton *v.* Mitchell, 1 Term Reports, 18, which was an attempt to make the owners responsible for a robbery committed at the instigation of a mariner.

Abbott on Shipping, 397.

Two other cases decided the same year (1785) may have had some influence in promoting this legislation.

Forward *v.* Pittard, 1 Term, 27.

Trent Navigation Co. *v.* Wood, 3 Esp., 127.

The liabilities of ship owners were still further limited by 53 Geo. III, c. 159, which exempted owners from all responsibility for any damage, by reason of any act or neglect without their fault or privity, beyond the value of the ship or vessel and freight.

Abbott on Shipping, 398.

The object of all this legislation was to encourage British shipping, and put it at least upon an equality with that of other nations, and it has accordingly been held that these laws were only applicable to British shipping.

The Dundee, 1 Hagg., 113.

Pope *v.* Dogherty, 7 Am. Law Reg., 181.

Although the rule of the common law, in relation to the liability of common carriers, has been fully recognised in this country from its earliest settlement, and the applicability of that rule to carriers by water, and although in many instances ship owners have been held liable for losses by fire occurring without neglect on their part, yet no successful attempt was made to limit their liabilities until the passage of the act of 1851.

2 Kent's Com., 599 and 609.

McClure *v.* Hammond, 1 Bay., 99.

1810, Scheiffelin *v.* Harvey, 6 Johnson, 170.

1815, Elliott *v.* Rossel, 10 Johnson, 1.

Cases of Fire.

1834, Harrington *v.* Shaw, 2 Watts, 33.

1823, Stbt. Co. *v.* Bason, Harper, 264.

1838, Patton *v.* McGrath, Dudley, 159.

1843, Gilmore *v.* Carman, 1 S. and M., 279.

1843, Hale *v.* N. J. S. Nav. Co., 15 Conn., 539.

1848, N. J. S. Nav. Co. *v.* Merchants' Bank, 6 How., 334.

These last two cases, which grew out of the burning of the Lexington, very strongly attracted the attention of shipping and commercial men, and led to the enactment of March 3,

1851. Although the law upon this subject was perfectly well settled, losses by fire upon the ocean had been of such rare occurrence, that ship owners had not fully recognised their liabilities until these decisions.

The history of that act during its passage is curious, suggestive, and instructive.

23 Congressional Globe, 713—718.

When first introduced into the Senate, the last clause of the act was as follows: "The preceding sections shall not apply to the owner or owners of any canal boat, nor to the owner or owners of any lighter or lighters employed in loading or unloading vessels, or in transporting goods or other property inland from place to place." Thus limiting the exception to canal boats and lighters engaged in inland commerce, or, in other words, extending the benefits of the law to all other vessels of every description within the jurisdiction of Congress.

The bill had been carefully prepared by the Committee on Commerce, and was called up by Mr. Hamlin, Senator from Maine, one of that committee. He said: "It is a bill which I think is just in its provisions, and it places our commercial marine upon the same basis as that of England."

Its consideration was opposed by several distinguished Senators, and urged by others as a measure of great importance. Mr. Davis, of Massachusetts, said "that it is by a recent decision some two or three years since that the owners of ships have comprehended their liabilities," and urging the consideration of the measure as a system which had been for many years in operation in England, and said, "it is simply putting our merchant marine upon the same footing as that of Great Britain. We are carriers side by side with that nation in competition with them, and we cannot afford to give them any very great advantage over us without affecting our interest very seriously."

Mr. Cass urged its consideration with great earnestness, for similar reasons; and when before the Senate upon its merits, Mr. Hamlin said: "It is true that the changes are most radical from the common law upon the subject, but they are rendered

necessary, first, from the fact that the English common-law system really never had any application in this country; and second, that the English Government has changed the law, which is a very strong and established reason why we should put our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? This is what this bill seeks to do, and it asks no more."

Mr. Butler, of South Carolina, opposed the bill, and said: "Great Britain has more interest in relieving itself from liabilities upon the ocean than any other."

Mr. Underwood, of Kentucky, as representing the agricultural interests of the West, opposed the bill, and especially that portion of it exempting the owners of the vessel from liabilities for loss by fire; he said: "The argument is, that we cannot compete with our great rival upon the ocean, with Great Britain, and that we must pass the first section of this bill in order to come into competition with her;" and he thought the bill would be injurious to the agriculturists, who produced articles of commerce, but who were not their own carriers; that it would lessen the security without lessening the cost of freight.

It was to obviate these objections coming from the interior that Mr. Pearce, of Maryland, moved to strike out the clause of the bill, and to insert the clause under consideration: "This act shall not apply to the owners of any canal boat, barge, or lighter, or any vessel of any description whatsoever used in rivers or inland navigation."

Mr. Hamlin, who had charge of the bill, said: "If those who represent the *interior waters* of the country desire such an amendment, I am perfectly willing that it should be made."

Mr. Phelps, of Vermont, living upon the banks of Lake Champlain, opposed the amendment, and said: "If there is any portion of our navigation which is entitled to the benefit of this change in the common law of the country, it is our *inland navigation.* From my own experience in my own imme-

diate neighborhood, of the navigation of the waters of the inland section of the country in which I reside, it is proved that this navigation is more subject to accidents, against which they cannot guard, than is the navigation of the sea. Under these circumstances I am opposed to the amendment, because I think that if the principle which is incorporated in the bill be adopted, it should be adopted in regard to all our navigation, internal as well as external."

Mr. Pearce, who introduced the amendment, said: "The memorials which gave rise to this bill came from that class of our people who were interested in *ocean navigation*, and one of the strongest arguments in support of this bill is, that it would put the ocean navigation of this country upon an equal footing with the ocean navigation of England and other countries. No such argument applies to this case; it is very manifest that the passage of this bill, without this amendment, will operate very disadvantageously to the interests of inland navigation."

Mr. Rantoul was willing to vote for the amendment, because it did not affect those sections directly interested in foreign navigation, and was willing that the other sections should make such arrangements as best suited their purpose.

Mr. Seward opposed the amendment, because it introduced "one system for ships that were engaged in the State of New York, another system for the commerce on our lakes, on Lakes Erie, Ontario and Michigan; one system for the rivers and lakes, and another system for the ocean navigation." "The reasons which lead to the necessity for this bill are applicable to the inland navigation, and not to ocean navigation alone."

Mr. Clayton, of Delaware, said: "I suppose the amendment will apply to lake navigation as well as inland navigation."

Mr. Walker, of Wisconsin, favored the amendment, for the reason "that the great producing interests of the country require it."

Mr. Shields, of Illinois, said: "I also hope the amendment will be adopted. I do not think we have too many guaranties upon our *Western waters* for the safety of either passengers or freight."

Looking, then, at the history of British legislation upon this

subject, and the greater liabilities that rested upon our ship owners, which had been so clearly brought to light by the decisions growing out of the loss of the Lexington, it seems very clear that the purpose of the act was in relation to *ocean* navigation, to place our vessels upon an equality with those of Great Britain, and enable them to compete successfully with British and other foreign shipping for the commerce of the seas. It seems equally clear, that the provisions of the clause in question were intended to be extended as well to commerce upon the lakes as on rivers.

The British statutes exempting ships from liabilities were not in force in Canada and upon the great lakes, nor was there upon those lakes any real competition between British and American shipping. It already stood upon an equality in relation to legal liability, and, practically, American shipping had the entire monopoly of the commerce.

Is there anything in this exception itself that requires a different construction? We think not.

In the first place, the exception excludes from the operation of the act certain vessels, irrespective of the character of the navigation in which they are engaged, canal boats, barges, and lighters. These, from their very nature, cannot be used in ocean navigation, nor be exposed to its hazards.

Then there is excluded from the operation of the act, "vessels of any description whatsoever used in rivers or inland navigation;" the phrase is sufficiently comprehensive to include everything that floats upon water, if used in the specified way.

Webster's Dict., "Vessel."

The phrase "used in rivers" is too unambiguous to require explanation or construction.

The remaining question, and which is the question in this case, is, what construction is to be given to the phrase "inland navigation;" shall it be held to embrace navigation upon Lake Erie and our great lakes? That this is the obvious, natural, and popular meaning of the phrase, we think there can be no

doubt. This is admitted by Judge Conklin, who suggests, however, a different construction.

Conklin Ad., 209.

It is now clearly settled, that in the construction of statutes the courts will give to the language used its ordinary and obvious meaning, unless from the statute itself it is clearly apparent that some other meaning was intended.

Sedgwick on Stat. Law, 243, 260, 310, 382.

Tisdale *v.* Comb, 7 Ad. and E., 788.

Lakes are from their very nature *inland*, and must be so, and the navigation upon them must therefore be inland navigation.

5 Am. Encyc., art. "Lake."

4 Nat. Cyc., art. "Canada."

5 Ed. Encyc., art. "Canada."

7 Nat. Cyc., art. "Lake."

Maunder's Scientific Treas., art. "Lake."

Webster's Dict., arts. "Lake" and "Sea."

Thus the Caspian, though sometimes called a sea, is strictly a lake, being a large collection of water in an inland place.

15 Ed. Encyc., art. "Physical Geo.," 608.

5 Amer. Cyc., art. "Lake."

7 Nat. Encyc., art. "Lake."

Webster's Dict., art. "Sea."

The word "inland," as applied to navigation or bodies of water, is used as the correlative of ocean or tide water.

Webster's Dict., "Inland."

We refer to a few only of the many instances in which the terms "inland seas," "inland waters," and "inland navigation," have been used by jurists and by other writers in relation to, or so as necessarily to include, the great lakes.

"Inland Seas," Woodbury, J., 5 How., 495.

"Interior Lakes," Webster Arguendo, 6 How., 378.

"Inland Seas," Taney, Ch. J., 12 How., 453.

"Interior Waters," Daniel, J., 20 How., 314.

"Inland Waters," Catron, J., 20 How., 401.

"Inland Waters," Clifford, J., 21 How., 22.

"Inland Navigation," Shaw, Ch. J., 11 Pick., 42.

"Inland Navigation," 1 Newberry, Pref. VIII.
"Inland Seas," Arguendo, 1 Newberry, 545.
"Inland Seas," Pratt, J., 3 Mich., 275.
"Inland Navigation," 1 Conk. Adm., 5, 8, 17.
"Inland Waters," 1 Conk. Adm., Pref. VIII.
"Inland Seas," Ed. Cyc., art. "Phys. Geo.," 608.
"Inland Seas," 1 Murray's Hist. of Canada, 22.
"Inland Navigation," Summerville's Phys. Geo., 266.
"Inland Seas," 3 Murray's Encyc. of Geo., 350.
"Inland Seas," Webster in his Buffalo speech, 1833; and in his 1st speech in reply to Hayne.
"Interior Trade," 3 Bancroft's Hist. of U. S., 111.

Indeed, it may well be said, that the great lakes are but expansions of the rivers connecting them, and this is the position taken by eminent geographers, some of whom give the length of the St. Lawrence as commencing at the head of Lake Superior.

4 Nat. Cyc., art. "Canada."
5 Ed. Encyc., art. "Canada."
9 Amer. Encyc., art. "Lake."

The term, therefore, "inland navigation," obviously and naturally includes lake navigation.

It is, too, clearly apparent, that the great lakes were to be included within the exception, from the fact that all rivers—as well those connecting the great lakes as others—are expressly within it, and there could be no reason why the navigation upon the St. Clair, the Detroit, and the St. Lawrence, should be governed by a different rule from that of the connecting lakes; the commerce is intimately, nay, indissolubly, connected together, carried on by the same vessels, in same voyages, subject to similar perils and similar competition.

Nor can it be said that these rivers are but straits connecting lakes, and therefore not embraced under the title "rivers."

Straits only connect ocean waters.

Maunder's Scientific Treas., art. "Straits."
Webster's Dict., art. "Straits."
17 Am. Encyc., art. "Straits."
Rees's Encyc., art. "Straits."

While these connecting waters are strictly rivers, answering in every respect the description of rivers, as given by lexicographers and geographers: "A river is a large stream of water flowing in a channel on land towards the ocean, a lake, or another river."

Webster's Dict., "River."

Maunder's Scientific Treas., "River."

16 Amer. Encyc., "River."

15 Ed. Encyc., "Phys. Geo.," 599.

4 Nat. Cyc., "Canada."

The Constitution *v.* the Young America, 1 Newb. Ad., 106.

And from their discovery they have been termed rivers. That the St. Lawrence is universally styled a river we need only refer to a very few of the many authorities upon this subject. In all books of geography and travel, in all histories, it is spoken of as one of the great rivers of the world.

5 Ed. Encyc., art. "Canada."

15 Ed. Encyc., "Phys. Geo.," 602, 606.

16 Amer. Encyc., art. "River."

4 Nat. Cyc., art. "Canada."

10 Nat. Cyc., art. "River."

3 Murray's Encyc. of Geo., 342, 350, 360, 607.

1 Smith's Hist. of Canada, 5.

1 Warburton's Conquest of Canada, 58.

Maj. Rogers's Account of N. America, 25.

10 U. S. Stat. at Large, Reciprocity Treaty, art. 4.

Although the name "Detroit," of itself, means "the strait," yet it is strictly a river, and is almost universally known as the Detroit river. It is so named in various acts of Congress, and in the very act admitting Michigan into the Union the "Detroit river" is described as one of its boundaries.

5 U. S. Stat. at Large, 49, 185.

3 U. S. Stat. at Large, 534.

10 U. S. Stat. at Large, 63.

It is so universally named in the statutes of Michigan.

1 Comp. Laws, 40, 41, 48.

Laws of Mich., 1857, pp. 73, 95, 105, 209.

So in all the laws and ordinances in relation to the city of Detroit.

See Charter and Ordinances of Detroit.

So in numerous judicial opinions.

6 McLean, 153, 155, 156, 485.

1 Newberry's Admiralty, 11, 13, 16, 46, 47, 63, 89, 95, 103, 106, 537, 539, 541, 542, 544, 545, 547, 549, 550, 551, 553.

2 Doug., (Mich.,) 33, 34, 36, 258, 260.

1 Mich. R., 273, 275.

5 Mich., 371, 377, 378; 20 How., 315.

So by miscellaneous writers.

Hennepin's Travels, (1698,) 33.

Carver's Travels, 151.

3 Bancroft's Hist. U. S., 134.

2 Hildreth's Hist. U. S., 114.

Lanman's Mich., 40, 41.

1 Murray's Hist. of Canada, 24.

3 Murray's Encyc. of Geo., 566, 569.

10 Nat. Cyc., art. "River."

Colton's Gazetteer, art. "Detroit."

15 Nat. Review, 432, (1827.)

The reason why "navigable waters" is used in the act of February 26, 1845, instead of "navigable rivers," is, that these were artificial navigable waters connecting the lakes as well as rivers.

The Constitution *v.* Young America, 1 Newb., 106.

Nor will it do to say that navigation upon Lake Erie is not inland navigation because it is a great lake. The size cannot alter the question whether it be an inland body of water or not. No such distinction is anywhere recognised; and if any such distinction be attempted, what is the dividing line between a lake that is inland and one that is not? To which class does Lake Champlain, Lake St. Clair, or the Lake of the Woods, belong? Inland, in this connection, means remote from the sea.

Neither does the immense importance of its commerce furnish any reason why lake navigation is not included in the

term "inland navigation." The very same commerce traverses the St. Clair, the Detroit, and the St. Lawrence, while the magnitude of lake commerce is rivalled by that of the Mississippi and the Hudson, and their commerce is expressly within the exception.

Nor does the fact that the commerce of the lakes is within admiralty jurisdiction furnish any reason why it should not be included in the term "inland navigation." The commerce of all the great rivers of the continent is equally within this jurisdiction, and it is expressly within the exception, and it is inland as well as river navigation.

The Genesee Chief *v.* Fitzhugh, 12 How., 234.
Fritz *v.* Bull, 12 How., 466.
Jackson *v.* Magnolia, 20 How., 291.
Prop. F. W. Backus, 1 Newb., 1.
Barque Jenny Lind, 1 Newb., 447.

The lakes and rivers and the commerce and navigation of the lakes and rivers of the West are usually mentioned together, and it is hardly conceivable that different rules should be applied to each.

Woodbury, J., Clash *v.* Warner, 5 How., 495.
Taney, Ch. J., Genesee Chief Case, 12 How., 47, 451.
Grier, J., Magnolia Case, 20 How., 302.
McLean, J., Magnolia Case, 20 How., 303.
Daniel, J., Magnolia Case, 20 How., 315.
Campbell, J., Magnolia Case, 20 How., 333.

The fact that Lake Erie is a border lake, and that through it runs the national boundary line, furnishes no reason why its navigation is not inland. The term "inland" can have no such meaning as "interior," within the country, within the national boundary line. This rule would bring within the exception Lakes Michigan and Champlain, and exclude from it lakes no larger, Erie and St. Clair. Rivers, too, form boundary lines; and upon any such construction, are they within or without the exception? What rule is to govern the commerce upon the St. John's, the St. Croix, the St. Lawrence, the Niagara, the St. Clair, the Detroit, the St. Mary's, the Pigeon, and the Colorado? Is it inland navigation or not? And suppose a

loss should occur upon inland waters entirely within the borders of a foreign country, as upon Georgian bay and Lake Nipising, the vessel being American, the parties American, and the suit being brought in an American court, would the case be within the exception or without it?

We submit, then, that the locality of the water, whether within or without our territorial limits, does not determine the character of the navigation, whether inland or not; that it cannot be that Lake Champlain is "inland" and Sorrel river "outland," Lake Michigan inland and Lake St. Clair not, the Mississippi inland and Pigeon river not.

It has been suggested that these great lakes are no more "inland" than the close and narrow seas, like the Baltic and the Mediterranean, and that the navigation of those seas is never termed "inland navigation."

But the analogy does not hold. The very term "inland" implies remote from the sea or tide water, and while the lakes are great like close seas, they are still remote from tide water, and therefore inland; while the seas are a part of the great ocean, on its level or nearly so, swept by its tides, governed by its laws, and like the ocean itself, not subject to dominion, but a free pathway for all nations.

Wheaton's International Law, 150, 158.

Vattel's Law of Nations, 187, 194.

Campbell, J., Jackson *v.* Magnolia, 20 How., 340.

Not so the lakes; they cannot be approached from the sea save by artificial means; they are not an open highway to all nations, but are within the exclusive sovereignty of the riparian nations, and it is only by treaty that they are free on either side of the boundary line to the two great nations that border on them and exercise their sovereignty over them.

It has also been suggested, that the reason why river and inland navigation was excepted from the operation of the act of 1851 was, that there was serious doubt as to the jurisdiction of Congress over such navigation, while in relation to the navigation upon the great lakes no such doubt existed.

But it is well settled that Congress has the same jurisdiction over navigation upon rivers that it has over that upon the

lakes, and that it has no jurisdiction over either except as it extends between States or with foreign nations.

Fritz *v.* Bull, 12 How., 466.

Jackson *v.* Magnolia, 20 How., 296.

Allen *v.* Newbury, 21 How., 244.

McGuire *v.* Card, 21 How., 248.

There are few authorities bearing directly upon the question involved. Judge Conklin, in the last edition of his Admiralty, suggests, indeed, that if the language of the act be not "too unequivocal and definite to admit of the exercise of judicial discretion, that its determination may depend upon the motives to which the exception shall be ascribed;" and, starting from an entirely erroneous view of those motives, comes to the conclusion that it is possible to give to the act the construction contended for by the defendant in error.

1 Conk. Admiralty, 209.

Parsons simply announces the decision of the court below in this case without note or comment.

1 Parsons's Shipping, 401.

The Supreme Court of the Western District of New York, at the February term, 1858, in the case of Root et al. *v.* Hart et al., decided that lake navigation was included within the exception by the phrase "inland navigation."

The Supreme Court of the city of Buffalo made the same decision, after fully considering the opinion of the court below in this case.

Bresler *v.* M. S. & N. I. R. R. Co., Dec. Term, 1858.

These, with the decision of the Supreme Court of Michigan in the case at bar, are the only decisions bearing upon the construction of this statute. Judge Clifford, in the case of the propeller Niagara *v.* Cordes, suggests that the question may arise whether the lakes are not excluded from the operation of the act under the term "inland navigation," but no opinion is intimated.

20 How., 26.

The language of this exception is very nearly copied from an exception in the act 52 Geo. III, which is as follows: "That nothing therein contained shall extend to the owner of any

lighter, barge, boat, or vessel of any description whatsoever, used solely in rivers or inland navigation, or any ship or vessel not duly registered according to law."

But we look in vain for any decisions in the English courts that throw any light upon the question now before this court.

Inland navigation in England is carried on mostly, if not entirely, by canal boats, barges, and lighters, in streams strictly land guarded, or in canals. They have no great rivers and no navigable lakes, and there can be no analogy between the inland navigation in the two countries.

An attempt to apply the term "inland navigation," as it exists in England, to this country, would be as difficult and as impracticable as to apply here the English definition of navigable waters.

Bowman *v.* Wathen, 2 McLean, 382.

Angel on Watercourses, secs. 545, 550.

Or as unreasonable as to adopt the English definition of admiralty jurisdiction, limiting it to the high seas outside of the limits of any county. This rule was never adopted in this country.

The Jefferson, 10 Wheat., 428.

Peyroux *v.* Howard, 7 Pet., 342.

U. S. *v.* Coombs, 12 Pet., 72.

And yet the Supreme Court of the State of Michigan seemed to have adopted this local definition of "inland navigation," as applicable to this country.

The same court referred to several English decisions to show that when a specific class of vessels were named in a statute, followed by general words, that the latter were to be construed to apply only to vessels of the same class of build or business, and the inference that they suggest rather than state is, the words "vessels of any description whatsoever" are controlled by the vessel previously described, and must be held to apply only to vessels like barges, canal boats, and lighters, and used in the same way.

5 Mich., 384.

We submit that there is no such arbitrary rule of construction, and that whether the general words are to be thus con-

trolled and construed is a question of intent, to be drawn from the whole act.

Here it is apparent that there is no such intent. Canal boats, barges, and lighters, wherever and however used, are to be excluded from the benefits of the act, and the words "any vessel," &c., are not used at all to enlarge the number and kind of vessels thus excluded. The object of the remaining part of the exception is to exclude from the benefits of the act vessels of every description, large or small, used in a certain way, viz: in rivers or inland navigation; and to give the construction contended for, would extend the benefit of the act to all large vessels, however used, and thus defeat the obvious intent of the act, of excepting from its benefits all vessels used in rivers and inland navigation.

In this respect the exception of the act of Congress requires a different construction from the exception in the stat. 53, sec. 3. There is but one class of vessels affected by this, other than unregistered ones.

But the English cases cited, so far from favoring the view suggested by the court, seem to us to have a directly contrary effect.

The case of Hunter *v.* McGowan, 1 Bligh, 180, arose under the 2d section of 26 Geo. III, c. 86, by which "any ship or vessel" shall not be made liable for losses by fire; and it was held that, from the whole structure of the act, it clearly related only to ships and vessels usually occupied in sea voyages, and that its protection did not extend to a galbert, a species of lighter. This decision was not founded on any such arbitrary rule of construction as is referred to, but was based upon the intention clearly appearing from the whole act.

Morewood *v.* Pollock, 18 E. L. and Eq., 343.

5 Mich., 384.

In the case of Blanford *v.* Morrison, 15 C. B., 724, by the same kind of reasoning, viz: the intent appearing upon the whole act, it was held that the words "any lighter, vessel, barge, or other craft," did not include a coal brig which brought coal coastwise from Newcastle, but was held to

apply merely to such vessels as were employed to unload coal from others for delivery.

5 Mich., 385.

In Regina *v.* Reed, 28 L. and Eq., 133, it was held that a monopoly of navigation given to a company of watermen, within certain limits, "by any lighter, wherry, or other craft," did not extend to a steam tug used for tugging the hull of another vessel. It was held that it was a penal act giving a monopoly, and that it was to be construed strictly, and from the nature and purposes of the act, which was to protect wherry-men and lighter-men in carrying passengers and goods, that the term "other craft" must be construed to mean craft of the same description and used for a similar purpose, and that it did not apply to the steam tug used for the purpose named.

To the same point is Reed *v.* Ingham, 26 L. and E., 164.

But in another case arising under the same act, it was held that a power authorizing the mayor and aldermen of London to make by-laws for regulating "the boats, vessels, and other craft, to be rowed or worked within the limits of the act," did extend to steamboats.

Tisdell *v.* Coomb, 7 Ad. and E., 788.

We submit that none of these cases, in the remotest degree, authorize or favor the construction, that the words "any vessel of any description" are to be limited to vessels of the same kind or business, as canal boats, barges, and lighters.

The Supreme Court of Michigan seem to suggest that the navigation upon the lakes is not to be termed inland navigation, for the reason that they are not entirely within the territory of the United States, but are border waters; and yet it is admitted that this cannot determine the character of the navigation, for Lakes Michigan and Champlain are not border lakes; and many rivers, some of which are narrow and land-guarded, are border rivers; yet this cannot prevent the navigation upon them from being inland navigation.

The same court also suggests that the navigation of the lakes is not to be deemed inland navigation because of the maritime character of its commerce. This reasoning applies

with as great force to the large rivers as it does to the lakes, and by that fact turns all its force.

It is further suggested that the navigation of the lakes is not to be deemed inland, because lake vessels also navigate the ocean. This is equally true of vessels navigating the great rivers, and the question whether such vessels are used in ocean navigation or in inland, must be determined precisely as such questions have before been determined. The question will be, what is the navigation in which they are principally used?

The coal boat D. C. Salisbury, Alcott's Adm., 74.

Buckley *v.* Brown, Bright's Digest, 305.

McCormic *v.* Ives, Abbott's Adm., 418.

N. J. Steam Nav. Co. *v.* Merchants' B'k. 6 How., 392.

Walker *v.* Cheney, 4 Am. Law Reg., 407.

But it would seem it is only by the assent of Great Britain and her courtesy that American lake vessels can pass to the ocean.

Recip. Treaty of 1854, art. 4.

We submit, in conclusion, that the ordinary meaning should be given to the word "inland" in this act, and that there is nothing in the act itself, in the history of legislation upon the subject in judicial decisions, or in the reasoning of the court below, to authorize the forced construction which was given to it by that court.

Mr. George B. Hibbard, for the defendant in error, made the following points:

Point First. The steamboat, at the time of her being burned, was not "used in inland navigation," and therefore the defendant in error, though a common carrier, was not liable for the loss of the goods.

I. The act entitled "An act to limit the liability of ship owners, and for other purposes," exempts the defendant in error from that liability.

9 Stat. at L., 635.

1. The first section of the act, in substance, provides that the owner of any ship or vessel shall not be liable for any loss to any goods on board the ship or vessel by reason or means

of any fire happening on board the ship or vessel, unless caused by the design or neglect of such owner.

2. The third section limits the liability of the owner in cases of collision, &c., &c., happening without the privity or knowledge of the owner, to the amount or value of the interest of such owner in the ship or vessel and her freight then pending.

3. The fourth section of the act provides substantially that the vessel owner, in certain cases, may exempt himself from liability, by assigning his interest in the vessel to a trustee for the benefit of the claimants against him.

4. The last clause of the seventh section reads as follows: "This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

II. For the purpose of arriving at the meaning of the last quoted clause of the act, it is necessary, in the first instance, to refer to former legislation on the subject in England, (the act in question being virtually a re-enactment of English statutes;) the state of the law before that legislation; the causes which led to the passage of the English acts, as well as our own, and the objects sought to be promoted by the legislation of both countries. Such aids in interpretation of the law are beyond question, proper.

1 Kent's Com., 460.

Tonnell *v.* Hall, 4 Comstock, 140.

Aldridge *v.* Williams, 3 Howard, 1, 24.

1. The principle of the act, unqualified by the limiting clause in question, has been operative in all modern civilized nations, possessing a national commerce, whenever the policy of such nations has been finally adapted to the exigencies of that commerce.

2. By the civil law itself, the owners of vessels were liable, in matters *ex delicto*, according to the amount of their respective interests in the ship. This, however, was not the case in matters arising *ex contractu*.

2 Brown's Civ. and Ad. L., 136, 138, 141.

The Rebecca, Ware, 194, 195.

3. The principle of this rule was adopted by nearly, if not quite, all the maritime powers of Europe, (excepting England, though England soon adopted it by legislation,) with the important qualification, however, that the extent of the liability, both in matters arising *ex contractu* and *ex delicto*, should be equal only to the amount of the interest of the owner sought to be charged in the ship itself. It was the law of Holland, Hamburg, and Sweden, (and indeed of the whole north of Europe,) with the same right in the owner as that given by the fourth section of the act immediately in question, of exempting himself entirely from personal liability, by surrendering the ship to the injured parties. It was the law of France by special ordinance, which, however, was said by Cleirac to be but a recognition of a rule acknowledged as generally existing. It was the general law of the Mediterranean.

Grotius De Jure Belli et Pacis, Liv. 2, c. 11, sec. 13.
Marine Ordinance Louis XIV, title 4.
2 Peters Ad. Decis., Appendix XVI.
Cleirac, Navigation des Rivieres, art. 15, p. 502.
Consulat de la Mer, c. 34.
The Rebecca, Ware, 195, 196, 197.

4. The whole principle which led to the legislation in England, (and which legislation was the source of our own act,) was recognised in its application to ships; and that, too, without limitation as to the waters upon which the ships were navigated.

Abbott on Shipping, 395.

5. The case of Boucher *v.* Lawson was decided in 1733. It held that the ship owner was liable for coin embezzled by the master after shipment.

Boucher *v.* Lawson, Rep. Temp. Hardwicke, 85.

The merchants of London, alarmed by this decision, on petition to Parliament, procured the passage, in 1734, of the act 7 Geo. II, c. 15.

Abbott on Sh., 395.

This act provided that the owner should not be liable for any such embezzlement, or for any other act of the master or

mariners, done without the privity, &c., of the owner, beyond the value of the interest of the owner in the ship.

6. The case of Boucher *v.* Lawson was followed by the case of Sutton *v.* Mitchell; and that by the case, decided in 1785, of Forward *v.* Pittard.

Sutton *v.* Mitchell, 1 T. R., 18.

Forward *v.* Pittard, 1 T. R., 27.

Lord Mansfield, in deciding this last case, says: "There are events for which the carrier is liable, independent of his contract." That further responsibility is "by the custom of the realm; that is, by the common law, by which a carrier is in the nature of an insurer." Upon familiar principles, he therefore decides a carrier, in a case of accidental fire, to be liable for the entire loss happening thereby to the owner of the goods in process of carriage.

This was the undoubted common-law rule at the time; and under the custom of the realm, the law of England being established to be thus different from that of continental Europe, these decisions were followed (in the enlightened policy of promoting so much of commerce as was really national) by the act of 26 Geo. III, c. 86, in 1786; and this by 53 Geo. III, c. 159, in 1813.

The object of all these acts is stated in some of the acts themselves. It was stated in the preamble to the act of 7 Geo. III, that "it was of the greatest consequence and importance to the kingdom to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein." The courts have recognised the whole objects of this legislation to be, "to encourage persons to become the owners of ships."

Gale *v.* Laurie, 5 B. and C., 156.

7. The acts of Geo. III are the sources, and almost the exact originals, of the act of Congress of 1851. The main provisions of the English acts are almost in language, and altogether in principle and object, identical with the act of 1851. The last clause of the act of 53 Geo. III is almost precisely like the portion of the act of Congress more particularly

under consideration. The English statute provides that it shall not extend to "the owners of any lighter, barge, boat, or vessel of any burden or description whatsoever, used wholly in rivers or inland navigation, or vessel not duly registered according to law."

8. The common-law rule, unqualified by legislation, became the law of this country. The case of the Lexington was decided in 1848.

The N. J. S. M. Co. *v.* The Merchants' Bank, 6 How., 344.

It was followed by the act of 1851.

9. The causes which led to the passage of the act of 1851 were, therefore, precisely similar to those which led to the English legislation. The acts of both countries are essentially the same. The commercial policy of both countries, and the objects to be subserved by the legislation of each, in this particular, are alike. Beyond all question, therefore, (and particularly under the rules of statutory construction referred to, Point First, II,) each of these acts must illustrate the other. The objects of all must aid in the interpretation of each. The authorities of either country bearing directly upon either of the acts, or upon kindred legislation, must aid in the construction sought for.

III. Approaching the immediate question under Point First, after brief review of the causes and objects of the law in question, the defendant in error claims, directly, that the navigation of Lake Erie and the great Western lakes is not "inland."

1. The meaning of the words "inland navigation," as thus employed, does not include the navigation of such waters.

2. The question is not what is the geographical meaning of the word "inland," used in distinguishing seas from oceans, or the waters within the body of a continent from the high seas. The question is as to the meaning of the phrase "inland navigation," employed in reference to a commercial business, and to promoting commercial objects. In this view, the meaning of the same words, or equivalent phrases in the same connection, are the true governing authorities, so far as mere definition is concerned.

3. The exact definition of the word "inland," as well as the

phrase "inland navigation," shows that such navigation is not the navigation of the great Western lakes. Webster's definition, (Webster's Dict., "Inland,") as applied to navigation, is: "Carried on within a country; domestic, not foreign, as inland trade or transportation; inland navigation." Worcester defines the word thus employed (Worcester's Dict., "Inland,") as: "Pertaining to the interior of a country; internal; opposed to coasting; inland navigation." In Rees's Encyclopedia, (Rees's Encyclopedia, "Inland Navigation,") "inland navigation" is defined to be a term "applied to the passage of boats and vessels on canals and rivers within a country, to distinguish it from navigation, properly so called, by means of shipping on the open seas, or on the largest of the lakes." The definition of the Encyclopedia Britannica (Encyc. Brit., "Navigation, Inland") is as follows: "Inland navigation may be defined as that branch of navigation which extends from the sea to the land, and affords the means of transportation through the interior of a country.

The word "inland," thus used, is opposed in meaning to the word "foreign." "Foreign" (Burrill's Law Dict., "Foreign") means "that which is without or beyond the limits of a particular territory," as the Western lakes are beyond the limits of a particular State. The navigation of the lakes is not "inland," as a bill of exchange drawn by a citizen of one State upon a citizen of another State is not an inland bill, and was formerly called an "outland bill," "to distinguish it," as says Justice Story, (Story on Bills, secs. 22, 23,) "from an inland bill, which is governed throughout by one municipal jurisprudence." Such navigation, thus conducted, through the systems of jurisprudence of several States, (when Congress, beneath its power, hereinafter considered, is silent on the subject,) is foreign, in the sense that the ships employed in that navigation are foreign to the State in which they are not owned.

Conklin's Admiralty, 57.

The consideration of some decisions may further illustrate this view. The statute of limitations of the State of Georgia provided that, in certain cases, it should not apply to parties

"beyond seas." It was held that the phrase meant beyond the limits of the State, irrespective of the question whether or not the party was in fact beyond any sea or other water.

Murray *v.* Baker, 3 Wheaton, 341.

Shelby *v.* Guy, 11 Wheaton, 361.

Beyond the jurisdiction of the State of Georgia, the party was "beyond seas"—beyond the control of the jurisprudence of that State, and necessarily, therefore, not "inland."

Upon the actual meaning, therefore, of the word "inland," so used, it must be determined that the words "inland navigation," in the statute, signify only a navigation carried on within the body of the country; and doubtless, (particularly when considered, as the question must be, and is hereinafter, under the powers of Congress over commerce,) when applied to lake navigation, a navigation conducted beneath the jurisprudence of a single State. It means a navigation which, when carried on on the lakes, is not the coasting trade.

4. The navigation, to be "inland," must be upon waters themselves "inland." The great Western lakes are not such inland waters.

This is a question of commerce and of law, not of geography. Other waters exist upon the face of the globe, the precise parallel of the Western lakes in commercial and legal view, which certainly are not "inland." Therefore the Western lakes are not "inland."

The case of the Genesee Chief, (Fitzhugh *v.* the Genesee Chief, 12 How., 443,) which will be hereafter adverted to in a more important view, established the principle that the business of the Western lakes and their national position determined their commercial and legal character, and that the distinctions, convenient in England, of the rise and fall of the tide and the saltness of the water, had nothing to do with thus fixing that character. Excluding, therefore, once for all, these immaterial tests, the great Western lakes, when viewed in comparison with other waters, not only are not "inland," but are commercial and legal seas.

And, first, as to their not being inland, regarded in the suggested comparison.

The Baltic sea, with the Gulfs of Finland and Bothnia, form one chain of waters; the Mediterranean, the Adriatic, the sea of Marmora, and the Black sea, another, like the line of the great Western lakes. The Mediterranean long has been known as the "tideless sea," and was, beside, the "*mare internum*" of the Romans.

Edinburgh Review, Oct., 1857, "The Mediterranean."

Encyclopedia Britannica, "The Mediterranean."

The inlets to both these chains of waters are narrow. In other physical features they are like them. In commercial character they are identical with them. Classed by the geographers, in the loose language which so generalizes such waters, as easily to distinguish them from the great oceans, they are sometimes termed, (as the Western lakes themselves were termed by Chief Justice Taney, in the Genesee Chief case,) "inland seas." Yet would the navigation of these European waters, or of Hudson's Bay, or Long Island Sound, or of the Gulf of Mexico, be termed "inland," in the view in which they must be regarded in this case? To the communities which dwelt along the borders of the European seas, and maintained a commerce petty in comparison with that now upon the Western lakes, we owe the very foundations of that body of admiralty law, never devised or efficient with reference to an inland commerce. From such communities sprang the Rhodian law, the Consulat de la Mer, the Tables of Amalfi, the laws of Wisbuy, of Oleron, and the Hanse towns. There lived those early writers upon maritime law, to whom we now look for the practical exposition of questions arising with respect to a commerce upon our lakes, far more like their own than that carried on upon the high seas. Waters thus situated, over which was extended that body of admiralty law which never was applicable to an "inland" trade, certainly never were "inland."

The Twee Gebroeders, 3 C. Robinson, 336.

Our waters, their very parallel, in every physical, commercial, and legal feature, and over which the same body of laws (as was decided in the Genesee Chief case, from the very character of the waters) extends to day, equally are not "inland."

But, as has been said, these waters are commercial and legal seas, and therefore their navigation cannot be "inland." They are *extra fauces terræ*.

The Schooner Harriet, 1 Story R., 251, 259.

They are waters where, to adopt the language of Sir Matthew Hale, "a man may not discern from shore to shore."

De Port. Maris. Harg. Tracts, c. 4, p. 10.

Hawkins Pl. C., b. 2, c. 9, sec. 14.

U. S. *v.* Grush, 5 Mason, 290, 298.

They are not within the boundary of any county; and, within the definition of Lord Coke himself, are therefore not inland.

4 Inst., 140, c. 22.

2 East. P. C., c. 17, sec. 10.

Comyn's Dig. Admiralty E., 7.

De Loviot *v.* Boit, 2 Gallison, 398, 426, 427.

Waring *v.* Clark, 5 How., 441, 462.

They are bordered not only by the States constituting the United States, but by the province of a foreign nation. Their navigation is subject to all the hazards that attend that of the ocean. "Hostile fleets," to use the language of Chief Justice Taney in the Genesee Chief case, "have encountered upon them, and prizes have been made there." The same system of admiralty law applies to them as to the commerce of the remoter oceans. That commerce, as will hereafter be seen, is equally extensive with that of our foreign commerce itself.

It is repeated, there is not a characteristic (excluding the immaterial ones of the ebb and flow of the tide and the saltness of the water, excluded by the Genesee Chief case, and which in this view always would have been excluded—2 Peters's Ad. Decis., LXXI; Spelman Reliq. Adm. Juris., 226; 2 Hale, P. C., 16) belonging to the "high seas"—the "main sea" of Coke and Hale, and Selden and Blackstone, which does not belong to the Western lakes. How, then, can their navigation be termed inland? Would the navigation of such waters be termed inland, within the meaning of the statutes of Geo. II and Geo. III? Would the navigation of the waters of the "four seas," (Hargrave and Butler's Notes to Coke upon

Litt., L. 2, c. 8, sec. 157; Chitty on Commercial Law, 88—102) including St. George's channel or the Irish sea, be deemed "inland" by an English court, construing the language in question as used in the statutes of Geo. III?

5. Some minor considerations will show, in this connection, that such navigation cannot be called inland.

By the law of nations, exclusive national jurisdiction, for certain purposes, is established over at least a marine league from the coast.

1 Kent's Com., 27, 28.

The whole of Delaware bay has been determined to be within national jurisdiction.

Opinion of Edmund Randolph, Attorney General U. S., 1 Opinion Att. Gen., 13.

The navigation of none of these waters would be termed "inland;" yet it should be, if the Western lakes are "inland."

6. Regarding the language in question, then, beneath all the lights which can be thrown upon it, it must be determined that the navigation in question is not "inland." This, a single question, intelligently put and answered—put and answered with full comprehension of the meaning of all things relating to this commercial and legal subject—must determine "inland." Within what land do these waters lie? That question would hardly be put upon some of the ships and steamboats upon the Western lakes, with nothing in sight above the horizon, nor within many leagues, unless it might be other ships employed in commerce between different States and Provinces, and (through the Welland Canal, which, overcoming the natural obstacle of Niagara Falls, has thus given access to the high seas through those public means, which Sir Matthew Hale says—De Port. Maris, c. 3.—render waters thus opened to public trade, public waters,) with European kingdoms.

IV. The object of the law determines the fact that the navigation of the lakes is not "inland," within the meaning of the act.

1. In ascertaining the object of the law, the court cannot, in the language of Chief Justice Taney, in any degree, be influenced by the construction placed upon it by individual

members of Congress in the debates which took place on its passage. "We must gather the intention of Congress from the language used in the law, comparing it, where ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

Aldridge *v.* Williams, 3 Howard, 1, 24.

Bank of Penn. *v.* the Commonwealth, 7 (Harris) Penn. R., 144.

Southwark Bank *v.* the Commonwealth, 26 Penn. State R., 240.

2. In determining whether the objects of the law would necessarily make it apply to the navigation of the Western lakes, it is, of course, necessary to ascertain something of the extent of these waters, and of the commerce carried on upon them.

The area of the lakes is some 90,000 square miles, and the aggregate length of the lakes alone exceeds 1,500 miles.

Andrews's Rep. on Colonial and Lake Trade, communicated to the Senate Aug. 26, 1852.

The value of the property annually carried in the transactions of the lake commerce exceeds $600,000,000, (exceeding the total value of property exported and imported into the United States in its foreign trade.) It is conducted in more than 1,600 vessels, with an aggregate burden exceeding 400,000 tons.

Report of Com. on Commerce to H. of R., 1856, vol. 3, No. 316, pp. 9, 10, 11.

Report Hon. I. T. Hatch, Commissioner, &c., to H. of R., June 18, 1860.

The strictly foreign trade with Canada alone on the lakes exceeds $30,000,000 in amount, annually, making our strictly foreign commerce with Canada third in actual value, and first in the amount of tonnage employed, compared with our commerce with all the foreign countries with which we have any trade.

Report of Com. on Commerce, 1856, pp. 10, 12.

3. Considering, therefore, the undoubted objects of the act,

(Point First, II, 6,) the immediate cause which led to the passage of the act, the loss of the Lexington, running in the coasting trade, like the vessels on the Western lakes, (Point First, II, 8,) the extent of the waters on which this commerce is conducted, the extent and national importance of that commerce itself, it certainly must be apparent that the promotion of such a commerce must have been within the objects of the act.

V. Our whole system of statutory law in reference to the coasting trade establishes the fact that such a trade has never been regarded as "inland" in its character.

1. The whole system of these provisions is thus generally regarded.

2 Kent's Com., 599, 600.

Elliott *v.* Rossel, 10 J. R., 10, 11.

2. The whole spirit of express legislation on these subjects shows such to be the fact.

The ordinance of 1787 dedicates these waters as public highways to the commerce of the States, and says they "shall be common highways, and forever free, as well to the inhabitants of the Territory as to the citizens of the United States, and those of any other States which may be admitted into the Confederacy."

Ordinance 1787, 1 Stat. at L., 52, note.

The act of 1793 in respect to the enrollment of vessels, (1 Stat. at L., 307;) the act of 1831, conferring enlarged privileges upon enrolled vessels on the Northwestern frontier, (4 Stat. at L., 487;) the steamboat inspection acts of 1838 (5 Stat. at L., 305) and of 1852, (10 Stat. at L., 62;) the act of 1850, requiring transfers of vessels to be recorded, (9 Stat. at L., 440;) the act of 1845, giving the District Courts jurisdiction of admiralty cases, (5 Stat. at L., 726)—all evidently regard the coasting trade of the lakes as the same in character with that of the seaboard.

This act has been expressly held to apply to vessels employed in the coasting trade on the seaboard.

Watson *v.* Marks, 2d vol. Law Reg., 157, U. S. District Court, E. Dist. Pennsylvania.

Can any reason be discovered why it should not as well apply to a vessel enrolled and licensed under the same laws, and employed in the same trade, upon another "coast" (Champlain and W. L. R. R. Co. *v.* Valentine, 19 Barbour, 484) of the country?

When this act of 1851 was passed, all these laws—the law of 1845, conferring jurisdiction in admiralty cases on the lakes to the District Courts, as well as the others—were in force. Can it be supposed, that if it was the intent of Congress to exclude the commerce of the lakes from the operation of such a law, that intent, under all the circumstances, would not have been plainly expressed?

VI. Admiralty jurisdiction, it was held in the Genesee Chief case, extends over the Western lakes. They cannot, therefore, be "inland."

1. In the Genesee Chief case, the court held (in accordance with that opinion of Chief Justice Marshall, which he said was one of the most deliberate of his life—Van Santvoord's Lives of the Chief Justices, 444,) that admiralty jurisdiction extended over the great Western lakes, within the meaning of the phrase "admiralty and maritime jurisdiction" in the Constitution, (art. 3, sec. 2,) from the commercial and national character of those waters, and the character of the trade conducted upon them.

Fitzhugh *v.* the Genesee Chief, 12 Howard, 443.

The Chas. Mears, 1 Newberry, 197.

Woolrych's Law of Waters, (Law Library,) 62.

2. Admiralty jurisdiction was never held, and, regarding the remedies administered under it, never could have been held, to extend over "inland navigation."

1 Curtis's Juris. Courts U. S., 34, 48.

De Loviot *v.* Boit, 2 Gallison, 398, 436, 468, and authorities cited.

This may especially be said, under the recent decisions, that admiralty jurisdiction does not include matters relating to transactions taking place within the limits of a single State.

Allen *v.* Newbury, 21 How., 244.

Maguire *v.* Card, 21 How., 248.

3. It therefore may be claimed that the phrase "inland navigation" was advisedly, or at least fortunately, used in the act. Its use enables the act to be applied wherever it in principle should apply; that is, wherever admiralty jurisdiction extends.

How, it may be asked, would a decision of this court, that this act does not apply to the lakes, stand on principle, in comparison with the decision in the case of the Genesee Chief?

VII. Congress intended, by the phrase "inland navigation," simply to exclude from the operation of the act only such places as it could not, under the Constitution, exercise such power over.

1. Congress has no power, under the Constitution, to legislate as to the commerce carried on within the bounds of any one State.

Gibbons *v.* Ogden, 9 Wheaton, 1, 195.
Steamboat Co. *v.* Livingston, 3 Cowen, 713, 755.

The object of the concluding paragraph of sec. 7 of the act, therefore, doubtless is expressly to provide that the act shall not apply where Congress has no power to make it apply. Similar restrictive phrases are commonly used in statutes, *ex abundanti cautela.*

2. Congress has the constitutional power to exercise legislation over the Western lakes.

Fitzhugh *v.* the Genesee Chief, 12 How., 443.
See Point Third.

Therefore, as the act applies in all cases except where its own limitations provide it shall not apply, it must apply to those waters.

3. Had it been the intent of the act that it should not apply to any of the lakes, the words "rivers and lakes" would have been used. As it is, it uses the term "inland navigation," and so uses it in the meaning given it by the courts—the navigation of waters within the bounds of a single State over which Congress has no control.

Steamboat Co. *v.* Livingston, 3 Cow., 755.
Gibbons *v.* Ogden, 9 Wheaton, 194.

The steamboat James Morrison, 1 Newberry's Admiralty R., 241, 246.

4. Must this not be clearly so, when the act is considered under the rule that statutes which favor commerce are to be liberally construed, and those parts which restrict it must be strictly construed?

Sewell *v.* Jones, 9 Pick., 412, 414.

Must it not be clearly so, under the rule, that excepting clauses in a statute are always strictly construed? "For it is a maxim," says Justice Story, "in the interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall plainly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exceptions, must establish it as being within the words as well as the reasons thereof."

The U. S. *v.* Dickson, 15 Peters, 141, 165.

[The remaining points of *Mr. Hibbard's* argument are omitted, for want of room.]

Mr. Justice NELSON delivered the opinion of the court.

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

The suit was brought by the plaintiffs in the court below against the defendants, a company incorporated under the laws of New York, and owners of the steam propeller M. B. Spaulding.

The goods in question were put on board of the propeller at Buffalo, on the 30th October, 1856, for transportation to Detroit, and on the next day they took fire, and vessel and goods were entirely consumed, without any default or negligence of the master or crew, or any knowledge of the defendants, their officers or agents. The propeller was of more than twenty tons burden, and was enrolled and licensed for the coasting trade, and engaged in navigation and commerce, as a

common carrier, between ports and places in different States upon the lakes, and navigable waters connecting the same.

The defendants relied, in their defence, upon the act of Congress, passed March 3d, 1851, entitled "an act to limit the liability of ship owners, and for other purposes."

The 1st section provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please.

The 2d section provides against any liability of the owner of the vessel, in case of precious metals, &c., unless notice and entry on the bill of landing.

The 3d section provides against liability of the owner, in cases of embezzlement or loss, &c., by the master, officers, &c., of any property shipped on board, or for any loss by collision, &c., without the privity or knowledge of the owner, exceeding the value of his interest in the ship and freight.

The 4th section provides for an apportionment of the proceeds, in case of the sale of the vessel, among the several freighters or owners of the goods, if these and the freight should not be sufficient to pay each loss.

The 6th section saves the remedy against the master and hands, in case of embezzlement or loss, or for any negligence or malversation by these persons.

The 7th section, after providing a penalty for shipping oil of vitriol, and such dangerous materials, without notice to the master, is as follows: "This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

It is insisted, on the part of the plaintiffs, that the navigation of Lake Erie, and also of all the other lakes in connection therewith, is within the exception to this act, as falling within the words "inland navigation." The question thus raised is

not without difficulty, as we have no clear or certain guide to lead us to the true meaning attached to these words by Congress. Looking at them in a very general sense, and without much regard to the reasons or policy of the law, it may, with some plausibility, be urged, as has been on behalf of the plaintiffs, that the phrase "inland navigation" was used as contradistinguished from navigation upon the ocean; and that all vessels navigating waters within headlands, and after they have passed out of the ocean, come within the designation. But a construction thus broad can hardly be maintained, for it would be unreasonable to suppose that Congress intended to apply one rule of responsibility to the owner in respect to the same vessel upon the ocean, and another upon the bays or rivers, in the course of the same voyage. Besides the absence of any good reason for such a distinction as to the rule of responsibility, it would have seriously embarrassed all parties engaged in commerce of this description in respect to their securities against accidents, and losses by means of insurance, bills of lading, charter-parties, &c.

The connection in which this term "inland navigation" is used in the act, we think, may throw some light upon the intent of the law-makers.

It is declared, that the act shall not apply to the owner of any *canal-boat*, *barge*, or *lighter*, or to any vessel of any description used in rivers or inland navigation. It will be seen, that certain craft is excepted from the act *eo nomine*, and then a class of vessels without any designation, other than by a reference to the waters or locality in which used. But the character of the craft enumerated may well serve to indicate to some extent, and with some reason, the class of vessels in the mind of the law-makers, which are designated by the place where employed. This class may well be regarded *ejusdem generis*, and thus aid us in interpreting the true meaning of the words of the act, namely, vessels "used in rivers or inland navigation."

Many of the provisions of this act were taken from the 53 Geo. 3, c. 159, as also the exception to the enacting clause. The exception in the English act is as follows: that nothing

in this act shall extend to the owner of any "lighter, barge, boat, or vessel of any description whatsoever, used solely in rivers or inland navigation."

The language of this exception is more specific than that used in ours; but the meaning intended to be conveyed, we think substantially the same. The words in ours are, "any vessel of any description whatsoever, USED in rivers or inland navigation." This word *used* means, in the connection found, *employed*, and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in rivers or inland navigation. It was this species of navigation—that is, on rivers and inland—which was intended to be withdrawn from the limitation of the liability of the owner; and the addition of the term "inland navigation," as an alternative to rivers, was doubtless designed, speaking in a general sense, to embrace all internal waters, either connected with rivers, but which did not, in a geographical or popular sense, fall under that name, or which might not be connected with rivers, but fell within the reason or policy of the exception, such as bays, inlets, straits, &c. Vessels, whatever may be their class or description, solely employed upon these waters, are usually employed in the trade and traffic of the localities, carried on chiefly by persons residing upon their borders, and connected with the local business, and without the formalities and precautions observed in regular commercial pursuits, with a view to guard against accidents and losses, such as insurance, bills of lading, &c. It was fit and proper, therefore, in this description of trade and traffic, that the common-law liabilities of the carrier should remain unaltered.

But the business upon the great lakes lying upon our Northern frontiers, carried on between the States, and with the foreign nation with which they are connected, (and this is the only business which Congress can regulate, or with which we are dealing,) is of a very different character. They form a boundary between this foreign country and the United States for a distance of some twelve hundred miles, and are of an average width of at least one hundred miles; and this, without including Lake Michigan, of itself three hundred and fifty

miles in length, and ninety in breadth, which lies wholly within the United States. The aggregate length of these lakes is over fifteen hundred miles, and the area covered by their waters is said to be some ninety thousand square miles. The commerce upon them corresponds with their magnitude.

According to the best official statistics, the value of the property annually, the subject of this commerce, exceeds $600,000,000, employing more than sixteen hundred vessels, with an aggregate tonnage exceeding four hundred thousand tons. These vessels are duly licensed for the foreign trade, as well as for that carried on coastwise. This commerce, from its magnitude, and the well-known perils incident to the lake navigation, deserves to be placed on the footing of commerce on the ocean; and, we think, in view of it, Congress could not have classed it with the business upon rivers, or inland navigation, in the sense in which we understand these terms.

These lakes are usually designated by public men and jurists, when speaking of them, as great inland waters, inland seas, or great lakes; and, if Congress intended to have excluded them from the limitation of the liabilities of owners, it would have been most natural and reasonable, and, indeed, almost a matter of course, to have referred to them by a more specific designation.

The decision in the case of the Lexington, which was burned upon Long Island Sound, led to this act of 1851. That case was decided in 1848, subjecting the carrier in case of a loss by fire. (6 How., 344.)

The Sound is but one hundred and ten miles in length, and from two to twenty in breadth.

The waters of these lakes, in the aggregate, exceed those of the Baltic, the Caspian, or the Black sea, and approach in magnitude those of the Mediterranean. They exceed those of the Red sea, the North sea or German ocean, the sea of Marmora, and of Azoff. And, like the lakes, all of these seas, with the exception of the North sea, are tideless. The marine disasters upon these lakes, in consequence of the few natural harbors for the shelter of vessels, and the consequent losses of life and property, are immense. According to the

report of a committee in the House of Representatives in 1856, the destruction of property upon Lake Michigan in the year 1855 exceeded $1,000,000. The appalling destruction of life in the loss of the Erie upon Lake Erie, and of the Superior and Lady Elgin upon Michigan, are still fresh in the recollections of the country. The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers, &c., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight.

It has been suggested that our construction of the act may embrace within the limitation of the liability of the owners Western lakes lying within a State, such as the Cayuga, Seneca, and the like. But the answer is, that commerce upon these lakes, and all others similarly situated, is not within the regulation of Congress. The act can apply to vessels only which are engaged in foreign commerce, and commerce between the States. The purely internal commerce and navigation of a State is exclusively under State regulation.

We think the court below was right, and that the judgment should be affirmed.

Mr. Justice CATRON dissenting.

By the common law of England ship owners were common carriers, and insurers against loss, of the goods shipped, without limitation as to the waters upon which the ships were navigated. Abbott on Shipping, 395. In the United States the same law governed. 2 Kent's Com., 599. N. J. S. Nav. Co. *v.* Merchants' Bank, 6 How., 334. In parts of continental Europe the law was different. The preamble of the British

act of 7 Geo. 3d, declares, "that it was of the greatest consequence and importance to the kingdom to promote and increase the number of ships and vessels, and to prevent any discouragement to merchants, and others, from being interested and concerned therein." The object of the British legislation was "to encourage persons to become owners of ships." By the act of Geo. 2d, and others, the Parliament exempted ship owners from liability in several cases of loss, and among them, loss by fire. That these laws applied to commerce on the ocean, is not controverted. Nor are they in force on the great lakes, partly belonging to Great Britain, on this continent.

Our act of Congress of March 3, 1851, was passed to put our commercial marine on an equal footing with that of Great Britain; so that the increase of the number of ships, and the navigation of them, might be equally encouraged. That *competition* with British shipping was the object of Congress, is manifest to my mind from the fact that the provisions of our statute correspond to British statutes. As there was no competition on our lakes, great or small, there was no reason for exempting owners of vessels from liability; and especially, for the reason that a vessel navigating a lake from one port to another, in the same State, is not within the act; as Congress could only legislate by force of the commercial power, and regulate commerce among the States. The act of 1851 does not in terms, nor by any fair intendment, as I think, attempt to regulate such internal commerce. Fearing, however, that it might be held to apply to actual navigation, an exception was appended to the act, declaring that it should not apply to owners of canal boats, nor to lighters or barges, This description of vessels were brought into, or used, in harbors and bays; and these being arms of the sea might be held as coming within the provisions of the act of Congress, the commerce they were engaged in being connected with that on the ocean. The commerce on the Chesapeake, through the tide-water canal, into the Delaware, by vessels propelled by steam, and the commerce carried on through the Hudson, into New York harbor, by canal boats and barges, shows the

reason why the exception was made, as respects this class of vessels.

And then comes the exception, of vessels that had no connection with commerce on the ocean, which declares, that the act shall not apply to any vessel, of any description whatsoever, used in rivers, or used in inland navigation. Why should navigation on the Mississippi and the St. Lawrence be governed by one law, and the great lakes, Green bay, Lake Champlain, Great Salt lake, Utah lake, and many others, by another rule of liability? Congress has made no such distinction; but on the contrary, every section and clause of the act of 1851 refer to losses happening on, or to vessels navigating, the ocean. The third section is especially significant of this conclusion.

What the expression, "inland navigation," means, must be ascertained from the geography of our own country, and the commerce carried on by vessels on its waters. Lake Erie is inland, and a voyage from Buffalo to Detroit is, in my judgment, "inland navigation." I am, therefore, of the opinion that the judgment should be reversed.

BRADDOCK JONES, PLAINTIFF IN ERROR, *v.* JAMES G. SOULARD.

The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: from the Sugar loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned."

This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream.

This rule, so well established as to fresh-water rivers generally, is not varied by the circumstance that the Mississippi, at St. Louis, is a great and public water-course. The rule with respect to tide-water rivers, where the tide ebbs and flows, does not apply to the present case.

Therefore, Duncan's island, upon which was the land in dispute, and which became connected with the shore as fast land, was included in a grant made by Congress, in 1812, to the town of St. Louis, for the public schools; and it neither passed to the State of Missouri by her admission into the Union, in 1820, nor by the act of Congress passed in 1851.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri.

It was an action of ejectment brought by Soulard, a citizen of Illinois, against Jones, a citizen of Missouri, to recover a parcel of ground lying in the city of St. Louis, in Missouri, described as the northern half of United States survey four hundred and four of the St. Louis series of school lands. In finding a verdict for the plaintiff, the jury described the property as so much of the northern half of the United States survey 404 of the St. Louis series of school lands as is contained in the St. Louis city block 873.

In the course of the trial below it was admitted that the plaintiff had in him all the title to the land that was vested in the schools under the acts and proceedings which will be presently mentioned; and that the defendant, who was in possession, had in him all the title that was vested in the city of St. Louis and Robert Duncan, under his pre-emption entry.

As to the description of the property, it was further admitted that on the 13th of June, 1812, there was a naked sand-bar in the Mississippi river, near St. Louis, which was, at that time, surrounded on all sides by fresh water, navigable, in fact, for the craft usually navigating said river, but many miles above the influence of the ebb and flow of the tide, and was covered by ordinary high water when the river was within its banks, and that it continued to be such a bar, and unfit for cultivation, until after Missouri was admitted into the Union; that the premises in dispute were part of an island called Duncan's island, which was formed from said sand-bar, after Missouri was admitted into the Union; and that they lie, and always did lie, west of the main channel of the Mississippi river, and within township 45 north, range 7 east of the 5th principal meridian, and are also within the assignment to the schools, and the out-boundary directed to be run by the 1st section of the act of 13th June, 1812, provided that that boundary is to be construed as extending to the middle of the main channel of the Mississippi river; that said premises are also within Duncan's pre-emption entry aforesaid; and that the island is now connected with the Missouri shore by the filling up of the

intervening channel, brought about by dikes constructed by the city of St. Louis since the year 1840.

It was proved that the premises in the possession of said defendant were worth three thousand dollars.

As the plaintiff below claimed under the schools, and the principal question in the case was, whether or not the land assigned to the schools extended into the river so as to make the middle of the channel the eastern boundary thereof, it is necessary to state the title more particularly.

In 1809, the town of St. Louis was incorporated by an order of the Court of Common Pleas for the district of Louisiana. Its eastern boundary was the river Mississippi.

On the 13th of June, 1812, Congress passed an act confirming the titles of the inhabitants of out lots, village lots, &c., which were to be surveyed; and enacting, further, "that all town or village lots, out lots, or common field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid."

As the property in question was not rightfully owned or claimed by any private individual, or held as commons, or reserved by the President, of course it fell within the reserving clause, provided the legal boundaries included it.

On the 26th May, 1824, an act was passed directing the surveyor general to survey, designate, and set apart, the vacant lots for the support of schools mentioned in the act of 1812. This survey was not executed until 1856, and the report of the surveyor general stated that the property in question was within the limits of the town of St. Louis, as it stood incorporated on the 13th of June, 1812.

In 1831, Congress passed an act on the 27th of January, relinquishing all their right, title, and interest, in and to the town and village lots, out lots, and common field lots, in the State of Missouri, reserved for the support of schools, to be sold and disposed of, or regulated for the above purposes, in

such manner as may be directed by the Legislature of said State.

In execution of the above power, the Legislature of Missouri passed an act on the 13th of February, 1833, creating a school corporation. By it all free persons residing in St. Louis were erected into a corporation, who were directed to take possession of all the lots which had been reserved for school purposes, the title to which was vested in the corporation.

It has been before stated that it was admitted, on the trial below, that all this title was vested in Soulard, the plaintiff in the ejectment.

The defendant claimed title under the following heads:

1. An entry made by Robert Duncan, in 1835, including the premises in controversy, but which had been cancelled by the Commissioner of the General Land Office, as having been made in violation of law.

2. Under an act of the Legislature of Missouri, passed in 1851, transferring the title of the State to two islands in the Mississippi river, in the county of St. Louis—one called and known as Duncan's island, (on which are the premises in controversy,) situated, &c.—to the city of St. Louis. The defendant below had, in himself, the whole of this title.

After the evidence was concluded upon both sides, the Circuit Court gave to the jury the following instructions, viz:

"The jury is instructed that if the land in controversy be within the Congressional township 45 north, of range 7 east, west of the middle of the main channel of the Mississippi river, and bounded on the west by the United States survey number 1,333, then it is within the out-boundary directed, by the 1st section of the act of 13th June, 1812, to be run for St. Louis; and the assignment of the schools read in evidence, the deed of the schools to H. G., B. A., and J. G. Soulard, and the lease of the said H. G. and B. A. Soulard, taken in connection with the acts of Congress of June 13, 1812, the act of 26th May, 1824, and the act of 27th January, 1831, and the act of the 13th February, 1833, of the Legislature of Missouri, vest in the plaintiff the legal title to the northern half of the survey 404; and, if the defendants were in possession

of said premises at the commencement of this suit, the jury must find for the plaintiff."

To the giving of which the defendant objected; but the court overruled the objection, and gave the instruction, to which opinion the defendant then and there excepted. And thereupon the defendant moved the court for the following instructions, viz:

"If, as early as the 13th of June, 1812, the land sued for was at low water only a naked bar in the Mississippi river, near St. Louis, surrounded on all sides by navigable water, and covered at ordinary high water, when the river was within its banks, and continued to be such a bar, unfit for cultivation, at the time Missouri became a sovereign State, then the plaintiff cannot recover upon the title he has shown in evidence."

Which the court refused to give, and to which opinion of the court the defendant then and there excepted.

Upon these two exceptions the case came up to this court.

It was argued by *Mr. Garesché* for the plaintiff in error, with whom was *Mr. Montgomery Blair*, and by *Mr. Garett* for the defendant in error, upon printed arguments.

The counsel for the plaintiff in error laid down the following propositions, viz:

1. That the town of St. Louis, as the same stood incorporated on the 13th June, 1812, did not extend to the middle of the main channel of the Mississippi river, as its eastern boundary, but only to high-water mark on its right bank.

2. Even if it did so extend, yet, at most, the land in controversy was but reserved for the support of schools, not actually granted for that purpose, and upon the admission of the State of Missouri, in 1820, it became the property of the State.

3. That the first direct grant of this land by the State was made by the act of 3d March, 1851, under which plaintiff in error claims.

The general proposition first laid down depends on the correctness of the following argument, viz: The limit of

private ownership on water-courses, when these are navigable in law, or arms of the sea, is high-water mark; and such rivers as the Ohio and Mississippi are of the same nature and dignity at law, above tide-water, as ordinary rivers below the flow of the tide.

It will not be denied, that when land is bounded by a tide-water river, the limit of private property is the mark to which high tide ascends. This is the point to which the sea flows, and, whether on the seashore or in the arms of the sea, it divides the King's or the State's domain from that of the individual.

The second branch of this first general proposition is more debatable. The plaintiff in error will argue it as follows: Arms of the sea or rivers, as far as the tide ebbs and flows, are navigable waters in England; and no waters are navigable in that country except tide-waters. Above the ebb and flow of the tide, no river of England is navigable at all. In inquiring into the definition of navigable streams in that country, therefore, it was found that they were correctly described to be those in which the tide ebbed and flowed. But navigability is the principal thing; the flowing of the tide is a mere incident. When, therefore, we find that there are navigable waters in America, or elsewhere, not flowed by the tide, we seek other definitions of navigable water, the flowing of the tide being no longer a test. Whatever be the new definition, we attach to navigable waters here the same consequences, properties, and incidents, that the jurists of England attached to navigable waters in that country. In other words, we treat our Western inland rivers in the same manner, and claim for them and the land bordering on them the same legal consequences, that are predicable of arms of the sea, properly so called, in England.

Upon the soundness of these positions the argument for plaintiff in error wholly depends.

That no rivers in England are navigable above tide-water is well settled. It is so declared in 12 How., 454, Genesee Chief *v.* Fitzhugh et al. The words of the court are: "In England, undoubtedly, the writers upon the subject, and the decisions

in its courts of admiralty, always speak of the jurisdiction as confined to tide-water; and this definition, in England, was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide. * * * In England, therefore, tide-water and navigable water are synonymous terms."

It is unnecessary to go beyond this. It will be taken for granted in all the residue of this argument, that this proposition is established beyond challenge.

In the same decision it was declared in the most solemn and emphatic manner that such a definition was inapplicable to the rivers and lakes of America, and that these were public navigable waters. (P. 454.)

This being settled, it is difficult to resist the conclusion that they have all the properties of public navigable waters, such as the sea, and its arms which are flowed by the tide; which last is declared to be an immaterial circumstance, and by no means an essential feature of navigability. (*Id. ibid.*)

If this be conceded, the case of the defendant in error is at an end, for one of the properties of arms of the sea is not to be the subject of private ownership below high-water mark. Arms of the sea do not belong to the owners of the adjacent soil; and when a man owns land bounded on a river flowed by the tide, his land is limited by the mark of high water, and does not go to the *medium filum aquæ.*

This view of the subject is supported by the following most respectable authorities, viz:

Pennsylvania—7 Barr., Naylor *v.* Ingersoll; 1 Penn. Rep., 105; 2 Binney, 475, Carson *v.* Blazer; 14 Serg. and Rawle, 71—74; 8 Watts, 434; 9 Watts, 228.

North Carolina—2 Devereux, 30—36.

Tennessee—6 Humphrey, 358, Elder *v.* Burrows.

Iowa—3 Iowa Rep., 1, McManus *v.* Carmichael; 4 Iowa Rep., 199, Haight *v.* City of Keokuk.

Michigan—1 Walker Ch., 155.

Alabama—2 Porter, 436, Bullock *v.* Wilson.

But the plaintiff in error is free to confess that in some of the other States of the Union, perhaps in a majority of them, a

contrary doctrine has been laid down, and that the decisions of the State of Missouri, and of the Supreme Court of the United States, may be cited in opposition to the views which it is the duty of the plaintiff in error to enforce.

It is imagined that peculiar stress will be laid upon those cases to be found in the Missouri Reports which conflict with the doctrine contended for by the plaintiff in error. But it is believed that but little weight is due to these Missouri decisions, for in all of them the matter seems to have passed without serious dispute or discussion. There is no evidence that the matter was argued at the hearing, and it is almost certain that the points now made were not presented to the court on those occasions. If they were, they received no attention. Under these circumstances, it is submitted that this court should consider itself free to consider the case as of the first impression, so far as the decisions of the Supreme Court of Missouri are concerned.

As to the decision of this court in the case of Howard *v.* Ingersoll, 13 How., 416—422, the point covered by this dictum was not necessarily decided, and so what fell from the court on that occasion was *obiter dictum.*

If the decisions of the Supreme Court of Missouri be not regarded as binding, and those of this court be not considered applicable to the matter in hand, there can be no occasion to notice those cases which may be quoted from other States, no matter what degree of appositeness may be claimed for them.

[The argument of the counsel upon the second point, viz: that the State of Missouri, upon her admission into the Union in 1820, became entitled to this navigable water, under the decision of this court in the case of Pollard's Lessee *v.* Hagan, in 3 Howard, 212, is omitted.]

Mr. Garett, the counsel for the defendant in error, submitted the following propositions, viz:

1. The documents read in evidence by the plaintiff below are conclusive in favor of the plaintiff against any one not having a better title under the United States to the premises in controversy.

2. The land within the assignment and survey 404 is, as a proposition of fact, admitted to be in T. 45, R. 7 E., in St. Louis county, and to be within the reservation for the schools by the second section of the act of 13th June, 1812; *provided*, that the eastern boundary of the town of St. Louis, as then incorporated, was the middle of the main channel of the Mississippi river. But is the middle of this channel that eastern boundary, as a proposition of law?

3. If it was within this reservation, the title passed to the school corporation by the several acts and documents read in evidence by plaintiff, whether, upon the admission of Missouri as a State, the proprietary right to the premises in controversy was continued in the United States, or transferred to the State of Missouri.

Upon the first proposition, it is not intended to do more than refer to the case of Kissell *v.* the Schools, 18 Howard's Rep., 19, where this matter was carefully considered, and where the very pre-emption of Duncan, which is set up as one of the defences in this action, was pronounced to be a nullity.

The examination of the second proposition brings up the inquiry, whether the eastern boundary of the town of St. Louis, as it stood incorporated at the date of the act of 13th June, 1812, was the middle of the main channel of the Mississippi river; and whether the out-boundary, run by the surveyor general in 1840, had for its eastern boundary the middle of the main channel of the Mississippi river.

The words used in each case are substantially the same. But inasmuch as the out-boundary directed to be run by the first section of the act quoted was to be the "out-boundary line of the town," and was to be run so as "to include the out-lots, common field lots, and commons," it follows that this out-boundary line must contain at least all the land embraced within the *town*, or the *out-lots*, or *common field lots*, or *commons* of the town, besides such other pieces or tracts of land as might be included within this continuous out-boundary, though not belonging strictly to any of these denominations.

Coming, then, to the description of the town, as it stood incorporated in 1812, we find that the calls are: "*thence due east*

to the Mississippi; from thence by the Mississippi to the place first mentioned."

This is the description of an incorporated town which is bounded on the east by the Mississippi river. That this description is, in every legal sense, equivalent to a call for the middle of the main channel of the stream, is one of those propositions which, to use the language of Judge Cowen, in his learned note to Ex parte Jennings, 6 Cowen's Rep., 518—543, "no lawyer will hazard his reputation by controverting." In the same note, he remarks that "the only question which can generally arise between the citizens and the State as to the ownership of rivers above the tide is, whether the former be the owner of the soil adjacent, within the meaning of Hale." (P. 543.)

In the case at bar there can be no question of this kind, for (see 18 How., 19) the schools are the owners of all the unappropriated land, within a survey of which—whether we adopt the description of the town of St. Louis, as it stood incorporated in June, 1812, or of the out-boundary of the town, "run so as to include the out-lots, common lots, and commons"—we find the Mississippi river designated as the eastern boundary. The only inquiry is, does this boundary carry us to the middle of the stream? In Judge Cowen's opinion, it requires a hardy man to dispute this, and certainly the weight of authority on this subject is overwhelming.

At the trial in the Circuit Court the following points were made and argued for the defendant in that court, now plaintiff in error, viz:

1. That the town of St. Louis, as the same stood incorporated on the 13th June, 1812, did not extend to the middle of the main channel of the Mississippi river as its eastern boundary, but only to high-water mark on the right bank of that stream.

2. Even if it did so extend, yet, at most, the land in controversy was only reserved for the support of schools, not actually granted for that purpose; and, upon the admission of the State of Missouri into the Union in 1820, it became the property of the State.

3. That the first direct grant of this land by the State was made by the act of March 3d, 1851, under which plaintiff in error claims.

These propositions asserted that, in the United States, a public river, navigable, in fact, though above the tide, was, *ipso facto*, subject to all the legal incidents of what are properly called "arms of the sea," or creeks and rivers flowed by the tide. This was the main position of the plaintiff in error (defendant in the court below) in the Circuit Court, and it is presumed that the same argument will be repeated here.

The defendant in error maintains that the doctrine of Sir Matthew Hale on this subject has been adopted, in all its integrity, by the judicial mind of America. He will first examine those decisions on the subject which have been made by the courts of the several States, and will then consider whether any modification of the rule thus established has been made necessary by opinions which have fallen from this court.

As the land in question lies in Missouri, we naturally look, in the first instance, to the decisions of that State to ascertain the rule by which controversies respecting land titles are to be determined.

The first decision bearing on this point occurs in 4 Mo. R., 343, O'Fallon *v.* Price. It was followed by the case of Shelton *v.* Maupin, 16 Mo., 124. Then came the case of Smith et al. *v.* the City of St. Louis, 21 Mo. Rep., 36; and the case of Smith et al. *v.* Kelly et al., not yet reported, decided at the March Term, 1860.

In all these cases, the common-law rule laid down by Hale, and referred to by Cowen, was quietly adopted by the court, and, indeed, does not seem to have been gravely questioned by the bar. The only question supposed to present any difficulty was the point which Judge Cowen states as giving rise to all the doubt on this subject which a lawyer *can* entertain, viz: whether the person claiming to the centre of the stream was, in truth, a riparian owner. The consequences following from the ownership of the shore were treated as being so plain as to require neither illustration nor argument.

When this question has come up, incidentally or directly, before this court, it has been treated as a settled matter. See 13 Howard's Reports, in the case of Howard *v.* Ingersoll, 416, (Judge Wayne's opinion,) and 422, (Judge Nelson's opinion;) see, also, 18 How., 150, Jones et al. *v.* Johnston. These are the latest opinions in which a reference to this principle is to be found. It had been repeatedly spoken of in like manner in earlier cases.

After referring to the decisions of the courts of Missouri and of the United States, it would seem unnecessary, in respect of the title to land in Missouri, to speak of the decisions of other States. Nevertheless, a brief citation of cases decided in the different States, all agreeing with the doctrine of Sir Matthew Hale, may not be inappropriate. All the cases which are now quoted come fully up to the ground taken by the defendant in error, viz:

Maine—Brown *v.* Chadbourne, 31 Maine Rep., 9.

Massachusetts—Storer *v.* Freeman, 6 Mass., 439; King *v.* King, 7 Mass., 496; Lunt *v.* Holland, 14 Mass., 149; Hatch *v.* Dwight, 17 Mass., 289.

New Hampshire—2 New Hampshire Rep., 369, Claremont *v.* Carleton; 11 New Hampshire Rep., 531, Greenleaf *v.* Kilton.

Connecticut—2 Conn. Rep., 483, Adams *v.* Pease; 6 Conn. Rep., 471, Warner *v.* Southworth.

New York—3 Caine's Rep., 307, Palmer *v.* Mulligan; 17 Johns. Rep., 195, People *v.* Platt; 20 Johns. Rep., 90, Hooker *v.* Cummings; 6 Cowen, 518, Ex parte Jennings; more than a dozen cases were decided afterwards in New York in which this principle is recognised, but all refer to this case and to Judge Cowen's valuable note. See 5 Paige, 137; 5 Paige, 547; 5 Wend., 447; 13 Wend., 358; 17 Wend., 571; 20 Wend., 111; 22 Wend., 425; 26 Wend., 404, &c., &c.

New Jersey—1 Halsted's Rep., 1, Arnold *v.* Munday; 3 Zabriskie, 624.

Maryland—5 Harr. and J., 195, Brown *v.* Kennedy.

Virginia—1 Rand. Rep., 417, Hays's Ex. *v.* Bowman.

North Carolina—Taylor's Rep., 84, (top paging,) 136, (side paging,) Hammond *v.* McGlaughlin.

Alabama—8 Porter, 9, Hagan et al. *v.* Campbell & Cleveland.

Georgia—6 Georgia Rep., 141, Young et al. *v.* Harrison et al.; 18 Georgia Rep., 539, Jones *v.* Water Lot Co., Columbus.

Mississippi—3 Smedes and Marshall, 366, Morgan et al. *v.* Reading.

Louisiana—6 Martin, 216, Morgan *v.* Livingston; 18 Louis. R., 122, Municipality No. 2 *v.* Cotton Press Co., Id. 278.

Tennessee—3 Swan, 9, Stuart *v.* Clark's Lessee, (overruling Elder *v.* Burrows, 6 Humphrey, 358.)

Illinois—3 Scammon, 510, Middleton *v.* Pritchard.

Michigan—8 Michigan Rep., (unpublished,) Lorman *v.* Benson.

Wisconsin—2 Wisconsin Rep., 308, Jones *v.* Pettibone.

Ohio—3 Ohio Rep., 495, Young *v.* McEntyre; 11 Ohio Rep., 138; 16 Ohio Rep., 540.

At the trial in the Circuit Court, the defendant (now plaintiff in error) cited, among other authorities to support his views, cases from the Supreme Courts of Tennessee, Alabama, and Michigan, being 6 Humphreys, 358; 2 Porter, 436; and 1 Walker Ch. Rep., 155, respectively.

The case in 6 Humphreys is overruled by that in 3 Swan, 9; and though the cases cited from Alabama and Michigan cannot be so distinctly said to have been overruled by the later cases of 8 Porter, 9, and Lorman *v.* Benson, (which will be found in 8 Michigan Rep. when published,) it is only because the previous decisions of those States were not as supposed by plaintiff in error; no previous decision needed to be overruled in those States. The cases cited from those States by defendant in error are unambiguous, and directly in his favor. He has been careful not to cite from any State any case which was not in point. All those which he has collated are precise, and establish, without any variation, that the bed of a fresh-water stream, or of a river above tide-water, be-

longs to the owner of the adjacent soil, and that this holds good whether the portion of the bed which is in question be navigable in fact or not; the only consequence of the stream admitting of navigation above tide-water being, that the proprietary right of the owner of the adjacent soil is subject to the public easement, or servitude, as it is called by Sir Matthew Hale. It is merely repeating the same idea, in almost the same words, to say that, when a piece of land is bounded by a river above tide-water, the middle of the main channel—*filum aquæ*—is the precise line of the boundary; and, therefore, the town of St. Louis, as it stood incorporated on the 13th of June, 1812, was bounded on the east by the middle of the main channel of the Mississippi river. It is admitted that if this were so, then the premises in controversy were within the town, and within the reservation of the second section of the act of Congress of that date.

It is scarcely important to fortify a position so abundantly strong; but it may not be inappropriate to refer to the fact that the first charter of St. Louis, passed by the State Legislature directly, without the intervention of a court, expressly calls for the middle of the main channel of the river as the eastern boundary of the corporate limits of the city, and this expression is to be found in all subsequent amendments to the charter. The words of the first section of the act of December 9, 1822, (which is the first charter granted directly by the Legislature,) are as follows: "Sec. 1. That all that district of country contained within the following limits, to wit: Beginning at a point in the middle of the main channel of the Mississippi river, due east of the southern end of a bridge across Mill creek at the lower end of the town of St. Louis; thence due west to a point at which the western line of Seventh street, extended southwardly, will intersect the same; thence northwardly along the western line of Seventh street, and continuing that course to a point due west of the northern line of Roy's tower; thence due east to the middle of the main channel of the river Mississippi; thence with the middle of the main channel of the said river to the beginning, shall be and is hereby erected into a city, by the name of the city of

St. Louis." This may be regarded as the more explicit declaration of the character and position of the eastern boundary, which the Legislature saw fit to give, instead of using the expression which had previously been used by the Court of Common Pleas on the same subject, which, to a lawyer, however, would convey precisely the same meaning.

In the Circuit Court, it was gravely stated, as a geographical truth, that in England no river was navigable, in fact, above tide-water, so as to be capable of being a public stream above that limit. Hence, (it was argued,) the point to which the tide flowed being the limit of navigability, tide-water and navigable water became convertible terms in that country, the one meaning in every respect the same thing as the other, and having all the legal incidents of the other. But the inland navigable waters of the United States being recognised as subject to the admiralty jurisdiction of its courts, (12 How., 450, Fitzhugh *v.* Genesee et al.,) and it having been decided (3 How., 212, Pollard's Lessee *v.* Hagan) that the ownership of all lands covered by tide-water within the limits of any State, and undisposed of by the United States, becomes vested in the State upon its admission into the Union; therefore, the bed of every fresh-water stream which is deep enough at its ordinary stage to float any of the boats or vessels which are used in commerce, no matter how far above the influence of the tide, becomes the property of the State on its admission into the Union, and the owner of land adjacent to such stream is bounded by high-water mark. Such was, in substance, the argument of the defendant below.

It is submitted, that nothing but a singular confusion of the senses in which the same word is used, in two distinct propositions, together with a total ignoring of the physical truths which underlie the whole learning upon this important subject, could have led those who labor under the geographical mistake above-mentioned into the adoption of the startling conclusion for which the plaintiff in error contends.

In the first place, it is far from being true that all the rivers of England are unfit for navigation above tide-water, and are not public rivers above that point. On the contrary, the

citations presently to be made from Hale's Treatise, "De Jure Maris et Brachiorum Ejusdem," show that the distinction between rivers navigable, in fact, above tide-water, and rivers navigable in the proper, legal sense, as being arms of the sea, was just as familiar to Hale as to the American jurist; and that it was in full view of the truth that rivers might be and were used by the public as common highways, above tide-water, that the doctrines "which," as Judge Cowen says in his note to 6 Cowen's Rep., 543, "at this day, no lawyer will hazard his reputation by controverting," were laid down in the first instance by English courts, and have since then been adopted with so much uniformity by the bench and bar of America. In the second place, it is a complete missing not only of the spirit but of the letter of the two decisions quoted from 3 How. and 12 How., respectively, to suppose that they give any countenance to the conclusions announced and contended for by plaintiff in error.

By reference to the decisions of the Supreme Court of the United States since Pollard *v.* Hagan, it will be seen, that while the doctrine of that case has been repeatedly reaffirmed, scrupulous care has been used to restate that doctrine as it was in the first place laid down, and to limit the decision by the circumstances under which it was made, viz: that land flowed by the sea at ordinary high tide, if not previously disposed of by the United States, became the property of the State on its admission to the Union. This careful reference to tide-water, (9 How., 471; 18 How., 71—74,) and the distinction, taken as lately as 13 How., 416, 422, between fresh-water streams and the arms of the sea, properly so called, are abundantly sufficient to show, if illustration were needed, the accuracy with which the doctrine declared in Pollard's Lessee *v.* Hagan was adapted to the particular facts of that case, and how little it was the purpose of this court to leave any one at liberty first to misconstrue and then misapply the decision in that cause. It will presently appear how little assistance, nay, what absolute refutation of these notions, the decision of Pollard's Lessee *v.* Hagan actually furnishes; but it will first be shown how inattentive the plaintiff in error has been to

the physical reasons underlying this legal question; how careless he has been, in his search after loose and imperfect analogies, to discriminate as to the essential and controlling facts out of which all true analogies spring, and to note the differences of circumstances which annihilate the "parity of reason" on which he endeavors to found himself.

The use which plaintiff in error has attempted to make of some expressions to be found in the opinion of the court in 12 How., 443, and other cases, affords a good illustration of the soundness and wisdom of the rules laid down respecting the unauthorized application of words used in one particular sense, to a purpose, or a subject, or circumstances, entirely different. The rule on this point is well settled. It is to confine a dictum to the particular circumstances of the case in which it was spoken. "What was said by my brother Ashhurst," (said Lord Kenyon, 5 D. and E., 7,) "in the case of Barry *v.* Rush, respecting the admission of assets, must be taken to refer to the particular case then under discussion, but ought not to be extended further."

Lord Ellenborough said, (3 East., 123,) "general language used by the court in giving their opinions in any case must always be understood with reference to the subject-matter then before them."

Sir James Mansfield (5 Taunt., 162) used language still stronger; and in 9 Bing., 168; 2 Barn. and Ad., 124; 3 Ball and B., 286; and in numerous other cases, the same rule of common sense and of law is inculcated. Reference to American cases on this subject would extend the quotations beyond limits, and these are omitted, not because they do not exist, but because they are needless.

What, then, were the circumstances under which the remarks, from which plaintiff in error endeavors to deduce his theory, were used by the court in the case of 12 How., above referred to? The question under examination was the extent of the admiralty jurisdiction of the United States judiciary. It had been repeatedly laid down before, (see Waring et al. *v.* Clark, 12 How., 441, and cases there cited,) that the English rule, which excluded the jurisdiction of their courts of ad-

miralty in all cases arising *infra fauces terræ*, or within the body of a country, as opposed to the high seas, was of no application in this country. In the case of 12 How., 454, it was observed that courts of admiralty had been found necessary in all commercial countries, not only for the safety and convenience of commerce and the speedy decision of controversies, where delay would be ruin, but also to administer the laws of nations in a season of war; and that it would be subjecting the States bordering on the great lakes and drained by the great rivers of the Northwest to great hardship and inequality, if the commerce on those lakes and rivers were denied the benefits of the same courts and the same jurisdiction for its protection which were accorded by common consent to similar commerce carried on in the Atlantic States. "It would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States."

12 How., 454.

The court then proceeds to say, that there is nothing in the objection; that there is no ebb and flow of the tide in the lakes and Western rivers; that the ebb and flow of the tide does not make the waters suitable for admiralty jurisdiction, nor does the absence of a tide render them unfit. "If it is a public navigable river on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same."

12 How., 454.

It is clear that the decision was made upon these grounds. The court recognised, in the amount and importance of the marine commerce carried on upon these inland streams, cogent reasons for asserting admiralty jurisdiction over them. The equality of the rights and privileges of the several States, which the Constitution guarantied, required that the immense marine commerce carried on between the States of the Union upon these fresh-water streams should have the same protection,

the same assurance of the prompt adjustment of any questions arising in conducting it, which were enjoyed by a similar commerce on the Atlantic coast. In respect of the obligation of the General Government to furnish appropriate tribunals for these purposes, the court held, that there was no escape on the ground that the water floating the commerce was not salt or brackish. The commerce was there, in its immense proportions and importance, demanding that protection and those facilities which the Federal Government, by its very Constitution, had undertaken to furnish; and the court held, that the obligation to comply with this demand was not to be evaded on technical grounds, but to be met with the fullest and most liberal good faith. Above all things, it became the court not to be misled by any imperfect analogies. It had already decided that the English rule, limiting the jurisdiction of admiralty courts to the "high seas," and forbidding its exercise even on tide-water, *infra fauces terræ*, was wholly inapplicable in America, where it had, indeed, been disregarded from the earliest times. In like manner, the court proceeded to declare the unreasonableness of the attempt to confine admiralty jurisdiction in this country to tide-water, and, having decided the cause on other grounds, let fall the remark, that this rule, so confining them, though unreasonable here, was reasonable enough in England, because there were "no navigable streams" above the tide in that country. The court was seeking to illustrate its meaning forcibly, and for this purpose used language which was very strong, as well as substantially correct. So small a proportion of water navigable, in fact, is to be found above the tide in England, that no one is in danger of being misunderstood when he states the rule, without the qualifications which technical, literal accuracy requires, and says, generally, that in England rivers are navigable as far as the tide ebbs and flows, and no further, and that tide-water and navigable water are convertible terms in that country, the exceptions being too trifling to affect the general rule. But when a remark, made under such circumstances, is seized upon as if it were framed with all the nicety of a scientific definition; when we hear an argument which depends for its

very existence on the fact that this supposed definition is accurately and critically exact, containing no superfluous or equivocal word—an argument, in short, founded on the supposed truth, that tide-water and navigable water are absolutely the same thing, precisely, in every sense, and to every intent and purpose, in England; and when we are asked to extend to water navigable, in fact, in America, the same legal properties which have from time immemorial been accorded to what are called "arms of the sea" in England, we certainly have a right to show that there is an essential distinction between the two things; that this distinction has always been recognised in England as well as in this country; and that the point of this distinction is precisely that upon which defendant in error won this case in the court below, and seeks its affirmance here.

Apart from all judicial decision, and all the authority of the legal sages who have illustrated this subject by their labors, there is a wide and obvious physical distinction between the navigability of the arms of the sea—those bays, more or less extensive, putting up from the ocean into the land, which are flowed by the tide of that great reservoir—and those channels of water which lie above that source of supply. So long as the ocean keeps its bed, and the present frame of nature exists, there will always be water up to the ocean level in those channels where the tide ebbs and flows; and upon this ocean level the quantity of water falling in rain has no influence of which our senses can take cognizance. These channels, then, which, twice in twenty-four hours, are filled by the flow of the sea, have a constant, unvarying level, and are constantly and uniformly navigable. They are navigable, in a legal sense, in the fullest and largest sense of which that term admits. Their navigability does not depend upon a season more or less rainy, but only on the continued operation of laws which human experience has shown to be unvarying and constant in their operation. They are as surely navigable as the sea is navigable. Though not as deep, their surface-level is the same, and therefore they are, without any violence of expression or distortion of idea, called "arms of the sea."

It is altogether otherwise with all the great rivers of the earth, for all parts of their course above tide-water. They depend for all the water that is in them entirely on what comes to them from the clouds. The Ganges, the Nile, the Danube, the Amazon, the Rio de la Plata, the Rio del Norte, the Mississippi, and the St. Lawrence, above tide-water, are entirely dependent upon the supply of rain. In some places, as on the eastern slope of the South American continent, upwards of three hundred inches in depth of rain fall every year. There is accordingly on that eastern slope such a system of magnificent rivers as can nowhere else be found on the face of the globe. No rain, or scarcely any, falls on the north of Africa; and accordingly, except the Nile, whose source is beyond the rainless region—this exception, therefore, proves the rule—we find no rivers there. To come to our own country, where the annual average depth of water falling in rain is nearly forty inches, we find a system of noble streams, not rivalling, indeed, the marvels of the South American continent, but in due proportion to the more limited supply of rain which they receive. The Mississippi has a course, from the sources of its principal branch in the Black-foot Indian country to its mouth near St. Louis, of more than 3,000 miles; and for more than two-thirds of this distance it is navigable at certain seasons of the year. From the mouth of the Missouri to New Orleans the Mississippi has a distance of 1,200 miles, with an average fall of more than three inches per mile, or upwards of 300 feet for the whole distance. The inclination of the bed of the Missouri is still greater, but these numbers are sufficient for illustration. The average depth of the stream opposite to St. Louis is less than 30 feet. The supply of the water which renders this river the vehicle of such countless benefits to the whole Western and Southern country is furnished entirely by the clouds. Fortunately, within certain limits, this supply is uniform. But we cannot shut our eyes to the fact that if those severe droughts, of which we have sad experience from time to time, and which have at different epochs embraced every season of the year, and every district of the region between the sources and the mouth of the river,

should become permanent as to time, and universal as to space, this great river might cease to be navigable for the smallest canoe. We are all familiar with the separate phenomena which, if they should concur, would bring about this deplorable result. A dry spring, a dry summer, a dry fall, and a dry winter, in different years, we can easily remember. Should the whole succession of the seasons fail to bring us rain, no extraordinary sagacity would be required to compute the period at which the flow of the river would cease.

In considering the question of what rivers being above tide-water are yet navigable, in fact, courts of justice have repeatedly shown an impatience of the suggestion that an insignificant rivulet, which is yet subject to have its volume so increased by freshets as to render it capable of floating a ship of the line for a few hours, deserves, for that reason, to be called a navigable stream. This impatience merely marks the revolt of the judicial sense from the proposition, that any improvement can be made upon the legal definition which, in one sense, confines the term "navigable" to tide-water. For as all rivers above tide-water depend for their navigability upon the rain which is drained into their beds, the degree to which the effect of the rain upon the volume of the stream is directly observable really makes no difference in principle. Whether the rivulet be liable to assume a momentary likeness to a river, under the influence of heavy and unusual rains, or the river, under the uniform supply which is vouchsafed to the principal inland streams of the United States, be kept to a depth affording almost constant service to the public, in the one case as in the other the supply is from the rain, and the navigableness of the stream (temporary and transient, or practically permanent) is due to this source alone. It is this accidental navigableness occurring in fresh-water streams which the law refuses to recognise in terms, when to do so would raise them to a level of dignity equal to that of the sea and its arms, and every man's reflection must confirm the sentence of the law; the distinction in kind between the grandest examples of such rivers, as the Amazon, La Plata, Orinoco, and Mississippi, above tide-water, and the shortest arms of the sea, in respect

of the certainty and invariableness of their supply of water, being as substantial as can be imagined.

The same policy which forbids the acquisition of exclusive individual rights over the shore of the sea, forbids the establishment of such rights over such places as are flowed by its tide; for in truth, as far as the tide flows in any river bed, that bed would be filled by the sea if the fresh river water were entirely to fail. Let us suppose all sources supplying fresh water throughout the world to fail, the beds of the rivers remaining as now. In this case, twice in twenty-four hours, for most of these, they would be filled with water from the ocean. This would be the true limit of the dominion of the sea. No one would be at any loss then to recognise the extent of "the sea and its arms." Upon these, then, there is to be no encroachment by any private individual. This limit is fixed by nature and adopted by the law. If by the supply of the necessary water the river beds above these limits become navigable, they become subject to the "servitude of public interest." But while the rights of the public, or the interests of the public, have been so far consulted in respect of rivers which are thus navigable, as to secure to the community the free use of such streams as common highways, yet subject to this easement, which is, from its nature, merely accidental and temporary, the bed of the stream, *usque ad filum aquæ*, belongs to the owner of the adjacent land. These principles were as clearly recognised, and these distinctions as clearly taken, in England as in America. The American cases already cited do not need to be quoted again; but reference will now be made to some of the expressions in Sir Matthew Hale's Treatise, to be found at large in the volume entitled "Hargrave's Law Tracts," and the first four chapters of which are reproduced in the notes to 6 Cowen, 540, already cited.

[The citations from the treatise of Sir Matthew Hale, and the remainder of the argument of the counsel for the defendant in error, are necessarily omitted for want of room.]

Mr. Justice CATRON delivered the opinion of the court.

Soulard sued Jones to recover the northern part of a United

States survey of land laid off for the St. Louis schools. The part sued for fronts the Mississippi, and includes a sand-bar, formerly covered with water when the channel of the river was filled to a navigable stage. The land is included in the survey approved June 15th, 1843, designating the school lands; and the controversy would be governed beyond dispute by the principles declared in the case of Kissell *v.* St. Louis Public Schools, (18 How.,) had this been fast land in 1812, when the grant to the schools was made. But it is insisted that the title to this accretion within the Mississippi river did not pass by the act of 1812, and remained in the United States till the State of Missouri became one of the States of the Union, in 1820, when the title vested in the State as a sovereign right to land lying below ordinary high-water mark. And furthermore, that if the State did not take by force of her sovereign right, she acquired a good title to the land known as Duncan's island by the act of Congress to reclaim swamp lands. These claims the State conveyed by a statute to the city of St. Louis, and that corporation conveyed them to Jones, the plaintiff in error.

Soulard claims under the corporation of the St. Louis schools. The school survey No. 404 contains 78 96-100ths acres, including the land in controversy.

The town of St. Louis was incorporated in 1809 by the Common Pleas Court of St. Louis county, in conformity to an act of the Territorial Legislature passed in 1808, and the only contested question in the cause is, whether the eastern line of the corporation extends to the middle thread of the Mississippi river, or is limited to the bank of the channel. The calls for boundary in the charter are, "beginning at Antoine Roy's mill on the bank of the Mississippi; thence running sixty arpens west; thence south on said line of sixty arpens in the rear, until the same comes to the Barrieu Donoyer; thence due south until it comes to the Sugar-loaf; thence due east to the Mississippi; from thence by the Mississippi, to the place first mentioned."

The expression used in designating boundary on the closing line in the charter is as apt to confer riparian rights on the

proprietor of the tract of seventy-nine acres as the call could well be, unless the last call had been for the middle of the river.

Many authorities resting on adjudged cases have been adduced to us in the printed argument presented by the counsel of the defendant in error, to show that from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-water rivers, where the expressions designating the water-line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions.

We think this as a general rule too well settled, as part of the American and English law of real property, to be open to discussion; and the inquiry here is, whether the rule applies to so great and public a water-course as the Mississippi is, at the city of St. Louis? The land grant to which the accretion attached has nothing peculiar in it to form an exemption from the rule; it is an irregular piece of land, of seventy-nine acres, found vacant by the surveyor general, and surveyed by him as a school lot, in conformity to the act of 1812.

The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case; nor does the size of the river alter the rule. To hold that it did, would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matter of fact, rather than proceeding on established principles of law.

1. We are of the opinion that the city charter of St. Louis, of 1809, extends to the eastern boundary of the State of Missouri, in the middle of the river Mississippi. Dovaston *v.* Payne, 2 Smith's Leading Cases, 225.

2. That Duncan's entry set up in defence in the court below is void, as this court held in the case of Kissell *v.* the St. Louis Schools, 18 How.

3. That the school corporation held the land in dispute, with power to sell and convey the same in fee to the defendant in error, Soulard, in execution of their trust.

It is ordered that the judgment of the Circuit Court be affirmed.

EX PARTE. IN THE MATTER OF THE COMMONWEALTH OF KENTUCKY, ONE OF THE UNITED STATES OF AMERICA, BY BERIAH MAGOFFIN, GOVERNOR, AND THE EXECUTIVE AUTHORITY THEREOF, PETITIONER, *v.* WILLIAM DENNISON, GOVERNOR AND EXECUTIVE AUTHORITY OF THE STATE OF OHIO.

1. In a suit between two States, this court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised.
2. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State.
3. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy.
4. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution of the United States, include every offence forbidden and made punishable by the laws of the State where the offence is committed.
5. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him.
6. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment.
7. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution, when Congress had, by that act, regulated the mode in which the duty was to be performed.
8. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him.
9. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago; and, upon that ground only, this motion for a mandamus was overruled.

A MOTION was made in behalf of the State of Kentucky, by the direction and in the name of the Governor of the State, for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the State of Kentucky, having jurisdiction of the crime with which he is charged.

The facts on which this motion was made are as follows:

The grand jury of Woodford Circuit Court, in the State of Kentucky, at October term, 1859, returned to the court the following indictment against the said Lago:

WOODFORD CIRCUIT COURT.

The Commonwealth of Kentucky against *Willis Lago, free man of color.*

The grand jury of Woodford county, in the name and by the authority of the Commonwealth of Kentucky, accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c., committed as follows, namely: the said Willis Lago, free man of color, on the fourth day of October 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky. W. S. DOWNEY, *Com. Attorney.*

On the back of said indictment is the following endorsement:

"A true bill; L. A. Berry, foreman. Returned by grand jury, October term, 1859."

A copy of this indictment, certified and authenticated, according to the act of Congress of 1793, was presented to the Governor of Ohio by the authorized agent of the Governor of Kentucky, and the arrest and delivery of the fugitive demanded.

The Governor of Ohio referred the matter to the Attorney General of the State of Ohio, for his opinion and advice, and received from him a written opinion, upon which he acted, and refused to arrest or deliver up the fugitive, and, with his refusal, communicated to the Governor of Kentucky the opinion of the Attorney General, to show the grounds on which he refused. The written opinion of the Attorney General is as follows:

OFFICE OF THE ATTORNEY GENERAL,
Columbus, Ohio, April 14, 1860.

SIR: The requisition, with its accompanying documents,

made upon you by the Governor of Kentucky, for the surrender of Willis Lago, described to be a "fugitive from the justice of the laws of" that State, may, for all present purpose, be regarded as sufficiently complying with the provisions of the Federal Constitution and the act of Congress touching the extradition of fugitives from justice, if the alleged offence charged against Lago can be considered as either "treason, felony, or other crime," within the fair scope of these provisions.

Attached to the requisition is an authenticated copy of the indictment on which the demand is predicated; and this, omitting merely the title of the case and the venue, is in the words and figures following:

"The grand jury of Woodford county, in the name and by the authority of the Commonwealth of Kentucky, accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c., committed as follows, viz: the said Willis Lago, free man of color, on the fourth day of October, 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky."

This indictment, it must be admitted, is quite inartificially framed, and it might be found difficult to vindicate its validity according to the rules of criminal pleading which obtain in our own courts, or wheresoever else the common law prevails. This objection, however, if it have any force, loses its importance in the presence of other considerations, which, in my judgment, must control the fate of the application.

The act of which Lago is thus accused by the grand jury of Woodford county certainly is not "treason," according to any code of any country, and just as certainly is not "felony," or any other crime, under the laws of this State, or by the common law. On the other hand, the laws of Kentucky do denounce this act as a "crime," and the question is thus presented whether, under the Federal Constitution, one State is

under an obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as *malum in se* by the general judgment and conscience of civilized nations.

This question must, in my opinion, be resolved against the existence of any such obligation. There are many acts—such as the creation of nuisances, selling vinous or spirituous liquors, horse racing, trespassing on public lands, keeping tavern without license, permitting dogs to run at large—declared by the laws of most of the States to be crimes, for the commission of which the offender is visited with fine or imprisonment, or with both; and yet it will not be insisted that the power of extradition, as defined by the Constitution, applies to these or the like offences. Obviously a line must be somewhere drawn, distinguishing offences which do from offences which do not fall within the scope of this power. The right rule, in my opinion, is that which holds the power to be limited to such acts as constitute either treason or felony by the common law, as that stood when the Constitution was adopted, or which are regarded as crimes by the usages and laws of all civilized nations. This rule is sufficiently vindicated by the consideration that no other has ever been suggested, at once so easy of application to all cases, so just to the several States, and so consistent in its operation with the rights and security of the citizen.

The application of this rule is decisive against the demand now urged for the surrender of Lago. The offence charged against him does not rank among those upon which the constitutional provision was intended to operate, and you have, therefore, no authority to comply with the requisition made upon you by the Governor of Kentucky.

Entertaining no doubt as to the rightfulness of this conclusion, I am highly gratified in being able to fortify it by the authority of my learned and eminent predecessor, who first filled this office, and who officially advised the Governor of that day, that in a case substantially similar to the one now presented, he ought not to issue his warrant of extradition.

Other authority, if needed, may be found in the fact that this rule is conformable to the ancient and settled usage of the State.

To guard against possible misapprehension, let me add that the power of extradition is not to be exercised, as of course, in every case which may apparently fall within the rule here asserted. While it is limited to these cases, the very nature of the power is such, that its exercise, even under this limitation, must always be guided by a sound legal discretion, applying itself to the particular circumstances of each case as it shall be presented.

The communication, in a formal manner, of the preceding opinion, has been long but unavoidably deferred by causes of which you are fully apprised. Though this delay is greatly to be regretted, it can have had no prejudicial effect, as the agent appointed by the Governor of Kentucky to receive Lago was long since officially, though informally, advised that no case had been presented which would warrant his extradition.

Very respectfully, your obedient servant,

C. P. WOLCOTT.

To the GOVERNOR.

Some further correspondence took place between the Governors, which it is not necessary to state; and the Governor of Ohio, having finally refused to cause the arrest and delivery of the fugitive, this motion was made on the part of Kentucky.

Upon the motion being made, the court ordered notice of it to be served on the Governor and Attorney General of Ohio, to appear on a day mentioned in the notice. The Attorney General of Ohio appeared, but under a protest, made by order of the Governor of Ohio, against the jurisdiction of the court to issue the mandamus moved for.

The case was fully argued by *Mr. Stevenson* and *Mr. Marshall* on behalf of the State of Kentucky, and by *Mr. Wolcott*, the Attorney General of Ohio, on the part of that State.

The great importance of the principles involved in this case

has induced the reporter to allow a large space to the arguments of the respective counsel.

That of *Messrs. Cooper* and *Marshall* and *Mr. Stevenson*, for the State of Kentucky, was as follows:

The State of Kentucky, interested in the preservation of the integrity of her own laws, and in the punishment of such as offend against them on her own soil, comes, as a party plaintiff in this proceeding, before the Supreme Court of the United States, as a court of original jurisdiction, to ask for a mandamus against Mr. Dennison, who is the Governor of Ohio, and as such, exercises the Executive authority of said State.

The second paragraph of section 2, article 4, of the Constitution of the United States, reads thus;

"A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

To execute this obligation of the Constitution the act of Congress of 1793 was passed, (Statutes at L., 302, sec. 1,) in which, by the first section, the duty to be performed, and the person by whom to be performed, in the event of a demand under the Constitution, are prescribed. That duty is simple, and is stated thus:

"It shall be the duty of the Executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the Executive authority making such demands, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

One Lago, who was indicted for an act denounced as a crime by the law of Kentucky, fled, and was found in Ohio, and was demanded by Governor Magoffin, the Executive authority of the State of Kentucky, of Governor Dennison, the Governor of Ohio, and at the time Executive authority thereof. All the conditions were observed to complete a proper demand, ac-

cording to the act of Congress. It is further shown that, for reasons set forth in the official reply of Governor Dennison, as Executive authority of Ohio, the demand was not complied with, and that he refused to arrest Lago at all. Upon that refusal this proceeding is taken.

The Commonwealth of Kentucky is properly the plaintiff in this case.

"Where an application is made, the object of which is to obtain the benefit of certain provisions of an act of Parliament, &c., those for whose benefit such provisions were inserted in the act, &c., should be the applicants for the rule, although they may be neither specially nor nominally mentioned."

Tapping on Mandamus, 289.

The duty prescribed by the Constitution and law was to have been performed by the defendant, Dennison, as the officer wielding the Executive authority of the State of Ohio. He is, therefore, the proper person against whom to institute the proceeding.

Is mandamus the proper remedy? We will not extend this brief by reciting what is said of the authority of the Court of B. R. over mandamus. It has been used since the days of Edward II, in England, and has been the suppletory police power of the kingdom.

Tapping on Mandamus, 5—30.

Cowp., 378; 2 B. and C., 198.

Burrows, 1265—'68.

15 East., 135.

3 Blacks. Com., 110.

In this court it is acknowledged as an action, a case, rather than as a "prerogative writ."

The proceeding on mandamus is a case within the meaning of the act of Congress. It is an action or suit brought in a court of justice, asserting a right, and is presented according to the forms of judicial proceeding.

12 Peters, 614; 2 Peters, 450.

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the pro-

priety or impropriety of issuing a mandamus is to be determined.

1 Cranch, 170.

This court (in 3 Howard, 99) treats the mandamus as "an action," and that "a party is entitled to it when there is no other adequate remedy." This court refuses to entertain the action of assumpsit for matter which might have been proved on a former action of mandamus.

There is no remedy for the grievance inflicted on the State of Kentucky by the refusal of Governor Dennison, unless the mandamus applied for will lie. If mandamus will lie in any case where the Supreme Court exercises original jurisdiction, all considerations and conditions concur to point it out as the proper remedy in this case; for—

1. The duty to be performed is single, simple, only ministerial and public in its nature and office.

2. The party directed to perform it is certainly named.

3. No other adequate remedy exists or is prescribed by law.

4. The duty is distinctly prescribed by the Constitution and the act of 1793.

5. The office held by Mr. Dennison does not shield him from the performance; "it is the nature of the duty which determines the propriety of mandamus as a remedy."

The Supreme Court of the United States has never adjudicated the question of this remedy as now it is presented.

In the case of the United States *v.* Lawrence, 3 Dallas, 53, (A. D. 1795,) this court was applied to as a court of original jurisdiction, and it entertained the jurisdiction. The case was disposed of on the point, that the duty of Judge Lawrence involved the exercise of a discretion in the execution of his office which this court could not control.

In the case of Marbury *v.* Madison, 1 Cranch, 175, a careful reading of the opinion will show that the mandamus was refused because the act of 1789 was unconstitutional, in so far as it disturbed the constitutional distribution of the judicial power of this court. The application was to this court, in its original jurisdiction, whereas the case belonged to it only

under its appellate jurisdiction, and therefore the rule was discharged.

In McIntyre *v.* Wood, 7 Cranch, 504, the point was as to the power of the Circuit Court of the United States; and the same remark applies to the case of McCluney *v.* Silliman, 6 Wheat., 600. The reasoning of those cases is sufficiently satisfactory, but it has no application in this case.

Ex parte Roberts, 6 Peters, 216, and Ex parte Davenport, 6 Peters, 664, were applications to control the judge of an inferior court by mandamus, which were refused because of the discretion the inferior officer had the right to exercise. Ex parte Bradstreet, 8 Peters, 634, and Ex parte Story, 12 Peters, 339, were cases addressed to this court, in the exercise of its appellate jurisdiction; so was the case of Kendall *v.* United States, which was very elaborately argued, 12 Peters, 525 to 655. Ex parte Guthrie, and all the rest of the cases of the applications for mandamus, have been to this court as an appellate court. This is the first case in our judicial history in which a mandamus has been asked for in a case falling properly within the original jurisdiction of the Supreme Court.

The judicial power of the United States is vested, by the Constitution, in the Supreme Court, and in such inferior courts as Congress may from time to time establish. This power "shall extend" to a number of classes of cases, among which are "all cases in law or equity arising under this Constitution, the laws of the United States," &c., &c., and, within the enumerated classes, "in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.

It is respectfully submitted that, under these constitutional grants of power and jurisdiction, this court may, *debito justitiæ*, entertain the application for mandamus where a State is a party, and this without resort to the act of Congress distributing the means of enforcing the jurisdiction. The judicial power, so far as this jurisdiction of the court is concerned, is vested by the Constitution; it would neither remain dormant, nor would it expire, though the Legislative power had never passed a law to authorize certain processes to assert such jurisdiction. We adopt the view taken by the counsel in the case of the

United States *v.* Peters, 3 Dallas, 126: "The judicial power is abstract or relative; in the former character, the court, for itself, declares the law and distributes justice; in the latter, it superintends and controls the conduct of other tribunals by a prohibitory or mandatory interposition. This superintending authority has been deposited in the Supreme Court by the Federal Constitution, and it becomes a duty to exercise it upon every proper occasion." "It is certain the Constitution fixes no limitation to the exercise of this power by this court upon the subject; nor does the law, but by the implication in the 14th section of the act of 1789, that the writs issued shall be allowable by principle and usage," and necessary to the exercise of the jurisdiction belonging to the court. If mandamus would then be granted by the Court of King's Bench, *debito justitiæ*, it can be issued in a case of original jurisdiction, upon a proper showing, by this court; and the express power is extended by the 14th section of the judiciary act of 1789, if the writ is necessary to the exercise of the jurisdiction belonging to the court.

If mandamus should not be regarded as a "prerogative writ," but as an action, a case, it falls, in this matter, directly within the vested power and original jurisdiction of the court, and can be entertained independently of the judiciary act, as a constitutional "power" of this court.

Where is the great conservative power which is to regulate State sovereignties in the execution of their constitutional obligations, if this court renounces, or shrinks from, the legitimate exercise of the functions with which it is invested by the Constitution?

The original jurisdiction of this court is limited to those cases in which foreign ambassadors, ministers, consuls, and American States, are interested; but in this range it has no limit. There is no judge who can interpose to exercise power over them but this court, in its original jurisdiction. From the very nature of the Constitution, the great police power of the mandamus, as between the States, is a necessity to the exercise of the jurisdiction conferred on this court. Therefore, Kentucky approaches this tribunal with the violated

obligation of Ohio in one hand, and with the Constitution in the other, conferring full jurisdiction on this court, as a court of original jurisdiction in all cases in law or equity in which a State is a party, and shows that, for the grievance she suffers, there is no legal remedy but mandamus.

"It is the case which gives the jurisdiction, not the court." 1 Wheat., Martin *v.* Hunter's Lessee.

Under the precepts of the law of nations, the obligation to deliver fugitives from justice touched only a few classes of criminals—those whose crimes "touched the State," or were so enormous as to make them *hostes humani generis*—poisoners, assassins, &c. These were delivered up, when convicted or tried, and sometimes before. This was done for comity. Vattel, Book 1, c. 19; B. 2, c. 6.

The character of this obligation was more frequently rendered certain by treaty, as in our treaties with Great Britain and France. But the Constitution of the United States has, among the States of the Union, extended and enlarged the rule of the publicists. Whereas they obeyed the demand in cases of criminals "convicted or tried," our States obey the demand where a person is charged with treason, felony, or other crime; whereas they only obeyed the demand in cases of heinous crimes, our States enter into the obligation for "other crime," making their obligation as broad as the word crime can be extended. Crime can be extended in its signification. Crime is synonymous with misdemeanor, (4 Black. Com., 5,) and includes every offence below felony punished by indictment as an offence against the public, (9 Wendell, 222.) We know that, in the first draft of this clause of the Constitution, the words "high misdemeanor" were used. They were stricken out, and "other crime" inserted, because "high misdemeanor" might be technical and too limited. The framers wanted "to comprehend all proper cases." (5 Elliott, 487.) To use the language of a learned judge, "there is a dependence that justice will be done; and the Constitution rests on this confidence for the vindication of the compact for 'a more perfect Union.'"

The Constitution reposes in the Federal Government the

discretion of conducting the foreign intercourse of these States with foreign Powers. This is manifest by the power given to the Executive "to receive ambassadors, public ministers, and consuls, and, by and with the consent of the Senate, to appoint ambassadors and other public ministers, and consuls," and, by and with the consent of the Senate, to make treaties. The correlative inhibitions to the States are expressed in the same instrument: "No State shall enter into any treaty, alliance, or confederation." Article 1, section 10: "No State shall enter into any agreement with a foreign Power," &c. This court has coincided with the view here expressed, in the opinion rendered in the case of Holmes *v.* Jennison, 14 Pet., 575. A Governor of one of these United States cannot surrender a fugitive from justice from a foreign country to the agents of that Power. This is exclusively within the sphere of the Federal Power. *Ib.*

The Constitution is harmonious in its complicated structure. As the Federal Government is the repository of the power over foreign intercourse, so the inter-State intercourse is established upon a fixed and stable basis, by dispensing with comity and the rule of the publicists, and making the obligation to render criminals to the jurisdiction they have offended a perfect obligation, in express constitutional compact. The States have left themselves no discretion on this subject. They cannot enlarge, diminish, abridge, or modify, the constitutional arrangement: "No State shall, without the consent of Congress, enter into any agreement or compact with another State," &c.

Congress cannot waive an express and mandatory provision of the Constitution. A person charged with treason, felony, or other crime, &c., shall be delivered up, &c. Can two of these States negotiate with each other a modification of this obligation? Certainly not. Can they with the consent of Congress? Certainly not. It is a fixed, well-defined, and perfect obligation, which furnishes all the essentials for its own execution, if properly considered, as an inter-State obligation, subject to the Judicial branch of the Government to enforce its due and proper execution. It expresses plainly

what is to be done, upon whose demand it is to be done, the circumstances under which it is to be done, and the purpose for which it is to be done. By whom it is to be done, the Constitution did not prescribe; for, it may be, that was a matter in which the State might have a choice. Congress acted; yet the Executive of the State was left to be guided by his State authority or his own responsibility as to the mode in which he would cause the arrest and delivery of the fugitive; but, beyond this simple and single ministerial performance, the Constitution and the law have left him no discretion whatever. He is a mere instrument of the Constitution, pointed out by the law, because he holds the Executive authority of his State, and is a sworn officer of the Constitution of the United States, bound by his oath to observe its mandates, and the laws of the United States made in pursuance thereof, as the supreme law of the land, even in preference to those of his own State. The Executive authority of the State was indicated, because the duty to be performed was of a very delicate nature, and a discourteous exhibition of power within the demesnes of a State was to be avoided, such as arresting one, without regular process, who might be within the protection of the State.

It would not be within the right or competency of the State of Ohio to refuse this delivery. All her departments could not make a law effective to prevent it. Can her Executive alone avoid it? If he can, why may not any one else, no matter how appointed or in what way qualified? Another could not be qualified by a stronger oath to support the Constitution, and the laws of the United States made in pursuance of it; for the Constitution requires this Executive to take that oath, and qualifies his right to the gubernatorial chair of his State by the fact of his taking or refusing to take that oath. Were he to refuse, as Governor of Ohio, to take the oath to support the Constitution of the United States, and to maintain the laws made in pursuance thereof, is there no power, by mandamus, in the Judicial Department of this Government, to compel obedience to a duty expressed on the face of the Constitution?

The State of Ohio must be considered as yet willing to abide by her constitutional obligation, for this refusal is not the act of the Government of the State; it is only the act of her Executive, of one department of her Government. The State is bound so strongly by the terms of the Constitution, she cannot refuse. If, then, she is consenting, and Kentucky is demanding, and only Mr. Dennison refusing, it remains to be seen whether there resides in the Judicial Department of the Federal Government power to compel him to the performance of a ministerial duty assigned to him by law, in order to execute the inter-State covenants inscribed in the Constitution. In that memorable case of Prigg *v.* Pennsylvania, (16 Pet., 539,) several leading principles of construction were asserted, to the observance of which we now invite the attention of this court.

1. When the end is required, the means are given; when the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.

2. The General Government is bound, through its own departments, Legislative, Judicial, or Executive, as the case may be, to carry into effect all the rights and duties imposed upon it by the Constitution.

We are perfectly aware that reliance may be placed on the very case from which these principles are extracted, to prove that the obligation to deliver the fugitive from justice is "exclusively Federal," and that, therefore, it may be insisted that Congress cannot direct a State Executive authority to execute it, but must impose this duty on some person who will be amenable, as belonging to one of the departments of the Federal Government. The court says the obligation is "exclusively Federal"—that "the States cannot be compelled to enforce it." From this *dictum* the inference is drawn that, if the person indicated to perform the duty, (though it be only ministerial,) holds any office under the State Government, this court cannot or will not compel him to perform the duty, but will wait for Congress to remodel the legislation of 1793, so as to make the person exclusively a Federal officer. We resist the propriety of such inference from the points decided

by the court in Prigg's case. The court alluded to the resort which the claimant of a fugitive from service must have to the Judiciary to ascertain a fact, in order to support a right upon the finding of the fact, and did intimate that the action of the State magistracy was voluntary, though valid, unless prohibited by the State. In the case of a fugitive from justice, however, there is no fact to be ascertained, no question to be adjudicated, no necessity to appeal to any one to support a right, but simply to deliver upon a demand. Will it be replied that, to afford even this facility, Congress must, by law, indicate who is to perform the duty? We rejoin, that Congress has so indicated by the act of 1793. As well might the defendant plead his citizenship or inhabitancy in Ohio to relieve him, as that he is relieved by being Governor, or holding an office by authority of the State. The power of this Government extends so far that the performance of a public duty may be demanded, and the incumbent of a particular office may be required to perform it, especially where the duty is only ministerial, though at the same time he may be in office in the State. We think it is eminently proper that the Executive authority of the State should be the power indicated for the performance of this duty; because that officer is, at the same time, sworn to support the Constitution of the United States, and the laws of Congress made in pursuance thereof; and because he represents the State on which the demand is made, and is bound by the constitutional compact on which the demand is founded.

The obligation is said to be "exclusively Federal." Does it not bind the State of Ohio? Is it not from her power the compact subtracts? We think the State has peculiarly come under the obligation expressed in the clause in question. Her hands are tied by the clause. Without the clause she might have been guided by her own discretion or by comity; now she is obliged, by the terms of the covenant to which she has consented. It may be she cannot be compelled to enforce the delivery of the fugitive; it may be the General Government is compelled, through its own departments, "to carry this into effect;" but that necessity does not shift the obligation.

The citizen owes obedience to the law, and is under obligation to perform the duties the law enjoins; but, if he fails, the court enforces the law, and secures the right which was infringed by the violation of the duty. Nothing can be more familiar than an obligation resting upon one party, and the right and power to enforce its execution vested in another. We submit, very respectfully, that this is just the case under our Constitution. The obligation to surrender the fugitive from justice rests upon the State; the power and duty to enforce the obligation reside in the General Government. The State of Virginia failing in 1790 to deliver certain fugitives upon the demand of Governor Mifflin, of Pennsylvania, he brought the facts before the President, and the act of 1793 was the consequence, whereby the Executive of the State was directed to perform the duty answering such demand. Every condition has been met. They who would escape the conclusion at which we wish to arrive must take the position not only that, in our system, the States may prohibit the use of their State agencies to the General Government in carrying the supreme law into effect within their boundaries, but this further position, that it is not in the power of the Federal Government to demand of any one in a State to perform a duty essential to the execution of the obligations inscribed in the Constitution.

We may well ask the Supreme Court to pause before ruling to this extent. When we remember that all Executive, Legislative, and Judicial officers, in the several States, are required, by the express letter of the Constitution of the United States, to be sworn "to support the Constitution," and that "the laws of Congress made in pursuance thereof are the supreme law of the land," overriding all State laws coming into conflict with them—that this body of State officers is bound solemnly to render obedience primarily to this supreme law, even in their respective jurisdictions, and though opposed to their State laws—it is difficult to comprehend the wisdom of that policy which teaches that those States can prohibit the use of these agencies in carrying into effect those very laws which the State has consented to observe as the supreme law, and its

agents have been sworn to support as paramount. It seems to us that the policy leads to a multiplication of officers, thus increasing the burdens of the people, and to conflicts between State and Federal agencies, by inculcating the idea that there is an incompatibility in the exercise of official fidelity to the State and Federal jurisdictions at the same time. Under our system of government, administered in its true spirit, there never can be a conflict. It is pernicious to the best interests to build on this foundation, for "a house divided against itself will fall." The State functionary owes allegiance and obedience to the Constitution of the United States, and the laws made in pursuance thereof, before everything else. The State owes the same obedience and observance to the same power. The Constitution enters and pervades our system everywhere. It surrounds the States and the people like an atmosphere vital to them, and ever in contact with them. To the officials of States, in every department of State Government, it is ever present with the oath to be rendered for its support, to remind them that, while they perform the functions of a limited jurisdiction, they are at the same time the conservative sentinels of that larger system, whose forces control the course and destiny of their State and of their fellow-citizens. The planet of the heavens revolves upon its own axis, and pursues its peculiar orbit; but it, and all who inhabit it, are at the same time particles of an infinite system, whose balanced and regulated forces acting upon it assure its safety, and preserve it from destructive collision with the spheres that surround it. The planet and its inhabitants are not taught that they cannot obey the laws of the Great Architect and Ruler.

The Constitution of the United States engages three articles in asserting the construction of its departments of Government, defining their powers, and prohibiting the exercise of these to the States. So precise is it, that no restraint is laid upon a State but that an examination will prove it is because the same power vested in the new Government. With the 4th article a new class is entered upon; they are not powers, but obligations and compacts, in which it is impossible to understand anything else (as it seems to us) than that the States

are bound *inter se*, and are understood to be actors. They are a class of cases to be rendered effective by the action of the States, and by the action of the General Government—concurrent powers. The rule is well settled that in such cases, when Congress acts, the rule it establishes obtains.

We submit to the court that the case of Prigg *v.* Pennsylvania has been modified by the subsequent decision of Moore *v.* the People of Illinois, (14 Howard,) so far at least as to authorize State legislation, which is ancillary to the effectuation of the obligation to be "carried into effect" by the Federal power. We hope the court will not carry the exclusive action of the Federal power so far as to say that it cannot indicate "the Executive authority of a State" as the instrument to perform the purely ministerial act required by the 2d section, 4th article, of the Constitution.

We refer, especially, to the opinion of Justice McLean in Prigg's case, because it is directly in line with the views we now present, and seems to us to be conclusive.

The duty required of the Governor of Ohio, in arresting a fugitive from justice, results from an express obligation of his State, which he, as the Executive authority of that State, is directed by the act of seventeen hundred and ninety-three to carry out. He has no judgment to exercise touching the point of arrest. He cannot even hear a question on the point of identity of person, that a judge might hear on *habeas corpus*. He cannot consider the question of guilt or innocence.

9 Wendell, 221.

We refer to Clark's case because it is a strong case, adjudicated in the better days of the Republic by a patriotic public officer, who strove only to perform his duty under the law.

May every State Executive at pleasure violate the Constitution in its most direct mandates, and most express obligations? Has the Judicial power an arm not strong enough to reach him? If so, the obligations of the Constitution may at any time and under any pretext be avoided; the instrument is a myth.

Governor Dennison has mistaken his power in this matter, by assuming the discretion to judge in regard to the alleged

crime. The words of the Constitution are unambiguous. That the crime is to be judged by the law of the State through whose Executive the demand is made, appears from the Constitution itself, for the object of the delivery of the fugitive is, "that he may be removed to the State having jurisdiction of the crime." To say that the authority on whom the demand is made shall judge of the guilt of the party, or of the fact of the crime, or whether the alleged act is a crime, is to nullify the sense, object, and intent, of the framers of the Constitution, and to assume a supervisory power by the Executive of a State over the law-making and police powers of another State. The police power of the States was reserved, and has never been surrendered to the Federal Government.

Moore *v.* the People of Illinois, 14 Howard, 18.

11 Pet., 139.

The Governor of Ohio, in refusing the demand, has not denied his general responsibility, under the Constitution and law of the United States, to make delivery of a fugitive from justice. His refusal was based upon the allegation that the offence charged in the Kentucky indictment was not crime, according to the signification of that word in the Constitution, and that therefore there was no obligation to deliver arising under the compact, nor springing from comity, because the offence was not known to civilized nations generally, to the common law, or to the statutes or polity of Ohio. In the views we have submitted already as to the duty of Governor Dennison, these positions are controverted. To confine the term to such offence as was denominated crime at the date of the Constitution, would give a restricted operation to the instrument, which would vastly impair its adaptation to the progress and wants of society. It would, in effect, destroy the force of this clause of the Constitution at its inception, and, instead of placing the States in bonds of mutual obligation to vindicate the jurisdiction of each other through future years, would make each a supervisor of the police power of the others, and, by reason of conflicting policies in their progress, would inevitably lead to alienation, confusion, and ultimate discord. "The instrument was not intended to provide

merely for the exigencies of a few years, but was to endure through a lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. * * * Hence its powers are expressed in general terms," &c.

1 Wheat., 305, 326.

The instrument was intended not only for those who framed it, but for posterity; not merely for the society of 1787, but for American society in all future time, and embraced in the word "crime" not merely what was punishable by indictment at the date of the instrument, but whatever each State in its progress might so declare. If this be not true, this family of American States are not connected by links stronger than a rope of sand. We will not elaborate this point further in this place, but may, if deemed proper, dwell upon it hereafter, together with reference to such works as will justify the views we suggest.

It only remains for the counsel for the demandant to say that the State of Kentucky, in bringing this case before the Supreme Court, pursues the law as it exists, and asks its enforcement, if the law can be enforced. If the act of Congress has exceeded the power vested in Congress by the Constitution, and we have been, since 1793, acting through instruments over which the Government has no control, Kentucky desires, through the Supreme Court, to know the fact, so that Congress may, without delay, so treat this important subject as hereafter to assure the faithful and prompt execution of this clause of the Constitution. To her it is a vital question; as to all the other States, in fact, whose institutions are similar to hers.

The argument of *Mr. Wolcott*, on behalf of the State of Ohio, was as follows:

I. The Government of the United States is one of limited and enumerated powers, derived primarily from the specific grants of the Constitution, which is at once the source and the law of all its being. It is a necessary correlative of this proposition, and one declared by the fundamental law itself, that each State still retains complete, exclusive, and supreme

power, over all persons and things within its limits, where that power has not been specially granted or restrained by the Constitution; and that, in respect to all this mass of undelegated and unprohibited power, the States stand to each other and to the General Government as absolutely foreign nations.

Gibbons *v.* Ogden, 9 Wheat., 203—208.

Brown *v.* Maryland, 12 Wheat., 419, 443.

Wilson *v.* Blackbird Creek Co., 2 Peters, 251, 252.

Buckner *v.* Finley, 2 Peters, 586, 590.

New York *v.* Miln, 11 Peters, 102, 139.

United States Bank *v.* Daniel, 12 Peters, 32, 34.

Rhode Island *v.* Massachusetts, 12 Peters, 720.

License Cases, 5 How., 504, 588.

.I. The Judicial Department of the Federal Government, sharing of necessity the intrinsic quality which marks that Government in its unity, is also one of limited and specific powers, and, in its tribunals of every grade, is subject to three conditions of universal application:

1. *Ex vi termini*, it is confined to the discharge of functions purely judicial in their nature.

Hayburn's Case, *in notis*, 2 Dall., 409.

2. These functions can be exerted only in the precise cases enumerated by the Constitution as subject to the judicial authority, and which, it has been said, range themselves in two general classes:

a. Cases in which the authority depends on the nature of the controversy, without respect to the character of the parties; and—

b. Cases in which the authority depends on the character of the parties, without regard to the nature of the controversy.

Cohens *v.* Virginia, 6 Wheat., 264, 293.

But this is evidently to be taken as subject to another qualfication; for—

3. The judicial power exercised in these specific cases must be the "judicial power of the United States." In other words, the authority of the Judicial Department is restrained not only by the limitations specially affixed to it, but also by those more general considerations which grow out of the very na-

ture and purpose of a Federal Government. Thus the judicial power of the United States cannot extend to a controversy in which a State may, even by a purely civil action, pursue a citizen of another State for his violation of its municipal laws. Though in that instance the controversy would, as to its subject-matter, be one proper for judicial cognizance, in the general sense of that term, and would also, in respect of its parties, fall within the enumerated cases, yet no tribunal of the United States could entertain it, because all matters of merely internal concern have been kept by the States for their own original, exclusive, and sovereign control.

New York City *v.* Miln, 11 Pet., 139.

License Cases, 5 How., 588.

III. The Supreme Court of the United States, while fettered by each of the conditions so attaching to the whole Judicial Department—of which it is simply the highest organ—has been otherwise so narrowly confined as to permit it to wield, in an original form, only a very scant degree of the scant power confided to the range of the Judicial Department. The Constitution assumed the existence of, but did not create this tribunal, and it delineated the outlines of the judicial authority with which it might or should be endowed. Of necessity, all judicial power must be exerted in an original or appellate form, and the Constitution has declared the precise cases in which, under either of these forms, the judicial power of the United States may be imparted to the Supreme Court.

The orginal jurisdiction, (and the present inquiry concerns that alone,) thus permitted to it, is expressly limited to—

1. Cases "affecting ambassadors, other public ministers, or consuls;" and—

2. Cases "in which a State shall be a party," and, since the adoption of the eleventh amendment, in which a State shall be the plaintiff, or other pursuing party. This means, that a State, in its sole corporate capacity, shall be the "entire prosecuting party on the record," with a *persona standi in judicio* of its own—a direct legal or equitable right pertaining to it, as a distinct unity. It is not enough that it may be "consequentially affected or indirectly interested."

Fowler *v.* Lindsay, 3 Dall., 411.
United States *v.* Peters, 5 Cranch, 115, 139.
Osborne *v.* United States Bank, 9 Wheat., 738, 850—857.
United States Bank *v.* Planters' Bank, 9 Wheat., 904, 906.
Wheeling Bridge Case, 13 How., 518, 559.

IV. The Constitution does not, of itself, vest any power of action in the Supreme Court. It simply enables the court, under the regulating control of Congress, to exert judicial authority in the prescribed cases; but the existence in the court of the power itself, and the methods and instruments of its exercise, depend on the affirmative legislative action of Congress. The Supreme Court, in respect of both forms of its jurisdiction, is the organ of the Constitution and the law.

Chisholm *v.* Georgia, 2 Dall., 419, 432, 452.
Marbury *v.* Madison, 1 Cranch, 137, 173.
Bollman's Case, Ex parte, 4 Cranch, 75, 93, 94.
Wayman *v.* Southard, 10 Wheat., 1, 21, 22.
New York *v.* New Jersey, 5 Pet., 284, 290.
Crane's Case, Ex parte, 5 Pet., 190, 193.
Rhode Island *v.* Massachusetts, 12 Pet., 657, 721, 722.
Kendall *v.* United States, 12 Pet., 524, 622.
Christie's Case, Ex parte, 3 How., 293, 322.

The Congress, exercising its power in this behalf, has regulated the jurisdiction of this court, and its forms and mode of proceeding. These regulations, so far as they bear upon the present purpose, are substantially as follows:

1. The original cognizance of this court, as to cases in which a State is a party, has been limited to "controversies of a civil nature"—a limitation not expressed by the Constitution, and yet certainly effectual.

Judiciary Act, sec. 13.

2. Power has been given to the Supreme Court to issue two named writs: the writ of prohibition to a named court, for a named purpose; and the "writ 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."

Judiciary Act, sec. 13.

The general authority to regulate its modes of proceeding conferred on this court by the "process act," (sec. 2,) and to issue "other writs," ancillary to the exercise of its jurisdiction, conferred by the judiciary act, (sec. 14,) does not enable the court to enlarge the uses of the writ of mandamus. The process act expressly shuts out from its operation "the forms of proceeding," which "are provided for by the judiciary act;" and the judiciary act, in terms, limits the court to the issue of "such other writs" as are "not specially provided for by statute." Moreover, on settled and necessary principles, the express grant of this writ, as against a specific class of functionaries—otherwise within the scope of its most ordinary uses, and to whom, as of course, it would run, without distinct grant, if the court had a general authority to employ it—is a clear exclusion of any such authority, and an emphatic prohibition against the use of the writ in any other case, for any other purpose.

Christie, Ex parte, 3 How., 293, 322.

V. Arranging, in continuous order, the ascertained general conditions which limit the existence and exercise of the original jurisdiction of the Supreme Court in all possible cases, except only those "affecting ambassadors, other public ministers, and consuls," of whom there is now no question, it will be seen that no controversy can gain a foothold here, unless it be—

1. Appropriate for the action of judicial, as distinguished from political power.

2. Within the scope of "the judicial power of the United States," as distinguished from the general mass of judicial power reserved by and to the several States for their own exclusive exercise.

3. Instituted by a State, as the "entire party" plaintiff on record, in virtue of such direct legal or equitable interest in the subject-matter as, according to the ordinary rules applied to other parties, entitles it to "move" a case at law, or in equity, against a party subject to the control of the court.

4. Of a "civil" as opposed to one of a criminal "nature;" and—

5. Conducted in a form of proceeding consistent with its subject-matter, with the character of its parties, and with the regulations prescribed by Congress for the use of that form of proceeding.

But the controversy, if a writ of mandamus can be so called, moved for by the present application, has no one of all these vital characteristics; for—

VI. The subject-matter of the controversy excludes it from discussion or adjudication by any judicial tribunal.

1. It is not appropriate for the action of judicial power, since it only concerns the execution of a compact between States—independent as to each other—for the extradition of fugitive offenders. Affecting the States at large as to their exterior relations, and their reciprocal national rights and duties, it is, in essence, a political question. Without express provision, committing them, under specific regulations, to the judicial authority, the performance of national engagements addresses itself to the department wielding the political power, and able to weigh political considerations. No such valid provision has been made in respect of this compact.

Marbury *v.* Madison, 1 Cranch, 137, 170.
United States *v.* Palmer, 3 Wheat., 610, 634, 670.
The Divina Pastora, 4 Wheat., 52, 63.
Foster *v.* Neilson, 2 Peters, 253, 307, 314.
Cherokee Nation *v.* Georgia, 5 Peters, 1, 20.
United States *v.* Arredondo, 6 Peters, 691, 735.

2. If fit for judicial cognizance under any circumstances, or by any tribunal, the subject of the proceeding is, nevertheless, not within the scope of the judicial power of the United States.

a. The Constitution has not granted any power to any department of the Federal Government concerning the reclamation of fugitives from justice, as between the States. The provision which it contains in this behalf is a simple engagement made by the States with each other, regulating matters of purely State concern, and addressed to the States alone.

If, as an original question, this interpretation could be doubted, it has become the fixed one by long usage and acquiescence. Since the foundation of the Government, each State has habitually determined for itself the extent of this obligation; many of them (and Kentucky is one, 1 Stanton's Rev. Stat., 557) have regulated its discharge by express enactment; but never, until now, has the authority of the Federal Government been invoked to constrain its fulfilment. This practical exposition, acted upon for nearly eighty years, is too strong and obstinate to be shaken or controlled.

Note.—Upon this ground, as well as another, yet to be noticed, the act of Congress relating to fugitives from justice is clearly void. No inference of power in the Federal Government over this subject can be drawn from acquiescence in its provisions, for the act, in defining the cases to which it extends, follows the precise language of the stipulation itself, and, in terms, leaves its execution wholly to the authorities of the States themselves. The States, doubtless, have generally observed the rules it declares for the mere manner of surrender; not, however, as having the force of law, but by reason of their inherent fitness and convenience.

VII. The proceeding is not one in which a State is the pursuing party on the record; nor is any State so interested in its subject-matter as to be entitled to pursue here any form of controversy in respect to it; nor is the adversary party one over whom this court can, under any circumstances, or by any mode, exercise any control.

1. The writ of mandamus—as will hereafter more distinctly appear—is a prerogative writ, issued by the Government, in its own name, to its own functionaries, to redress or prevent a wrong done or threatened to itself as a Government. Awarded upon this ground and for this purpose, the Government is, of necessity, the prosecutor on the record. The relator is no "party" to the writ, and the writ constitutes the whole "case," or "controversy." If granted in this case, it will be a proceeding instituted by "The United States of America" against "The Governor of Ohio." Though the State of Kentucky may be interested in the performance of that duty,

yet the writ will issue upon reasons of public policy, simply to constrain the discharge of a public duty, imposed by the authority of the General Government, and essential to its own peculiar welfare. But if the applicant for the writ can be deemed the prosecuting party of record, still—

2. The Commonwealth of Kentucky has not such an interest in the discharge of the asserted duty as entitles her to set the writ in motion. The ground on which it must base its interest in the extradition of Lago is simply one phase of that general obligation, springing out of the social compact itself, which binds every organized political community to avenge all injuries aimed at the being or welfare of its society. Certainly, this is the first and highest of all governmental duties; but nevertheless it is, in juridical language, a "duty of imperfect obligation," incapable in its essence of precise exposition or admeasurement, and its fulfilment depends on moral and social considerations, accosting the community at large, which a judicial tribunal can neither weigh, define, nor enforce. But if there be any such right in this behalf as may constitute a foundation for legal proceedings to enforce it, then—

3. The claim made for the surrender of Lago must be prosecuted by the Executive authority, *eo nomine*, of the Commonwealth of Kentucky. That "authority" alone is empowered by the Constitution to demand the extradition, and, by parity of reason, can alone institute proceedings for its enforcement. But a suit by or against a State functionary, as such, is not a suit by or against the State itself.

Osborne *v.* United States Bank, 9 Wheat., 852, 859.

United States Bank *v.* Planters' Bank, 9 Wheat., 904.

4. The official personage against whom the writ is prayed is not subject, in any form or degree, to the jurisdiction of this court. The proceeding is against him in his official character and respects his official duty; so that if from any cause the present incumbent of the office should, prior to the execution of the writ, be divested of his official position, the writ itself would, in the same instant and *ex necessitate rei*, fall impotent—a mere *brutum fulmen*. The proceeding, then, is aimed at the

supreme Executive of the State of Ohio, to "coerce" the exercise of one of its imagined functions. But no power has been confided to any Department of the Federal Government to impose a duty upon any functionaries of a State, or to constrain the discharge of their official concerns.

Martin *v.* Hunter's Lessee, 1 Wheat., 304, 336.

Houston *v.* Moore, 5 Wheat., 1, 21, 22.

Prigg *v.* Pennsylvania, 16 Peters, 539.

Note.—Upon this ground, also, the act of Congress relating to fugitives from justice, which speaks only to State authorities, is void.

VIII. The controversy raised by the motion is not of a civil nature. It involves no question of the rights of person or the rights of property. The power of the court is invoked simply in aid of the administration of the criminal code of Kentucky, to the end that she may be able to try Lago for an imputed offence against her laws, and, if guilty, to imprison him in her penitentiary.

IX. The original jurisdiction of this court cannot be exercised through the method of the writ of mandamus; and this disability springs as well from the inherent nature of the writ itself as from the regulations prescribed for its use by the Legislative power.

1. The nature and functions of the writ are so peculiar as to forbid its employment, save for a single purpose, by any of the courts of the United States. The writ comes to us from the common law; and this court has judicially determined that the common-law remedies in the Federal tribunals are to be according to the principles of that law as settled in England, (Campbell *v.* Robinson, 3 Wheat., 221,) subject, of course, to the modifications made by Congress, or under its authority, and also to such limitations as result from the constitution of the court and the nature of the Federal Government. According to these principles, this writ, as tersely defined by Lord Mansfield, is "a high prerogative one, flowing from the King himself, sitting in the Court of King's Bench, superintending the police, and preserving the peace of the country."

Rex *v.* Barker, 1 Bl. Rep., 300, 352.

Stated in a different form, the writ at common law is issued by a tribunal in which not only the judicial sovereignty, but the prerogative of general superintendency resides, and it is employed extra-judicially (Audley *v.* Jay, Popham, 176) as well as judicially. Its judicial use is to supervise the administration of the King's justice by his inferior judicatures; and its extra-judicial function is "to preserve peace, order, and good government," by constraining the prompt and rightful performance of every public duty confided to any public functionary or tribunal by "Parliament or the King's Charter."

Tapping on Mandamus, S. 6, 11, 12.
Bacon's Ab. Tit. Mandamus, A.
Butler's Nisi Prius, 195.
Rex *v.* Baker, 3 Burr, 1266.
Rex *v.* Bank of England, 2 Barn. and Ald., 622.
Rex *v.* Fowey, 2 Barn. and Cr., 596.
Rex *v.* North Riding, 2 Barn. and Cr., 290.
Rex *v.* E. C. Railway, 10 Ad. and El., 557.
Kendall *v.* United States, 12 Peters, 621.

But this court is one of very special and limited jurisdiction. The judicial sovereignty, in its general sense, does not reside here; and it has no prerogative power, no police power, no power to superintend the conduct of public affairs. All its attributes are purely judicial; and from its very constitution, the power to issue this writ, in the large sense of the common law, cannot be given to this court. Of necessity, it can employ the writ only in its judicial operation, and as a revisionary process directed to some inferior judicature charged with the administration of the justice of the Federal Government. Otherwise stated, the court cannot, under the Constitution, be empowered to issue the writ of mandamus, save to the inferior judicatures of the United States, in the exercise of its appellate jurisdiction.

Marbury *v.* Madison, 1 Cranch, 137, 176.
Kendall *v.* United States, 12 Peters, 524, 621.

2. The judicial act, as already noticed, in regulating the conditions under which the great common-law writs may be issued by this court, has interdicted the employment of this

writ, except as it may, agreeably to "the principles and usages of law," be directed against "courts appointed, or persons holding office, under the authority of the United States." (Sec. 13.) In effect, however, the power to issue the writ is not co-extensive with even the narrow boundaries so prescribed. For the court, considering the validity of this provision, and recognising the incompatibility of any of the common-law functions of the writ with the limited and peculiar nature of its original power, has solemnly determined that the Constitution prohibits it from issuing the writ, except to the courts of the Federal Government, in the exercise of its appellate jurisdiction.

Marbury *v.* Madison, 1 Cranch, 137, 176.

Kendall *v.* United States, 12 Peters, 524, 621.

But the party against whom the writ is now invoked does not come within either of the categories prescribed by the judicial act. The Governor of Ohio is not a "court appointed, or a person holding office, under the authority of the United States."

X. The results now attained demonstrate that the controversy which the present application seeks to inaugurate is, in its form and in its essence, in its whole and in its every part and element, beyond the utmost sweep of the jurisdiction of this court. The power to compose this national and political strife does not reside in this tribunal; the pursuing party cannot cross its threshold; the party pursued is without the reach of its arm; the subject of the difference has been excluded from its action; and the writ which it is solicited to grant has been denied to it as a method for the exercise of its original jurisdiction.

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

The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

Some of them, however, are not now for the first time brought to the attention of this court; and the objections made to the jurisdiction, and the form and nature of the process to

be issued, and upon whom it is to be served, have all been heretofore considered and decided, and cannot now be regarded as open to further dispute.

As early as 1792, in the case of Georgia *v.* Brailsford, the court exercised the original jurisdiction conferred by the Constitution, without any further legislation by Congress, to regulate it, than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of Oswold *v.* the State of Georgia, in which the court regulated the form and nature of the process against the State, and directed it to be served on the Governor and Attorney General. But in the case of Chisholm's Executors *v.* the State of Georgia, at February term, 1793, reported in 2 Dall., 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions, as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction, and held that process served on the Governor and Attorney General was sufficient. Mr. Justice Iredell differed, and thought that further legislation by Congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed. And in the case of New Jersey *v.* New York, in 1831, 5 Pet., 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of Chisholm *v.* the State of Georgia, and to the opinions then delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:

"It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in

suits against a State, under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the State to appear after due service of process, has been also prescribed."

And in the same case, page 289, he states in full the process which had been established by the court as a rule of practice in the case of Grayson *v.* the State of Virginia, 3 Dall., 320, and ever since followed. This rule directs, "that when process at common law, or in equity, shall issue against a State, the same shall be served upon the Governor or chief Executive magistrate and the Attorney General of such State."

It is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of Kendall *v.* United States, 12 Pet., 615; Kendall *v.* Stokes and others, 3 How., 100.

So, also, as to the process in the name of the Governor, in his official capacity, in behalf of the State.

In the case of Madraso *v.* the Governor of Georgia, 1 Pet., 110, it was decided, that in a case where the chief magistrate of a State is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party on the record. This was a case where the State was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the Governor in behalf of the State, and was indeed the form originally used, and always recognised as the suit of the State.

Thus, in the first case to be found in our reports, in which a suit was brought by a State, it was entitled, and set forth in

the bill, as the suit of "the State of Georgia, by Edward Tellfair, Governor of the said State, complainant, against Samuel Brailsford and others;" and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of "His Excellency Edward Tellfair, Esquire, Governor and Commander-in-chief in and over the State of Georgia, in behalf of the said State, complainant, against Samuel Brailsford and others, defendants."

The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice. And that it has also been settled, that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims.

We may therefore dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished.

This brings us to the examination of the clause of the Constitution which has given rise to this controversy. It is in the following words:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the

State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word "crime" of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called "misdemeanors," as well as treason and felony.

4 Bl. Com., 5, 6, and note 3, Wendall's edition.

But as the word crime would have included treason and felony, without specially mentioning those offences, it seems to be supposed that the natural and legal import of the word, by associating it with those offences, must be restricted and confined to offences already known to the common law and to the usage of nations, and regarded as offences in every civilized community, and that they do not extend to acts made offences by local statutes growing out of local circumstances, nor to offences against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the Attorney General of that State.

But this inference is founded upon an obvious mistake as to the purposes for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offences were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offence. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton

on the Law of Nations, 171; Fœlix, 312; and Martin, Vergè's edition, 182. And the English Government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the States of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offences against the sovereignty of the State, as well as all other crimes. And as treason was also a "felony," (4 Bl. Com., 94,) it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.

Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognised and acted on by the American colonies; for we find, by Winthrop's History of Massachusetts, vol. 2, pages 121 and 126, that as early as 1643, by "articles of Confedera-

tion between the plantations under the Government of Massachusetts, the plantation under the Government of New Plymouth, the plantations under the Government of Connecticut, and the Government of New Haven, with the plantations in combination therewith," these plantations pledged themselves to each other, that, upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an offender at the time of the escape, the magistrate, or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof." It will be seen that this agreement gave no discretion to the magistrate of the Government where the offender was found; but he was bound to arrest and deliver, upon the production of the certificate under which he was demanded.

When the thirteen colonies formed a Confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But, as these colonies had then, by the Declaration of Independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded, so as to include treason and felony—that is, political offences—as well as crimes of an inferior grade. It is in the following words:

"If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the Governor or Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence."

And when these colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words, but substituting the word "crime" for the words "high misdemeanor," and thereby showing the deliberate purpose to include every offence known to the law of the State from which the party charged had fled.

The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause new offences created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offences in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill-will.

The clause in question, like the clause in the Confederation, authorizes the demand to be made by the Executive authority of the State where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the State having jurisdiction of the crime. But, under the Confederation, it is plain that the demand was to be made on the Governor or Executive authority of the State, and could be made on no other depart-

ment or officer; for the Confederation was only a league of separate sovereignties, in which each State, within its own limits, held and exercised all the powers of sovereignty; and the Confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a State. In the present Constitution, however, these powers, to a limited extent, have been conferred on the General Government within the territories of the several States. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is, (with the exception of an unimportant word or two,) a literal copy of the article of the Confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the Confederation, must have been in the minds of the members of the Convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the Confederation—that is, of demanding the fugitive from the Executive authority, and making it his duty to cause him to be delivered up.

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the Confederated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed, and that it gives the right to the Executive authority of the State to demand the fugitive from the Executive authority of the State in which he is found; that the right given to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled.

This is evidently the construction put upon this article in

the act of Congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost cotemporaneously with the commencement of the Government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the Congress which enacted the law.

The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the State could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the Executive Department can act only in subordination to the Judicial Department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the Judicial Department. The Executive authority of the State, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the Executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.

This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the Governor of the State where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of Congress to authorize it. These difficulties presented themselves as early as 1791, in a demand made by the Governor

of Pennsylvania upon the Governor of Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of Congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the Constitution, which declares, "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State; and the Congress may by general laws prescribe the manner in which acts, records, and proceedings, shall be proved, and the effect thereof." And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between States, and the authentication of official documents—was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power to Congress. And acting upon this authority, and the clause of the Constitution which is the subject of the present controversy, Congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words:

"Section 1. That whenever the Executive authority of any State in the Union, or of either of the Territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the Executive authority of any such State or Territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief Magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the Executive authority of the State or Territory to which such person shall have fled to cause him or her to be arrested and secured, and notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear;

but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

"Section 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled; and if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."

It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress; and the certificate of the Executive authority is made conclusive as to their verity when presented to the Executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the Executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the Executive of the State under this law, when the demand is made upon him and the requisite evidence produced. The

Governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the Executive authority of the State of Ohio.

The demand being thus made, the act of Congress declares, that "it shall be the duty of the Executive authority of the State" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it

possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the State to carry it into execution.

It is true that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the District Court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly belonged to them, as State courts; and in other States, doubts appear to have arisen as

to the power of the courts, acting under the authority of the State, to inflict these penalties and forfeitures for offences against the General Government, unless especially authorized to do so by the State.

And in these cases the co-operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the jurisdiction merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either

through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.

RUSSELL STURGIS, CLAIMANT OF THE STEAM-TUG HECTOR, HER TACKLE, &C., IMPLEADED WITH THE SHIP WISCONSIN, HER TACKLE, &C., APPELLANTS, *v.* HERMAN BOYER, ALBERT WOODRUFF, AND JEREMIAH R. ROBINSON, OWNERS OF THE LIGHTER REPUBLIC, LIBELLANTS.

In a collision which took place in the harbor of New York, between a ship which was towed along by a steam tug, to which she was lashed, and a lighter loaded with flour, by which the latter vessel was capsized, the evidence shows that she was not in fault, and is entitled to damages. Neither the ship nor the tug had a proper look-out, and being propelled by steam they could have governed their course, which the lighter could not.

Both the tug and tow were under the command of the master of the tug, who gave all the orders. None of the ship's crew were on board except the mate, who did not interfere with the management of the vessel, the persons on board being all under the command of a head stevedore. The tug must therefore be responsible for the whole loss incurred.

The vessel must be responsible because her owners appoint the officers, and the master of the tug was their agent, and not the agent of the owners of the ship, who had made a contract with him to remove the ship to her new position.

Some of the cases examined as to the distinction between principal and agent.

Cases arise when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation.

Other cases may be supposed when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow.

But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she must be held responsible for the proper navigation of both vessels.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York.

It was a case of collision in the East river, at the southern extremity of New York, between the ship Wisconsin, propelled by the steam-tug Hector, on the one hand, and the Republic on the other. The narrative of the case is given in the opinion of the court.

The District Court condemned the ship and tug both, the claimants of which appealed to the Circuit Court by separate appeals.

The Circuit Court affirmed the decree of the District Court against the tug, to the amount of $2,364.74, with costs, but dismissed the libel with costs as against the ship.

The claimant of the tug appealed to this court, and the libellants appealed from the decree so far as related to the ship, which they wished to hold responsible as well as the tug. Both cases were argued together, and the opinion of the court covered both.

It was argued by *Mr. C. A. Seward* for the tug, *Mr. Williams* for the Wisconsin, and *Mr. Benedict* for the Republic. It was a triangular war. *Mr. Seward* contended that the Republic was in fault, but if not so, then the Wisconsin ought to be responsible, and not the tug; *Mr. Williams* contended that the Wisconsin ought in no manner to be blamed, but if there was fault upon that side, it was altogether owing to the tug; whilst *Mr. Benedict* was chiefly desirous to attach blame to the Wisconsin, as being the most responsible party. One or two of the points made by the respective counsel will be given.

Mr. Seward contended—

I. There is no sufficient evidence to charge the tug. The lighter might have avoided the collision. She saw the ship long before the collision—long enough to avoid her, and should have done so. But if not, then the ship alone, and not the tug, was responsible for the collision.

II. The ship was under the direction of her owners at the

time. Next under them was their regular mate, who was on board, and had the general charge of moving the ship. To aid him, they sent on board Captain Ostrom, to take charge of the ship, and ten or fifteen men to man the ship, of whom he had charge, to do the labor, to unmoor the ship, and make her fast to the tug, steer her, and then to pull and haul to make her fast at her berth at Dover street. The owners sent the tug to do the labor of pulling and hauling in the river, there being a strong flood tide, and no wind. The captain of the tug had charge of the ship, so far as transporting her in the river. These were the three classes of servants of the owners, co-operating in moving the ship—all of them in charge for certain purposes. Of all of them, only one, the tug, is free from blame for negligence; against her there is not an allegation of blame from any quarter.

III. The mate of the ship was on board as acting master to move her, and ten or fifteen men were in the service of the ship—"had enough men on board to move the vessel." The captain of the tug had charge of the ship only so far as transporting her in the river was concerned. The mate says: "I was at work getting lines out, and ready to come alongside the dock. I had a boss stevedore on board. He was sent aboard to take charge of the ship; his name was William Ostrom. The captain of the ship was never on board when I moved the ship. I have often moved the ship without him." It was his duty as mate, acting as master, to see that good watch and look-out was kept.

Actually on board the Wisconsin were the mate, Sinclair, Captains Ostrom, Phillips, and Brower, and ten or fifteen men. None of them belonged to the tug except Brower. He was there aft, that he might easily communicate with the ship and tug. The mate gave no proper attention; he was forward, getting lines out. The most of the men were busy with him. Captain Ostrom was on the quarter-deck, giving no proper attention to his duty, though giving orders. The ship's man was at the wheel, but he is not produced as a witness. No one saw the lighter, coming as she was, with sails up, in full sight, at high noon, till it was too late. The mate saw her

first, when she was but a short distance off, and her captain was swinging his hat and singing out. The mate first gave the alarm, when neither the lighter nor the tug could do anything to avoid the collision, as he himself says, for it was after the ship had sheered into her berth, and the tug had stopped her engine.

VII. The tug was not in fault; no negligence or mismanagement is alleged against her by any party or witness in the pleadings or proofs, and there should be no recovery against her for the collision, and her little fee for hauling the ship does not make her an insurer for the benefit of third parties. If, by reason of her being lashed to the ship, a decree must go against both, then, as they have answered and stipulated separately, the decree should be against the ship and her stipulators first, and contingently only against the tug and her stipulators.

If there can be decree against one alone, then the decree of the Circuit Court should be wholly reversed, the Wisconsin condemned, and the Hector discharged.

Mr. Williams, for the Wisconsin, made the following points:

I. In no view of the case can the ship be made responsible, or her owners liable, for the damages sustained by the lighter.

Sproul *v.* Hemmingway, 14 Pick. Reps., 71.

The Express, 1 Blatchford's Reps., 365.

1. She was lashed firmly to the side of the tug, and under the exclusive command and direction of the captain and officers of the tug. Neither the owners of the ship, nor any of their servants, nor yet her captain, nor any of her crew, had any power over or control of the ship. She was exclusively and immediately in the power of the tug, which was under the exclusive charge, control, and sole direction, of her master. Any act of the master or crew of the ship, had they all been on board and in full command, could not, in the least, have affected the course, speed, or movement of the ship, unless, indeed, the captain of the tug should first have been displaced, and the captain of the ship had been appointed in his place—an act that could have been done only by the owners of the

tug, with the consent of the captain of the ship—a position which may have been illy adapted to his capacity.

II. To make the owners liable for such a collision would be to establish an entirely new principle of law.

1. It would not be an application of the principle, *respondeas superior*, for in no sense can the captain and crew of the tug be said to have been the agents or servants of the owners of the ship. They were in no sense under the control of, or subject to the orders of, the owners of the ship. But, on the other hand, they were the servants and agents, strictly the employees, of the owners of the tug, and owed obedience, and were amenable to no one else in the discharge of their duties.

If the owners of the ship could be liable for the misfeasance or malfeasance of the captain or crew of the tug, it would follow that the owners of the ship should have the right to appoint and remove the captain and crew of the tug—a doctrine that would not be contended for; not only that, but it must be established that they were appointed by, and held their respective offices from, the owners of the ship.

Laugher *v.* Pointer, 5 B. and C., 553, 554.

Milligan *v.* Wedge, 12 A. and E., 737.

Lucey *v.* Ingram, 6 M. and W., 302.

McIntosh *v.* Slade, 6 B. and C., 657.

Nicholson *v.* Mouncey, 15 East., 384.

Lane *v.* Cotton, 1 Salk., 17; 15 Mod., 472; 15 East., 392; Cowp., 754.

Rapson *v.* Cabitt, 9 M. and W., 710; 6 Moor, 47; 2 D. and R., 33.

Quarman *v.* Burnett, 6 M. and W., 509, 510, per Park, B.; 9 M. and W., 713; 6 Esp. N. P. C., 6; 5 B. and C., 559, 560; 4 M. and S., 29.

Randleson *v.* Murray, 8 A. and E., 109.

Storm *v.* Cartwright, 6 Term, 411; 3 Camp., 403; 5 B. and C., 554, per Littledale, J.; 5 M. and W., 414; 8 A. and E., 835.

Fletcher *v.* Braddick, 2 N. R., 182; recognised, 5 B. and C., 556; 7 Bing., 190; 4 M. and S., 288; 8 A. and E., 842, 843.

Broom's Legal Maxims, 386, 387, 388, 389, and cases there cited.

Story on Agency, secs. 453 *a*, 453 *b*, 453 *c*.

It is not easy to see why the owners of the ship should be any more liable than the owners of the cargo. The cargo, if heavy, contributes to the force of the blow given by the colliding vessel, which additional force may have occasioned the one vessel to be cut down and sunk, rather than the other.

Take the case of a cargo of timber, a part of which projects over the sides of the vessel, and is the very thing which gives the blow that does the injury. How could the liability of the owner of such timber be distinguished in principle, on the one hand, from the liability of the owners of flour stowed in the hold; or, on the other hand, from the liability of the owner of a ship lashed fast to the side of the colliding vessel?

Sproul *v.* Hemmingway, 14 Pick. Reps., 71.

Fletcher *v.* Benedict, 5 Bos. and Pul., 182.

Mr. Benedict, for the libellants, directed the first part of his argument to show that somebody must pay, and then proceeded to argue that the ship was responsible, as well as the tug.

9. The ship is clearly responsible to the libellants for this collision; they should not be deprived of her responsibility, and compelled to resort to the tug alone.

The enterprise was the enterprise of the ship. The owner of the Wisconsin was the *dux facti*. He was sending her from Corlaer's Hook, foot of Grand street, to Dover street, for the purpose of mooring her alongside the ship William Rathbone, to discharge a cargo and take in another. She had on board "the mate, helmsman, and a full complement of mariners." There was no wind, and an adverse tide. She needed a propelling power, and she procured a tug to assist her, not to command her, or her officers, or men. All was the proper business of the ship.

10. The owner of the ship furnished the tug, and sent her to the ship, for the purpose of "assisting to move her." The mate was acting master, and Captain Ostrom and mariners

were on board for the general purpose of "moving the ship." "Ostrom was sent aboard to take charge of the ship." They were all of them, including the tug, servants of the owners of the ship, each, in his own way, acting in such service in the line of his duty. They were all agents of the ship, acting in the course of their agency. If any of them were negligent, it was the negligence of the ship.

11. The captain of the tug was on board the ship; and, if he was master of the ship *pro hac vice*, he was appointed by the owners. For the purpose of getting under way, and moving, and mooring at the end, and steering her, and keeping a look out, Captain Ostrom had charge, and the mate had charge as master. The ship must be steered by her own helm, except that in cases of difficulty the helm of the tug must be used to assist; it is too small to control. The look-out must be on board the ship, because the ship was ahead. The tug was small, and did not reach the ship's bows, within one-third of the ship's length. The tug was behind, at one side, and down below, so that she could not look out.

"The ship was 830 tons; was one-third ahead of tug; the rudder of the ship is used to steer the tow; the rudder of the tug is always midship, unless, in case of emergency, to make a short turn, when rudder of tug is also used; I had a boss stevedore on board; he was sent on board to take charge of the ship; his name was William Ostrom."

12. The tug was on board the ship. She was firmly fastened to her, alongside, and was, for the time being, a part of her, as much as the machinery and side paddle-wheels of the tug were on board or a part of the tug. They were all fastened on the outside of the hull, to act as motive power.

13. The ship was the actual cause of the injury. The tug did not touch or injure the lighter; the ship alone struck her. The actual collision was out of sight and out of reach of the tug.

The negligence of the ship, and of those on board, and in charge of her, caused the collision; they did not see the lighter because they had no look-out who was careful or efficient.

"On the ship were the mate, Sinclair, three captains—Ostrom, Phillips, Brower—and ten or fifteen men; all but Brower belonged on the ship. The mate gave no attention. He was getting lines out. The most of the men were busy with him; the three captains were together on the quarter-deck. The ship's man at the wheel is not produced as a witness. No one saw the lighter till it was too late. The mate saw her first; her captain swinging his hat, and singing out. The mate first gave the alarm, when the lighter could do nothing to avoid the collision."

14. At the time of the accident the tug was still. She was shut off at Catharine ferry; her function had ceased. The ship's company were sagging her into her berth before they saw the lighter. The ship was going by her own momentum. While the tug was propelling her, she went four or five knots an hour; at the time of the collision, much less.

15. When a ship is sent through a crowded public harbor, her owners are bound to provide her with all the necessary means, implements, and agencies, of the most skillful, reliable, and trustworthy character, for the safety of other vessels; and, if any of them fail, and thereby another is injured, the ship herself is responsible; and if, instead of owning, they hire anchors or sails which are insufficient, or boats to haul, or persons to navigate her who were unskillful or negligent, the law does not excuse the ship, and turn the injured party over to the broken anchor, the old suit of sails, or the irresponsible mariners, or the badly-managed boat.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal in admiralty from a decree of the Circuit Court of the United States for the southern district of New York, in a cause of collision, civil and maritime. It was a proceeding *in rem* against the ship Wisconsin and the steam-tug Hector, and was instituted in the District Court on the twenty-sixth day of October, 1855, by the owners of the lighter Republic. They allege in the libel, that the lighter, on the fifteenth day of October, 1855, started from pier six, in East river, in the port of New York, laden with flour, which was

in their possession as common carriers, to proceed up the river to the foot of Dover street, in the same port; that she had a competent crew on board, but that the wind being light, she was propelled exclusively by oars, and was moving through the water only at the rate of a mile an hour; that when she arrived at a point nearly opposite the place of her destination, she was headed towards the pier or wharf for which she started, and while in that position, that the ship Wisconsin, in tow of the steamboat Hector, and lashed to the starboard side of the tug, came down the river, and was so negligently managed that the flying jib-boom of the ship struck the lighter and capsized her, causing her cargo to roll into the water, and damaging the flour and the lighter to the amount of two thousand and one hundred dollars. Negligence, want of care and skill on the part of those in charge of the tow, are alleged to have been the cause of the collision; and the libellants also allege that the ship and steam tug were incompetently manned; that they had no proper look-out, and that those in charge of them disregarded the warnings of the lighter, and did not in due time stop and back the engine of the tug, or shear the tow so as to avoid the lighter, as they were bound to have done. Process was issued against the ship and the tug, and the claimants of the respective vessels subsequently appeared, and filed separate answers to the several allegations of the libel. Both answers affirm that the collision was occasioned through the fault of those in charge of the lighter, but in most other respects they are essentially variant. On the part of the steam tug, it is alleged that she was employed by the owners of the ship to tow her from the foot of Water street to the pier at the foot of Dover street; and that the tug was merely the motive power to move the ship to the pier, and that the tug and her crew were subject to, and obeyed the orders of, the master and other officers in charge of the ship. Wherefore, the claimant prays that, in case the libellants recover any sum against the ship and tug, he may have a decree against the ship and her owners for such proportion of the same as he may be made liable to pay. But the claimants of the ship allege that she was in the charge and under the control and management of

the master and crew of the steam tug. They admit in the answer that her mate, helmsman, and a full complement of mariners, were on board, but aver that they were all under the direction and control of the master and officers of the steam tug to which she was lashed. Testimony was taken on both sides, and after a full hearing in the District Court, a decree was entered in favor of the libellants against the ship and the steam tug. From that decree the claimants of each of those vessels appealed to the Circuit Court, and the cause was there again heard upon the same testimony. After the hearing, the Circuit Court affirmed the decree of the District Court against the tug, but dismissed the libel with costs as against the ship. Whereupon the claimants of the tug appealed to this court, and the libellants also appealed from so much of the decree as pronounced the ship not liable.

At the argument in this court, it was conceded that the flying jib-boom of the ship struck the peak halyards of the lighter, and capsized her, causing the cargo, which consisted of flour in barrels, to roll into the water, and no question was made that the damages had not been correctly estimated. According to the testimony in the case, the lighter was bound up the river, and she was propelled exclusively by oars or sweeps. Her course was on the northern side of the stream, some two hundred yards from the shore. She was moving about a mile an hour, and the collision occurred at midday, and in fair weather. As alleged in the pleadings, the ship was bound down the river, and she was securely lashed, in the usual manner, to the starboard side of the steam tug. Neither the ship nor tug had any proper look-out, and it clearly appears that those in charge of them did not see the lighter till it was too late to adopt the necessary precautions to prevent a collision. Their course down the river was about the same distance from the northern shore as that of the lighter, and both vessels were propelled by the steam-power of the tug. They were bound to a point, alongside of another ship, lying at the end of pier twenty-seven, and the lighter was bound to pier twenty-eight, a short distance up the river. None of these facts are disputed, and the testimony clearly

shows that the lighter first changed her course, and headed towards the pier to which she was bound. When the lighter changed her course, and headed for the pier, the ship was so far distant that, if she had kept her course, the lighter would have passed to the pier in safety. Nothing appearing in the river to obstruct the view, those in charge of the lighter had a right to assume that she was seen by those navigating the approaching vessels, and that they would hold their course or keep out of the way. Propelled as they were by steam-power, those in charge of them could readily govern their course and control their movement. More difficulty, however, would have attended any such effort on the part of the lighter. It was then about slack high-water, the current still running up a little out in the stream; but the tide had commenced to ebb close in shore, so that the flour, after it rolled into the water, floated down the river. Until the lighter turned towards the pier, she had been aided in her course by the current; but, when she changed her course, and headed towards the pier, she was rather impeded than benefited by the tide. Those in charge of her saw the ship and tug approaching, and hailed those on board, apprising them of the danger of a collision. There were three men belonging to the lighter; two were forward at the oars, and one was aft, and it does not appear that they omitted anything in their power to do to avoid the disaster. On the other hand, it does appear that the descending vessels were without any look-out, and that those in charge of them did not see the lighter in season to adopt the necessary precautions to prevent the collision. Beyond question, it was the mate of the ship who first saw the lighter, and he admits that she was then heading square into the slip, and was using two oars. He had no charge of the ship, and it does not appear that he, in any manner, interfered with her navigation from the time she left her mooring until she reached her place of destination. When the hail was given from the lighter, he was employed in getting the lines ready to send ashore, as soon as the ship should arrive at the proper place. All of the orders were given by the master of the tug, which had been employed by the owners of the ship to transport her

from her moorings to pier twenty-seven, for the purpose of discharging what merchandise she had on board, and taking in another cargo. They had also employed a head stevedore to discharge her cargo, and reload her; and, in point of fact, all the men on board, except the mate, were the hands in the employment of the principal stevedore, not one of whom belonged to the crew of the ship. Her master was not on board, and, contrary to the allegation of the answer, the testimony shows that she was without a crew. One of the stevedores was at the wheel of the ship, but both vessels were exclusively under the command and direction of the master of the tug. Prior to the collision, and when the pilot of the tug gave the signal to slow, the master of the tug left his own vessel and went on to the ship, and all the subsequent orders were given by him, while standing on the quarter-deck of the latter vessel. "My attention," says the mate of the ship, "was first called to the lighter by a hail from one of her men." He was the first person on the descending vessels who saw the lighter, and he at once gave notice to the master of the tug. They were then so near, that the mate says he anticipated a collision, and, considering the headway of the ship, he was unable to see how it could be avoided. True it is, the master of the tug testifies that the ship had no headway at the time of the collision, but the weight of the testimony is greatly otherwise. No doubt is entertained that he gave the orders to stop and back before the collision occurred, but the circumstances clearly show that those orders were too late to have the desired effect.

Looking at all the facts and circumstances in the case, we think the libellants are clearly entitled to a decree in their favor; and the only remaining question of any importance is, whether the ship and the steam-tug are both liable for the consequences of the collision; or if not, which of the two ought to be held responsible for the damage sustained by the libellants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or

crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a sea-

worthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. Sproul *v.* Hemmingway, 14 Pick., 1; 1 Pars. Mar. L., 208. The Brig James Gray *v.* the John Frazer et al., 21 How., 184.

Very nice questions may, and often do arise, says Judge Story, as to the person who, in the sense of the rule, is to be deemed the principal or employer in particular cases. Story

on Agency, sec. 443 *a*, p. 557. Where the owner of a carriage hired of a stable-keeper a pair of horses for a day, furnishing his own carriage, and the stable-keeper provided the driver, through whose negligent driving an injury was done to the horse of a third person, the judges of the King's Bench were equally divided upon the question, whether the owner of the carriage or the owner of the horses was liable for the injury. Laugher *v.* Pointer, 5 Barn. and Cress., 547. But the better opinion maintained by the more recent authorities is, that the driver should be regarded as the servant of the stable-keeper, and inasmuch as he could not at the same time be properly deemed the servant of both parties, that the stable-keeper, and not the temporary hirer, was responsible for his negligence. Upon the like ground, says the same commentator, the hirer of a wherry, to go from one place to another, would not be responsible for the waterman; nor the owner of a ship, chartered for a voyage on the ocean, for the misconduct of the crew employed by the charterer, provided the terms of the charter party were such as constituted the charterer the owner for the voyage. Quarman *v.* Burnett, 6 Mee. and Wels., 499; Randleson *v.* Murray, 8 Adol. and Ellis, 109; Milligan *v.* Wedge, 12 Adol. and Ellis, 737; The Express, 1 Blatch. C. C., 365. Whether the party charged ought to be held liable, is made to depend in all cases of this description upon his relation to the wrong-doer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable; and he is equally so, if it was done by one towards whom he bore the relation of principal; but liability ceases where the relation itself entirely ceases to exist, unless the wrongful act was performed or occasioned by the party charged. It was upon this principle that the ship was held not liable in the case of the John Frazer, 21 How., 194. In that case, this court said, the mere fact that one vessel strikes and damages another does not, of itself, make her liable for the injury, but the collision must, in some degree, be occasioned by her fault. A vessel properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it, and yet she certainly would

not be liable for damages which it was not in her power to prevent. So, also, ships at sea, from storms or darkness of the weather, may come in collision with one another without fault on either side, and in that case each must bear its own loss, although one is much more damaged than the other. Stainback et al. *v.* Rae et al., 14 How., 532. Applying these principles to the present case, it is obvious what the result must be. Without repeating the testimony, it will be sufficient to say, that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction, and management, of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that any one belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises.

Counsel on both sides stated, at the argument, that they were prepared to discuss a question of jurisdiction supposed to be involved in the record; but upon its being suggested by the court that the question was not raised either by the evidence, or in the pleadings, the point was abandoned. In view of the whole case, we think the decision of the Circuit Court was correct, and the decree is accordingly affirmed, with costs.

JOSEPH C. PALMER, CHARLES W. COOK, BETHUEL PHELPS, AND DEXTER R. WRIGHT, APPELLANTS, *v.* THE UNITED STATES.

An instrument of writing, purporting to be a grant of land in California by Pio Pico, in 1846, is not sustained by the authority of the public archives or in conformity with the regulations of 1828, and therefore comes within the previous decisions of this court, declaring such grants void.

Moreover, the evidence in the case shows that the alleged grant was utterly fraudulent.

THIS was an appeal from the District Court of the United States for the northern district of California.

The case is stated in the opinion of the court.

It was argued by *Mr. Benjamin* for the appellants, and by *Mr. Black* (Attorney General) for the United States.

The arguments consisted of comments upon the evidence in the case, which would not be interesting to the profession generally.

Mr. Justice GRIER delivered the opinion of the court.

The appellants claim the land in dispute as assignees of Benito Diaz. This claim was rejected by the board of land commissioners, and also by the District Court.

The documentary evidence, upon which the case rests, is as follows:

1. A petition of Benito Diaz, dated April 3, 1845, in which he asks for a grant of land which he calls "a vacant place within the jurisdiction of San Francisco, known by the name of 'Punta de Lobos,' bounded on the north by the sea, which flows to the port of San Francisco; on the south with the Cerro, in the rear of the mission known by the name of the 'Cerro de Laguna Honda;' on the east with the 'Loma Alta;' and on the west by 'la Punta de Lobos;' which will comprehend two leagues." The petition adds that the presidio and castle are within the tract, but the petitioner does not ask for them unless the Government is willing; but if that be done, he promises *to erect a house of certain dimensions in the port of San Francisco for the military command.*

2. An order of reference, bearing date May 24, 1845, and signed Pico, ordering the petition to pass for information to the respective judge, *and await the report of the military commander upon the matter.*

3. A report from Jose de la Cruz Sanches, who seems to have been alcalde at the pueblo of San Francisco, dated August 16, 1845, in which he declares that the land is vacant, and the petitioner has the necessary requisites according to law, *but declining to give any information about the military lands.*

4. A report by Francisco Sanches, the military commander, *dated at the military command of San Francisco*, October 18, 1845, setting forth that the land the petitioner solicits is vacant and

may be conceded to him, "*not comprehending in the grant the two military points of the castle and presidio that are included in the petition.*"

These documents are all written on the same paper. The Governor's order of reference is on the margin, and the reports endorsed. But there is no concession or order that a definitive title should issue to the petitioner, as is always found when the Governor accedes to the prayer of the petition. (See Arguello *v.* United States, 18 Howard, 543.)

The petition is not accompanied by a diseño or map of the land, as required by the regulations of 1828. This is all the document found among the archives or public records, and shows this fact only: that the petitioner asked for land; that the informè did not satisfy the Governor, who did not accede to the request, and therefore the petitioner took nothing by his application. That the Governor had good reasons for refusing the prayer of this petition, is apparent from the fact, not only of the public fortifications of the harbor being erected thereon, but because on the 4th of November, 1834, Governor Figueroa, in his decree establishing the puebla of San Francisco, had included a large portion of the land now claimed, and the remainder was claimed as the land of the Mission Dolores, which the Departmental Assembly afterwards (15th April, 1846) ordered to be sold at auction, and suspended the further alienation of the same as vacant.

This is all the record evidence, on which alone the court can rely as speaking the truth. It does not show even an inchoate equity in Benito Diaz; nor does the fact that he carried off some of the materials of the dilapidated fort to build him a house in San Francisco add to it.

The next fact which we can admit as sufficiently proved is, the sale by Benito Diaz of the land claimed to Thomas O. Larkin, in September, 1846, reciting a grant or patent to Diaz, dated 25th of June, 1846. This instrument purports to be a patent or definitive title to Benito Diaz, for all the land included in the boundaries mentioned in the petition. The public fortifications which protect the harbor of San Francisco are not excepted. The value of such a grant might easily be

anticipated, when the occupation of the country by the United States had taken place. Pio Pico, after his deposition from the government, could afford to be more liberal in 1846 than in 1845, when he very properly refused to make it. There is no trace of this grant to be found on record, or in the public archives. It purports to be signed by Pio Pico, and attested by his secretary, Moreno; and each of them has been called to attest the genuineness of the signatures. We have decided in the case of Luco *v.* United States, (23 How., 543,) "that, owing to the weakness of memory with regard to the *dates* of grants signed by them, the testimony of the late officers of the Mexican Government in California cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives." In compliance with this rule, we might dismiss this case without further argument; for if the testimony of the officers of the Government cannot be relied on, much less can that of more obscure individuals, especially as we have seen in the Luco case, and some others, that it is easy to obtain any number of witnesses to depose to any fact necessary to establish a fraudulent grant.

The testimony brought in this case to support this private deed, and give it the force and effect of a public record, grant, or patent, and to prove that it was executed as such before the 7th of July, 1846, when the official functions of the late officers ceased entirely, tends only to confirm the suspicions in which it is involved, and demonstrate the necessity of the rule of decision which we have adopted.

Pio Pico was called as a witness. He swears "that he *believes* the signatures to be genuine," and that is all. He does not state *where* it was signed, or *when* it was signed, whether before or after his expulsion from the Government. If executed *where* it purports to be, viz: at Los Angeles, where the public records were kept, he knew it could be proved he had left Los Angeles a week before its date, (25th June,) and was residing at Santa Barbara, where he remained till the approach of Fremont to Monterey. He knew it could be proved that his secretary, who attested the paper, was in Los Angeles,

seventy miles distant. He could probably give no better reason for his willingness to sell the public forts, which he had refused to do a year before, than the fact that the Americans had taken possession of them. His silence on these points is expressive. There is no doubt that his testimony, so far as it goes, is true, and given with his habitual caution. He might excuse himself for not stating whether or not this grant was one of the large number said to have been executed by him on the 8th of August, on the eve of his departure to Mexico, for the reason that no question was asked him as to that fact.

Moreno, the secretary, is not so cautious, and therefore has involved himself in more difficulties, which are unexplained, and perhaps inexplicable.

He testifies as follows:

"I recollect this document. I saw *it on the 25th June*, 1846, when I signed it. This is my signature as secretary ad interim, and also my signature to the certificate of registry; and I saw Pio Pico sign it as Governor. This is his genuine signature. I think Benito Diaz wrote the body of the grant himself. After the grant was completed, I delivered it to the agent of Benito Diaz, on the road from Los Angeles to Santa Barbara. The agent to whom I delivered it, according to my recollection, was Eulogio Celiz."

Now, this document states that it was "given in the city of Los Angeles, on the 25th of June, 1846," and Moreno swears he saw Pio Pico sign it, who was on that day seventy miles distant in Santa Barbara. His certificate, that he has recorded it in the proper book, he does not prove to be true; or if he was at Santa Barbara, with Pico, on the 25th, how he could record it in Los Angeles, where alone the records were kept. If he executed and recorded it in Los Angeles, he does not explain why it is in the handwriting of Benito Diaz, and not drawn up by the clerks of the department as other grants; and how it came to pass that the date of the paper, and his certificate, are in the handwriting of Benito Diaz, who was at San Francisco, some five hundred and twenty miles distant; nor how it came to pass, that when he had signed and recorded this important document, he put it in his pocket, and started

for Santa Barbara, and met Celiz on the road; nor does he explain how Celiz, who left San Francisco on the 21st of June, with this paper drawn up by Diaz, for the purpose of taking it to Los Angeles to have it executed, could have taken it all the way to Los Angeles, five hundred and twenty miles, before it was executed; and then, that Moreno should meet him on the road between Santa Barbara and Los Angeles, *after* it was executed. There were no railroads in California at that time by which to account for such swift travelling.

Diaz testifies that the document is in his handwriting; "that he wrote it in San Francisco, on the 20th or 21st of June, in consequence of a letter which he received from Bandini, whom he calls secretary of the Government," but who was *not* secretary. "That the country was in such *a critical state*, that it was necessary to send it immediately; which he did, by special courier. That from information of his courier, Celiz, he understood that the grant was signed *on the road*, either at Santa Buena Ventura, or Santa Barbara." The critical state of the country, as the Americans were in possession of the greater part of it, will no doubt account for the fast riding of the courier, and in some measure for the execution of the deed on the highway, and the false certificate of record of a document which, without such recording, was but a private deed.

If Celiz met Pico where he states, he required but five days to ride five hundred miles, while it required eight days for Pico to travel less than seventy miles.

There is no necessity to rely upon the testimony of witnesses Crane and Watson, that Diaz declared, "that after the American revolution, he made out the grant in his own handwriting; and that, in order to make it valid, he dated it back to the month of June."

The face of the paper, and the testimony brought to support it, sufficiently demonstrate this to be the fact.

It is evident, that when this grant was fabricated, it was not known that conclusive evidence could be produced of the absence of Governor Pico from Los Angeles on the day of its

date. Hence the necessity of changing the venue to that of the highway, when it was too late to alter or erase the certificate of record to suit it. And hence the absurd contradictions exhibited in the testimony of Moreno, who appears to be emulating the example of his predecessor.

The judgment of the District Court is therefore affirmed, with costs.

THE UNITED STATES, APPELLANTS, *v.* CLAUDE CHANA, WILLIAM MARTIN, THOMAS P. TURNER, AND ALBERT ROWE.

The decision of this court in the cases of United States *v.* Nye, 21 Howard, 408, and United States *v.* Rose, 23 Howard, 262, again affirmed; and as the testimony in the present case is similar to that offered in the above cases, the judgment of the District Court in favor of the claimant is reversed.

THIS was an appeal from the District Court of the United States for the northern district of California.

The claim was based upon Sutter's general title, which has been explained in some of the preceding volumes of these Reports.

It was submitted on printed argument by *Mr. Black* (Attorney General) for the United States, no counsel appearing for the appellees. It appears to have been confirmed by the court below before they knew the decision of this court with regard to Sutter's general title.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees presented their claim before the board of commissioners for the settlement of land claims in California for a tract of land, consisting of four leagues, on the south side of Bear creek, in Yuba county, under a grant to Theodore Sicard by Micheltorena, Governor of the Department of California.

The testimony to sustain the claim is similar to that offered in the cases of United States *v.* Nye, 21 How., 408, and United States *v.* Rose, 23 How., 262. In these cases it was determined that the testimony was not sufficient to support the

claims. This case must follow the same course that was assumed in those.

Judgment of the District Court reversed, and petition dismissed.

WILLIAM A. HALL, PLAINTIFF IN ERROR, *v.* JOSEPH L. PAPIN.

An act of Congress passed on the 15th of May, 1829, (3 Stat. at L., 605,) authorizes persons who claim lots in the village of Peoria, in Illinois, to notify the register of the land office, who was directed to report to the Secretary of the Treasury, to be laid by him before Congress.

An act of March 3, 1823, (3 Stat. at L., 786,) grants to each one of the settlers who had settled on a lot prior to the 1st of January, 1813, the lot so settled on and improved, where the same shall not exceed two acres; and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: *Provided*, the right of any other person derived from the United States, or any other source whatever, &c., shall not be affected.

These two statutes were drawn into question in the case of Bryan et al. *v.* Forsyth, 19 Howard, 334, where it was ruled that "in the interval between 1823 and the survey a patent was taken out, which was issued subject to all the rights of persons claiming under the act of 1823. This patent was controlled by the subsequent survey."

In the present case the patent is not controlled by the subsequent survey, for the following reasons:

The old village of Peoria was settled very early in the history of the country, but abandoned before the years 1796, 1797, and the new village of Peoria built up at the distance of a mile and a half.

The act of March, 1823, applies only to the new town, and the land in question is an out-lot or field of ten acres near the old village of Peoria.

Papin, the plaintiff below, claimed under a plat of the village made in May, 1837, approved September, 1841, and a deed to himself from the confirmee made in 1854.

Hall, the defendant below, claimed under a pre-emption certificate of 1833, a patent from the United States in 1837 to Seth and Josiah Fulton, and a deed to himself from the patentees in 1838.

Supposing that no out-lot was meant to be confirmed, the inchoate right of the claimant under the act was subject to a survey and designation before it could be matured into a title.

An instruction given by the court below to the jury, viz: that the persons taking under the patent of March 18, 1837, and under the entry of July 11, 1833, must be considered as taking their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and

1823; and when a party brought himself within those acts, his title was the paramount title, notwithstanding the patent to the Fultons was erroneous.

So, also, it was error in the court below to refuse to instruct the jury, that if they believed from the evidence that by the plaintiff's recovering in this case the legal representatives of Willette would be confirmed in more than ten acres of Peoria French claims, they were to find for the defendant.

The true construction of the act is, that a claimant was to have one confirmation of "a lot so settled and improved," which had been claimed and entered in the report of the register of the land office at Edwardsville, in pursuance of the act of May 15, 1820; that no claimant, though he shall appear in the register's report as having made several claims, could, after having had one of them confirmed, transfer any right of property in the others to any person whatever.

THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of Illinois.

The dispute arose under the two acts of Congress passed in 1820 and 1823, confirming the claims of settlers in the village of Peoria, which are particularly mentioned in the opinion of the court, and which were also examined in a case reported in 19 Howard, 334. The instructions of the court below are also set forth in the present opinion, which renders it unnecessary to state them in this place.

It was submitted on a printed argument by *Mr. Browning* for the plaintiff in error, and by *Mr. Merriman* and *Mr. Blair* for the defendant.

It will be observed that the principal point upon which the decision of this court turned was, that the lots in question were outside of the village of Peoria. *Mr. Browning* brought this point before the court in the following manner:

The plaintiff in error (defendant below) asked the court to instruct the jury, "that if they believed, from the evidence, that the original French settlement or improvement, upon which the plaintiff's claim in this suit is based, was not upon or within the northwest quarter of section three, in township eight north, in range eight east, of the fourth principal meridian, nor located upon that quarter section by the United States surveyor until after that quarter section was sold to

the Fultons by the United States, they, the jury, are to find for the defendant."

Which instruction the court refused to give; but, on the contrary, instructed the jury that the acts of Congress of 1820 and 1823, taken in connection with the report of the register of the land office and the survey under the authority of the law, vested in the party entitled under the acts of Congress an absolute right of property in the lot so surveyed; and that the surveys, for the purposes of this action, made the title of the claimant, under the acts of Congress, complete; and that the persons taking under the patent of March 18, 1837, as well as of the entry of July 11, 1833, being the same grant, took their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and 1822; and that when a party brought himself within these acts, his title was the paramount title, notwithstanding the patent to the Fultons.

Now, this instruction virtually admits that the land in controversy never had been settled upon or improved by any of the French or Canadian inhabitants of the village of Peoria, and that it was no part of the village, but quite and altogether outside of and beyond its limits; for the defendant below had proven this state of fact, or given evidence strongly tending to prove it; and the court told the jury, substantially, that it was wholly immaterial whether it had ever been settled upon and improved or not, or whether it had ever been a part of the village of Peoria or not; for that the title of the plaintiff, by virtue of the laws of 1820 and 1823, and by virtue of the survey made, not upon the land of the United States, but upon the land of the Fultons, was made absolute, and paramount to the title of the Fultons, notwithstanding the Fultons had the first grant from the Government. Or, to put it in another form, the instruction amounted simply to this: That on the 11th July, 1833, and the 18th March, 1837, when the land was sold and patented to the Fultons, said land belonged, absolutely and exclusively, to the United States, and that the French settlers at Peoria had no right to or interest in it, inasmuch as they had never had any settlement or improvement upon it,

and it had never been any part of their village; that the Government owning it, had a right to do with it as it pleased, and that in the exercise of that right it had sold and granted it to the Fultons, thereby parting with all its right, title, and interest in it, and all power and control over it; but that, notwithstanding this, it could authorize a survey of it under a law which had no reference whatever to this land, but to land upon which the French had settled and improved; and by virtue of such survey, take Fultons' land and appropriate it to the satisfaction of a French claim, which, in reference to this land, had never had an existence.

Now, let it be conceded, as it is by the instruction of the court, that there was never any French settlement or improvement on this land, and that it was no part of the village of Peoria—then, I ask, by what right, or upon what principle, it can be taken for the satisfaction of a claim in the village of Peoria, after it has ceased to be the property of the United States and has become the property of a private citizen? I freely concede that whilst it remained the property of the United States they could authorize any part, or the whole of it, to be given in satisfaction of French claims, although the French settlements and improvements had never been on or near it. But I do not comprehend how, after the Government had parted with its interest, had sold and conveyed to the Fultons, it could authorize it to be taken for the satisfaction of a French claim, or for any other purpose. Its power over it was gone, and it could no more take this than it could take land situated anywhere else, which it had previously sold and granted away.

It is admitted that the surveyor might go outside of the original French settlement and locate a claim upon any land belonging to the Government, for the Government had a right to do as it pleased with its own, and to authorize the location of a claim where no settlement had previously been, and to confirm such location after it was so made; but it is emphatically denied that he could go outside of the original settlement and locate upon the land of an individual, in which the Government had no interest. If he could go off the set-

tlement, outside of the village at all, where was he to stop? what limit was there to his discretion or power? If he could go a half mile, could he not go a mile? and if one, could he not go ten? Could he not, in fact, go to the uttermost bounds of the land district? Mere contiguity of Fultons' land to the old French village of Peoria gave the French claimants no more right to it than they had to land situated ten miles distant, and which had been sold by the United States after the passage of the laws of 1820 and 1823. Yet the court told the jury that although no part of the original French settlement or improvement, upon which the claim is based, was upon the land sued for, nor located upon it by the United States surveyor until after it had been sold to the Fultons by the United States, still, the Fultons took the land subject to the contingency of its being thereafter taken from them to satisfy this French claim. How did the Fultons take their land subject to such a contingency, any more than other purchasers from the Government? There had originally been no French settlement upon it, and when they bought, no claim had been surveyed or located upon it. When the United States sold, its title was perfect and the land unincumbered, and they sold and granted absolutely, unconditionally, and without reservation of any kind or character. It was no part of the contract between the Fultons and the United States that they should take the land subject to the contingency of its being afterwards retaken and disposed of to another. If they took their land subject to such a contingency, did not every other person in that land district who purchased land from the United States, after the passage of the laws of 1820 and 1823, take it subject to the same contingency? There was nothing in the character or quality of the land purchased by the Fultons, nor in the nature of their contract with the United States, to distinguish them from other purchasers from the Government. They took upon the same terms, and they held by the same tenure, with all others who purchased land to which the Government had title; and I ask again, what was there in this transaction to distinguish it from any other case of an absolute and unconditional sale of land by the United

States, to which they had title, or to subject the Fultons to the contingency of having it taken from them, after they had fairly bought it, paid for it, and received a patent therefor? If they are to be made an exception to all the general rules of law and property, they ought, at least, to be informed why. It is not because there had been a French settlement and improvement upon their land, for this is disproved. Not because it had been surveyed, and a French claim located thereon before they bought, for no such thing had been done. Not because they made a conditional purchase, for the United States conveyed to them absolutely, and without condition or reservation. No reason whatever is perceived for making an exception of this case.

If the instructions given by the court to the jury are right, it must be because they contain a general principle of law, applicable to all cases in the same land district with Peoria, for there is nothing in this case to distinguish it from any other; and that general principle, as declared by the court, is, that all persons who purchased from the United States in that land district, after the passage of the laws of 1820 and 1823, took their land subject to the contingency of having it retaken, to satisfy French claims. This certainly cannot be so.

Upon this point, *Mr. Merriman* remarked as follows:

The second assignment of errors is upon the refusal of the court to grant the instructions asked by the defendants below. The first of which is, that if the jury should believe, from the evidence, the original French settlement upon which the suit is based was not upon or within the N. W. 3, 8 N., 8 E., nor located thereon by the United States surveyor until after that quarter section had been sold by the United States to the Fultons, they should find for the defendant, which instruction was refused; and the third instruction of the court was given upon that point—to which instruction the court is referred.

The instruction, as asked, was improper, for two reasons: first, there was no evidence tending to show a different location of the lot in controversy; and secondly, for the reasons stated in the said instruction of the court. The lot was grant-

ed to the settler or his legal representative in 1823, while the land belonged to the Government; and by the terms of the act, the located lot was to be designated, surveyed, and set apart to such settler, by the surveyor of the district. This survey was a duty enjoined upon the said officer, and it was a portion of the grant, and, as such, was notice to all persons afterwards purchasing of Government. Although the report of Edward Coles, containing a diagram of said claims, did not state, in numbers, the township, range, or section, upon which said settlement was made, yet it stated the location of said village so fully and particularly, together with its village lots and out-lots, that although, perhaps, the precise boundaries could not be ascertained without a survey, yet no one, by looking at the report and diagram of Coles, and comparing it with the sectional map of the township, including said village, could avoid the conclusion that this lot, thirteen, was wholly or in part on the quarter section claimed by plaintiff in error; the location of the village on the lake, the distance of this lot from the main village, the size of the lots between this lot and the main village, was sufficient notice of the probable location of this lot; and this, followed up by the fact that this village and out-lots were mostly located by the surveyor on said section three, and the evidence in this case of the marks of the old French cultivation, and which must have been plainer still at the time of the first settlement of said quarter section, are, we think, sufficient evidence of notice, if notice had been required. The courts will take judicial notice of all acts of Congress, as well as of the location of the different townships, ranges, and sections, by their Congressional divisions.

The record shows a space of time between the survey of the lot and the approval of such survey of over three years, during which time, if there were any objections to such survey, the parties interested should have filed their objections with the surveyor of said district. It cannot be said that they did not have plenty of time and opportunity for so doing.

Mr. Justice WAYNE delivered the opinion of the court.

This is a suit for the recovery of ten acres of land, which is

admitted by the parties to be a part of the northwest quarter of section three, in township eight north, of range eight east, of the fourth principal meridian, in the district of lands subject to sale formerly at Springfield, Illinois, and afterwards at Quincy.

Upon the trial below, the plaintiff gave in evidence: 1st, the act of Congress of May 15, 1820, entitled, an act for the relief of the inhabitants of the village of Peoria, in the State of Illinois; 2d, the act of the 3d March, 1823; 3d, the report of Edward Coles, in the 3d vol. State Papers, page 421; 4th, the special and general plat and field-notes of the survey of the village, made May 11, 1837, approved September 1, 1841, and approved by the surveyor of public lands in Illinois and Missouri; 5th, the deed of lot 13 by Bartholomew Fortier and his wife, Angelica, to plaintiff, September 23, 1854; 6th, depositions showing that Angelica was the only representative of Francis Willette, and that, when she made her claim before J. W. Coles, she was the wife of Louis Pilette, and that she married Fortier in 1838.

The defendant below, here the plaintiff in error, introduced in evidence a patent from the United States to Seth and Josiah Fulton, dated March 18, 1837, a pre-emption certificate of the same, laid July 11, 1833, and a conveyance by the Fultons to him of the land covered by the patent dated the 11th July, 1838. The patentees, Seth and Josiah Fulton, had lived upon the quarter section for several years before their entry was made, and Hall, also, had occupied the quarter section for some years before the Fultons sold to him. Also, a patent from the United States to the representatives of Francis Willette, for a lot which had been claimed by them under the act of the 3d March, 1823, and sundry depositions, which it is not necessary for us to notice in this opinion.

The defendant in error, Joseph L. Papin, claims the ten acres sued for in virtue of his purchase from Bartholomew Fortier, and Angelica, his wife, she being the sole representative of her father, and had claimed the land under the act of Congress of the 15th May, 1820, 3 Stat. at Large, 605, and that of the 3d March, 1823, U. S. Stat. at Large, 786.

The first of these acts declares, that "every person, or the legal representatives of any person, who claims a lot or lots in the village of Peoria, in the State of Illinois, shall, on or before the first day of October next, deliver to the register of the land office for the district of Edwardsville a notice in writing of his or her claim, and it shall be the duty of the register to make to the Secretary of the Treasury a report of all claims filed with him, with the substance of the evidence in support thereof; and also his opinion, and such remarks respecting the claim as he may think proper to make; which report, with a list of the claims which, in the opinion of the register, ought to be confirmed, shall be laid by the Secretary of the Treasury before Congress for their determination." Under this act claims were made by Louis Pilette in right of his wife, Angelica, the daughter of Francis Willette, and they appear in the register's report, dated the 10th November, 1820, entered as numbers 11, 12, and 13. That report, however, was not finally acted upon by Congress until the 3d March, 1823. The first section of that act declares, "there is hereby granted to each of the French and Canadian inhabitants, and other settlers in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress approved May 15, 1820, and who had settled a lot in the village aforesaid prior to the first day of January, 1813, and who have not heretofore received a confirmatory claim or donation of any tract of land or village lot from the United States, *the lot so settled upon and improved*, where the same shall not exceed two acres; and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: Provided, nothing in this act contained shall be so construed as to affect the right, if any such there be, of any other person or persons to the said lots, or any part of them, derived from the United States, or any other source whatever, or be construed as a pledge on the part of the United States to make good any deficiency occasioned by any other interfering claim or claims." And it was made the duty of the surveyor of the public lands of the United States

for that district to cause a survey to be made of the several lots, and to designate in a plat thereof the lots confirmed and set apart to each claimant, and forward the same to the Secretary of the Treasury, who shall cause patents to be issued in favor of such claimants, as in other cases.

The land sued for is described in the declaration as an out-lot or field of ten acres, near the *old village of Peoria*, in the State of Illinois, *confirmed* to Louis Pilette in right of his wife, Angelica, the daughter of the late Francis Willette, by the act of Congress of the 3d March, 1823, entitled "An act to confirm certain lots in the village of Peoria, it being claim No. 13 of the report made by the register of the land office at Edwardsville, in pursuance of an act of Congress of the 15th May, 1820." The lot is claimed in the report of the register as an out-lot or field, containing fifteen or twenty arpents of land, situated three-fourths of a mile northeastwardly (northwestwardly) from the village of Peoria. There can be no uncertainty whether the old or new village was meant, as the survey establishes it to have been near the old; and in our consideration of the act of the 3d March, 1823, our conclusion is, that that act can only embrace lots in the new village, or others appertaining to it.

The old village of Peoria was situated on the northwest shore of Lake Peoria, about one mile and a half above the lower extremity or outlet of the lake. The village had been established by Frenchmen at an early date, previous to the recollection of any one. About the years 1778, 1779, the first house was built on what was then called La Ville de Maillet, *afterwards the new village of Peoria*, and afterwards known by the name of Fort Clark. It was situated about one mile and a half below the old village, immediately at the lower front or outlet of the lake. This situation was preferred on account of the water being better and the place more healthy than at the old village. In consequence, the inhabitants gradually deserted the old village, and before the years 1796, 1797, had entirely abandoned it, and removed to the new village.

The inhabitants were generally Indian traders, hunters, and voyagers. They formed a link of connection between the

French residing on the waters of the great lakes and the Mississippi river. From that happy facility of adapting themselves to their situation and associates for which the French are so remarkable, the inhabitants of Peoria generally lived in harmony with their savage neighbors. But about the year 1781, an apprehension of Indian hostilities induced them to abandon the new village. They returned to it, however, after the peace of 1783, between England and the United States and the powers which had engaged in our revolutionary war, and continued there until the autumn of the year 1812. Then they were forcibly removed from it and their village destroyed by a Captain Craig, of the Illinois militia, on the ground, it was said, that himself and his company had been fired upon in the night by Indians, while at anchor in their boats before the village, with whom Craig suspected the villagers to be on too intimate and friendly terms. Craig and his company were in the service of the United States. The inhabitants of Peoria settled there without any grant or permission from any Government. Each person took such a portion of unoccupied land as he wished to occupy and cultivate; but as soon as he abandoned it, his right to the land ceased with his possession, and it reverted to its natural state. It was then liable to be improved and cultivated by any who thought proper to take possession. Sometimes a settler sold out his improvements before abandoning. That and the itinerant character of the inhabitants, account for the number of persons who claimed the same lot. As was usual in French villages, the lots in the village were small. They were large enough for houses, out-houses, and gardens, and in some instances, those who were able to do so cultivated what were known as out-lots or fields near to, but outside or beyond, the village. Those out-fields were of different sizes, depending upon the industry and means of persons to till them. The village lots, as contradistinguished from out-lots, contained generally the half of an arpent. Neither the old nor new village had ever been surveyed or occupied upon any fixed plan. Seventy claims were made under the act of the 15th May, 1820. They were returned on the report of the register

to the Secretary of the Treasury, on the 10th of November, 1826. In a little less than three years the act of 1823 was passed. Coles's Report, 3 Am. State Papers, Land.

The narrative just given has an important bearing upon the construction of the acts of 1820 and 1823. It serves to show the locality of the village of Peoria, for which those acts were passed, the purposes to be accomplished, and the extent and conditions upon which a lot may be confirmed to a claimant who had *settled and improved a lot* in the village before the first day of January, 1813, and who had not before received a confirmation of claims, or donation of any tract of land or village lot from the United States, when the lot settled upon and improved did not exceed two acres; and when it did, to confirm to the claimant ten acres, subject to the proviso in the act.

It was a gratuity to such settlers of a single lot in the village. Such was the first section of the act of 3d March, 1823. It gave to the claimant an incipient or inchoate right to a lot, when, in conformity with the second section of the act, a survey had been made of the several lots reported by the register, *with a designation or a plat thereof of the lot confirmed and set apart to each claimant.* When that had been done, the claimant became a confirmee under the act, and his right to the lot, as between himself and the United States, was complete. Such was the view taken by this court of the acts of 15th May, 1820, and of the 3d March, 1823, in Bryan and Forsyth, 19 Howard, 336. Its language then was, when the survey was made, and the plats returned and approved and recorded by the surveyor general of Illinois and Missouri, and recognised as valid at the General Land Office, it bound the parties to it, the confirmee and the United States.

The law was intended to grant the lot settled upon and improved, and no other land described as an equivalent. But, in this instance, no survey was made in conformity with the 2d section of the act until the 11th April, 1837. It was not examined and approved by the surveyor of the public lands in Illinois and Missouri until the first September, 1840, seven years after Seth and Josiah Fulton had made their entry upon the quarter section, and three years after they had received

their patent for it from the United States. The land was unconditionally sold to them. Hall, the plaintiff in error, bought from the Fultons in July, 1838. Under the decision of this court, already cited, no location of the out-lots could be made upon this quarter section after the patent had been issued to the Fultons. It follows, then, that there was no confirmation of the land sued for to the representative of Francis Willette; and, consequently, that the quit-claim conveyance by Angelica Fortier and her husband, of the 23d September, 1854, to Papin, the defendant in error, gave to her no title to the ten acres for which he has sued. We have shown that the inchoate right of the claimant under the act—supposing that no out-lot was meant to be confirmed—was subject to a survey and designation before it could be matured into a title. The requirement of a survey before a claimant could be considered as having a legal title to land upon a concession, has frequently been passed upon by this court; and the case before us is within that of Menard Heirs *v.* Massey, in 8 Howard, 309.

It now remains for us to consider two of the instructions which were asked by the defendant in the court below, which the court refused to give to the jury.

They were: If the jury believed from the evidence that the original French settlement or improvement, upon which the plaintiff's claim in this suit is based, was not upon or within the northwest quarter of section 3, in township eight north, in range eight, east of the 4th meridian, *nor located upon that quarter section by the United States surveyor until after that was sold to the Fultons by the United States, that the jury were to find for the defendant.*

The court did not give the first branch of the instructions asked, and, in our opinion, rightly so; for there was no proof in the case to show that the French settlement, which was the basis of the suit, was not a part of it. Indeed, no such instruction would have been asked; for it was admitted by the parties that the tract sued for was a part of the quarter section described in the patent to the Fultons. But the court refused, also, the second branch of the prayer, which, in our opinion,

should have been given, and gave the jury an instruction as follows: He told the jury that the acts of Congress of 1820 and 1823, taken in connection with the report of the register of the land office and the survey under the authority of law, vested in the parties entitled, under the acts of Congress, with an absolute right of property in the lot surveyed; and that Angelica, the person named in the evidence, was the daughter and sole heir of her father, Francis Willette, the settler; that she was within the meaning of the law; and her claim being in the report, was confirmed by the act of 1823.

And the jury was further instructed, that the survey of the claimed lots, as reported by the register, was duly made and approved, because the survey for the purposes of this action made the title of the claimants under the acts of Congress complete; and that the court was of the opinion that the persons taking under the patent of March 18th, 1837, and under the entry of July 11th, 1833, must be considered as taking their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and 1823; and when a party brought himself within those acts, his title was the paramount title, *notwithstanding the patent to the Fultons.*

The defendant, in our view, had asked for such an instruction as he had a right to have under the authorities cited in a previous part of this opinion. The instruction given to the jury was erroneous.

The defendant had also asked in his second prayer, that the court would instruct the jury, if they believed from the evidence that by the plaintiff's recovering in this case the legal representatives of Willette would be confirmed in more than ten acres of Peoria French claims, that they were to find for the defendant. The prayer is inartificially drawn; but when taken in connection with the evidence in the case and the act of 1823, its purport could not have been misunderstood. The object of the defendant was to get an instruction from the court, upon the evidence he had given, in conformity with the limitation in the act, as to the quantity of land which could be confirmed to a claimant under it. It declares when the lot shall not exceed two acres, that it shall be confirmed; and

when the same shall exceed two acres, that every such claimant shall be confirmed in a quantity not exceeding ten acres.

Pilette, the husband of Angelica, had filed in her behalf, in the year 1820, before the register, claims for lots eleven, twelve, and thirteen. The first, being the land numbered as number eleven, contained about one-half of an arpent of land; number twelve the same quantity, situated directly in the rear of eleven, and separated from it by a street; number thirteen was a claim for an out-lot or field, containing fifteen or twenty acres of land, and situated about three-fourths of a mile north-eastwardly (northwestwardly) from the village of Peoria; number eleven was also claimed before the register by Felix Fontain, his claim being in the report No. 41; but it turned out, according to the survey, that both were for the same land, and that they covered the southwest part of Etienne Barnard's claim number 1, the northeast part of it being also covered by another claim of Felix Fontain, numbered in the survey as 42. For land so described, containing fifty-four thousand eight hundred and ninety and fourteen-hundredths of a square foot, designated as covered by the claims one, eleven, forty-one, and forty-two, a patent was issued by the United States to the representatives of Francis Willette, on the 28th August, 1845. That patent was introduced in evidence by the defendant below, the plaintiff in error. The purpose was to show that the heirs of Willette having already had one confirmation of "a lot *settled and improved*," under the act of 3d March, 1823, that they were not entitled to another, or to any confirmation of the title to the land in litigation. If that were allowed, they would get more than the ten acres, to which every claimant was limited by the act. Our construction of the act is, that a claimant was to have one confirmation of "a lot so settled and improved," which had been claimed and entered in the report of the register of the land office at Edwardsville, in pursuance of the act of the 15th May, 1820; that no claimant, though he shall appear in the register's report as having made several claims, could, after having had one of them confirmed, transfer any right of property in the others to any persons whatever.

Papin, the plaintiff below, took from the representatives of Willette a quit-claim conveyance for the land for which he sues on the 23d September, 1854—more than thirty years after the passage of the act of the 3d March, 1823—more than twenty years after the Fultons had made their entry upon the quarter section—eighteen years after they received their patent for it from the United States—seventeen after Hall had the land in possession by purchase from the Fultons, and ten years after the patent of confirmation to the representatives of Willette had been recorded in the General Land Office. Under these circumstances, Papin took a conveyance, which gave him no right to the land. When the plaintiff in error, Hall, asked the court to instruct the jury, that if they believed from the evidence that, by the plaintiff's recovery in this case, the legal representatives of Francis Willette will have been confirmed in more than ten acres of Peoria French claims, they were to find for the defendant, the prayer ought to have been apprehended by the court, according to its relation to the subject-matter in controversy, and such an instruction should have been given accordingly to the jury. The refusal, then, was error.

For the reasons given, we shall direct the judgment of the court below to be reversed; that a *venire facias de novo* shall be issued; and that the court, in its further proceedings in the cause thereon, conform to the rulings of this opinion.

ANGELINA R. EBERLY AND PEYTON LYTLE, BY HIS NEXT FRIEND, A. B. EBERLY, PLAINTIFFS IN ERROR, *v.* LEWIS MOORE AND CHARLES RAYLON.

After the defendants had put in a plea in bar, they moved the court for leave to withdraw the plea, and to plead in abatement that the plaintiffs had alleged themselves to be citizens of another State, but were in reality the citizens of the same State with themselves, in consequence of which the District Court of the United States had not jurisdiction of the case.

The court allowed the motion and the plea in abatement to be filed. Being satisfied by the verdict of a jury that the allegation of the plea was true, the petition of the plaintiffs was dismissed.

In this the District Court was right. The jurisdiction has been conferred by acts of Congress upon the courts of the United States so to supervise the various steps in a cause as to prevent hardship and injustice, and that the merits of a cause may be fairly tried.

That the plea was not artistically drawn is not a sufficient reason for reversing the judgment of the court below.

THIS case was brought up by writ of error from the District Court of the United States for the western district of Texas.

Angelina R. Eberly, and the minor, Peyton Lytle, brought an action of trespass to try title to a tract of land situated in Falls county, in the State of Texas. The suit was brought against a number of persons, who adopted different modes of defence. Moore and Raybon pleaded the general issue and certain pleas of adverse possession in bar. At the succeeding term of the court they presented a motion for leave to withdraw their answer, and plead in abatement, upon the ground that the plaintiffs, instead of being citizens of Kentucky, as they had alleged, were in reality citizens of Texas, and consequently that the court had no jurisdiction over the case. The motion was granted and the pleas in abatement filed. Other proceedings took place which it is not necessary to state. After the jury was impannelled, the court charged them as follows:

GENTLEMEN OF THE JURY: To give the court jurisdiction of this case, it is necessary that the plaintiffs should be non-residents, or citizens of the State of Texas. The petition alleges that two of the plaintiffs, viz: Mrs. Eberly and Peyton Lytle, are citizens of the State of Kentucky. This allegation is denied by the plea in abatement, which avers them to be citizens of the State of Texas. Upon this issue arises the question of fact which you are to determine.

When a domicil or citizenship is once acquired in a State, a mere temporary removal will not affect it, and a citizenship elsewhere will not be acquired without a corresponding removal, accompanied with a *bona fide* intent for that purpose. This intent the jury must determine from all the facts and circumstances in evidence before them. The jury will simply state in their verdict whether, from the proof before them in

this case, Mrs. Eberly, and her grandson, Peyton Lytle, or either of them, were citizens of the States of Kentucky or Texas on the 4th November, 1855.

T. H. DUVAL,
U. S. Dist. Judge.

The defendants ask the court to charge, that if Texas was the natural domicil of Peyton Lytle, that is, the domicil of his birth, and if it remained so until the death of his parents, then it was not in the power of the grandmother to change his domicil by carrying him to Kentucky, and thus to confer upon him that citizenship which would give this court jurisdiction. JNO. A. & R. GREEN,
For Def'ts.

The above instruction is given.

T. H. DUVAL,
U. S. Dist. Judge.

And the jury having heard the evidence, and argument of counsel, and the charge of the court, retired, and returned into court with the following verdict, which is in words, to wit:

"We, the jury, find, from the law and the evidence, that the domicil or residence of the plaintiffs in this case, Angelina R. Eberly, and her grandson, Peyton Lytle, never has been changed from the State of Texas, and that their domicil or residence was in the State of Texas at the commencement of this suit."

The counsel for the plaintiffs took an exception to the judgment of the court, granting permission to the defendants to withdraw their plea first filed and file one in abatement; and afterwards moved the court for judgment by default to be entered against the defendants, for want of a defence or answer; which motion being overruled by the court, the plaintiffs excepted. The jury then found that the residence of the plaintiffs was in Texas, and the court dismissed the suit.

The case was argued by *Mr. Hale* for the plaintiffs in error, and submitted on a printed argument by *Mr. Ballinger* for the defendant.

That part only of the argument of *Mr. Hale* which related to the power of the court to grant leave to the defendants to withdraw their first plea and plead in abatement can be inserted.

Ordinary questions of amendment are intrusted to the discretion of the inferior courts, and are not revisable here; but in a case of this character, the courts of law have no discretion. The 32nd section of the act of 1789, (1 Stat. at L., 91,) applies, in its first clause, to the correction of formal defects or errors by a reference to other parts of the record; and in its last and more general clause, to an amendment of "any defect in the process or pleadings." It is obvious that this statute grants only the power of correcting an error occurring in the body of a pleading, and is not to be understood as authorizing the cancellation or withdrawal of the pleading itself. In the latter case there would be no "defect" to be supplied, as there would be nothing left in which to supply it. The power, then, to allow the withdrawal of an entire plea and the substitution of another, must be derived, if at all, from the common law, or the general and necessary authority of a court *in ordinationem litis*. But this general authority cannot extend to the case of amendments, because then there would have been no need of the enabling statutes. And at common law, the courts had at first no power of admitting amendments after the term.

Bac. Ab. Amendment, A.
Blackmore's case, 6 Co. R., 157.
Com. Dig. Prerogative, D., 85.
Nelson *v.* Barker, 3 McLean, 379.

Afterwards their power was considered to continue as long as the cause was "in paper."

Tidd's Pract., 697.
Bondfield *v.* Milner, 2 Burr., 1099.

The expression "in paper" appears to be strictly applied to the condition of a cause before the impannelling of a jury; but the decisions are conflicting as to the power of granting an amendment in a material point, (except to correct a vari-

ance,) after issue is taken. It is clear that an omission cannot, in the English courts, be supplied after that time.

Bye *v.* Bower, Carr and M., 262.

John *v.* Currie, 6 Carr and P., 618.

Brashear *v.* Jackson, 6 Mees. and W., 549.

Webb *v.* Hill, Mood and M., 253.

But there have been instances where a demurrer or replication was allowed to be withdrawn and a new pleading substituted. In these cases, however, it is to be noticed that the object has been to speed the cause. There is no precedent for the withdrawal of a plea in bar, to admit either a demurrer or a plea in abatement. On the contrary, it is well settled that a plea, introduced by amendment, must be to the merits of the case.

Law *v.* Law, Str., 960.

Perkins *v.* Burbank, 2 Mass., 73.

Eaton *v.* Whittaker, 6 Pick., 465.

Beach *v.* Fulton Bank, 3 Wend., 573, 576.

Waples *v.* McGee, 2 Harring, 444.

See, also, D'Wolf *v.* Rabaud, 1 Pet., 585.

Ripley *v.* Warren, 2 Pick., 592, 594—596.

Palmer *v.* Everson, 2 Cow., 417.

Engle *v.* Nelson, 1 Penns., 442.

There seem to be two rules on this subject; first, that an amendment will not, in general, be allowed, unless there is something in the record by which or on which to amend; and second, in the rare cases in which an entire new plea is permitted, it must be of a character subsequent in the natural order of pleading to the one withdrawn.

Judicial discretion can only be exercised where neither party has a legal right. When rights are involved, discretion ends, and any decision becomes the subject of appellate revision. In the present case, the defendants in error, by pleading in bar at a former term, had admitted the jurisdiction of the court and waived any objection to it.

Co. Litt., 303.

Com. Dig. Abatement, D., 9, 5.

Mostyn *v.* Fabrigas, Cowp., 161.

Bailey *v.* Dozier, 6 How., 23, 30.
Sheppard *v.* Graves, 14 How., 505, 509.
Whyte *v.* Gibbes et al., 20 How., 579, 585.
Martin *v.* Commonw., 1 Mass., 347.
Ripley *v.* Warren, 2 Pick., 592, 594.
Coffin *v.* Jones, 5 Pick., 61.
Ludlow *v.* Simond, 2 Caines Ca., 40.
Wood *v.* Mann, 1 Sumn., 578.
Hinckley *v.* Smith, 4 Watts, 433.
Chamberlain *v.* Hite, 5 Watts, 373.

And it is so expressly decided in Texas, Hart. Dig., art. 688, 691.

Drake *v.* Brander, 8 Texas, 351.
Cook *v.* Southwick, 9 Tex., 615.
Ryan *v.* Jackson, 11 Tex., 391, 400.
Wilson *v.* Adams, 15 Tex., 323.
Compton *v.* Western Stage Co., Mss. opinion.

This waiver on the part of the defendants enures to the plaintiffs, and when acted on by them, in the further prosecution of the suit, gives them a right to insist on it as conclusive. Thus Lord Eldon said, in Iveson *v.* Harris, 7 Vesey, 254, "the objection to the jurisdiction may have been waived by the defendant himself—that is, he may have pleaded so that it is incompetent to him to stay the proceeding afterwards." And this is further illustrated by the remarks of the Vice Chancellor, in Chichester *v.* Donegal, 6 Madd., 375. "I state," he says, "without exception, as a general principle, that in courts of equity, as well as courts of law, a party admitting a fact which gives jurisdiction to a court, and appearing, and submitting to that jurisdiction, on general principles and upon all the analogies known to us, can never recede, or as it is called in the Scoth law, *resile*, from these facts and withdraw that admission."

See, also, Smith *v.* Elder, 3 Johns. R., 113.

Cases are not wanting, also, in which the power of a court to permit a plea to the jurisdiction, after such a constructive admission, has been expressly denied. Thus in Martin *v.* Commonw., 1 Mass., 353—60, the Attorney General asked

leave to plead in abatement after an imparlance in error; and objection being made by Parsons, counsel for plaintiff in error, the court unanimously refused to permit it, because the plea in abatement was offered after a plea in bar had been filed, which admitted the capacity of the plaintiff in error. In a similar case in New York, where it was shown that the general issue had been pleaded without the knowledge of the defendant, the court still refused to allow it to be withdrawn to let in a plea of coverture.

Anonymous, 3 Caines R., 102.

So permission to plead in abatement will be refused, after imparlance, though the prayer for imparlance was by mistake or through ignorance.

2 Rol., 244.

Com. Dig. Abatement, D., 9, 2.

The subject is elaborately discussed in Wood *v.* Mann, 1 Sumn., 578. And the principle is substantially affirmed by the Supreme Court of Texas in Coles *v.* Perry, 7 Texas, 109, 141.

That part only of *Mr. Ballinger's* argument which relates to the general rules of pleading can be given, omitting the references to the Texas decisions.

II. The court below had the right to permit the answer to the merits to be withdrawn and abandoned, and a plea to the jurisdiction filed; and this court will not revise the discretion which was exercised.

The general rule requiring a plea to the jurisdiction to precede a plea to the merits, or otherwise waiving the former, is of course familiar. Its reason is thus explained by Judge Story: "All pleas to the jurisdiction are objections to entering into the *litis contestatio*, and they must and ought therefore to precede the *litis contestatio*. When the party submits the merits of the case to be heard by the court on the pleadings and testimony, he admits that the court has jurisdiction for that purpose."

2 Sumner, 585; 11 Pet., 393; 14 How., 509.

But the question is, whether, if a party once pleads to the

merits, he forever forfeits all right to ask, and the court itself loses all power to permit, upon any ground whatever, such plea to be withdrawn, and an issue presented to the jurisdiction of the court. If he is led to make such plea through fraud and misrepresentation practiced upon him, or through accident or mistake, not culpable on his part, and it appears not to have prejudiced the plaintiff in any degree, but to be only an unconscionable advantage in his favor, is the mouth of the defendant forever closed, and is he placed beyond the pale of any relief? "Fraud vitiates the most solemn proceedings of courts of justice."

Duchess of Kingston's Case.

Accident, surprise, and mistake, are grounds of relief in all the transactions of life. Can it be possible that rules of pleading, fashioned by the courts for their own convenience in the administration of justice, are the only exception to the power of courts to grant relief from unconscionable advantages obtained by either of these means? "If courts could not, in cases of accident or necessity, with a view to reach the truth, give relief or indulgence on making the other party indemnity for the delay, our rules would be worse than any principles of law in common cases, which are often relieved against in equity, and sometimes at law, in the event of accident and mistake."

See Wallace *v.* Clark, (3 Woodb. and M., 359,) a case standing on very analagous ground.

The Constitution of the United States provides that "the judicial power shall extend to all cases in law and equity, arising," &c. By "cases in law" was meant suits in which legal rights are to be determined, in contradistinction to rights cognizable in equity or admiralty.

Parsons *v.* Bedford, 3 Pet., 44.

Bennett *v.* Butterworth, 11 How., 647—5.

There is no common law of the United States regulating principles of pleading and practice at law, or upon any other subject, (Wheaton *v.* Peters, 8 Pet., 658;) nor do the laws of a State have any such effect, *proprio vigore.*

9 Pet., 329; 2 Curt. C. C., 94.

The Supreme Court of the United States has the power to prescribe rules of pleading and practice, in suits at common law, for the District and Circuit Courts, (act Aug. 23, 1842, sec. 6, 5 Stats., 517;) but it is a power which has never been exercised. The District Court in Texas has also the power to regulate its practice, "as shall be fit and necessary for the advancement of justice," &c., (act March 2, 1793, sec. 7, 1 Stats., 385;) and in the entire want of all other rules, it adopted its own rules of pleading and practice, conforming them to the practice of the State courts, so far as consistent with the laws of Congress and the distinctive organization of a court of law. One of the few provisions, by act of Congress, touching the pleadings in the courts of the United States, is, that those courts may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe.

32d sec. Judiciary Act, 1789, 1 Stats., 91.

By the law governing the State practice, "the pleadings in all suits may be amended under the direction of the court, upon such terms as it may prescribe, at any time before the parties announce themselves ready for trial, and not thereafter."

O. & W. Dig., art. 434.

These express provisions of law intrust the amplest discretion to allow amendments of the "pleadings," and the largest measure of such discretion and control also results from the organization of the court. The exercise of that discretion cannot, upon well settled principles, be revised by this court. In Marine Ins. Co. *v.* Hodgson, 6 Cranch, 206, the defendant having filed six special pleas, was refused leave to file two others. The court say:

"This court does not think that the refusal of an inferior court to receive an additional plea or to amend one already filed can ever be assigned for error. This depends so much on the discretion of the court, which must be regulated more by the particular circumstances of every case than by any precise and known rule of law, and of which the superior

court can never become fully possessed, that there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial or not to continue a cause; but in neither case can the party be relieved by writ of error, nor is the court apprised that a refusal to amend, or to add a plea, was ever made the subject of complaint in this way. The court, therefore, does not feel itself obliged to give any opinion on the conduct of the inferior court in refusing to receive these pleas. At the same time, it has no difficulty in saying that even in that stage of the proceedings, the Circuit Court might, if it had thought proper, have received these additional pleas, or admitted of any amendment in those already filed." (Pp. 48, 219.)

"The allowance or disallowance of amendments is not matter for which a writ of error lies here."

Chirac *v.* Reinecker, 11 Wheat., 280.
Walden *v.* Craig, 9 Wheat., 573.
Wright *v.* Hollingsworth, 1 Pet., 165.
United States *v.* Buford, 3 Id., 31.
Clapp *v.* Balch, 3 Greenl., 219.
Morgan & Smith *v.* Dyer, 10 Johns., 163.
Northum *v.* Kellogg, 15 Conn., 574.
Toby *v.* Claflin, 3 Sum., 380.
Calloway *v.* Dobson, 1 Brock, 119.

The precise question of permitting a plea to the jurisdiction after general answer to the merits was decided by Judge Story, in Dodge *v.* Perkins, 4 Mason, 435, in which suit was brought against a citizen of Massachusetts by an administrator, alleging citizenship of his intestate in New York. There was an answer to the merits, also denying the averment of citizenship. Judge Story held that the citizenship of the administrator must be averred, and granted leave therefor. After deciding that the question of citizenship was preliminary, and to be made by plea, and not by answer, he says: "In this case, I should feel it my duty to give the defendant a right to withdraw his answer and put in a plea, if the pos-

ture of the cause hereafter should render that course desirable to him." (P. 437; and see 1 Sum., 579.)

The general rule is thus recognised in Pennsylvania by Ch. J. Tilghman: "The pleadings are always under the control of the court. Pleas in abatement ought not to be put in after pleas in bar, unless under special circumstances, of which the court will judge."

Riddle et al. *v.* Stevens, 2 Serg. and R., 544.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiffs, as citizens of Kentucky, commenced a suit by petition against the defendants, as citizens of Texas, for the recovery of a parcel of land in their possession. At the return of the process the defendants pleaded to the petition the general issue, and the statute of limitations, in bar of the suit.

At the next succeeding term they moved the court, upon an affidavit charging that the allegation in the petition, "that the plaintiffs were citizens of Kentucky, was untrue, and fraudulently made to induce the court to take cognizance of the cause," and that they were citizens of Texas, for leave to withdraw their pleas, and to plead this matter in abatement of the suit. This motion was allowed, and pleas in abatement were filed. One of these avers that the allegation of citizenship in said plaintiffs' petition *is* not true; that said plaintiffs *are* not citizens of Kentucky, but *are* respectively citizens of Texas; wherefore he prays the dismissal of the cause for want of jurisdiction. The plaintiffs thereupon moved the court for judgment for the want of a plea. This motion was not allowed, and thereupon the plaintiffs refused to reply to the pleas in abatement, and the court then proceeded to impannel a jury, and directed them to ascertain whether, from the proof before them, the plaintiffs, or either of them, were citizens of the States of Kentucky or Texas at the date of the writ. The jury returned as their verdict, that the domicil or residence of the plaintiffs never had been changed from the State of Texas, and that their domicil or residence was in the State of Texas at the commencement of this suit. The court dismissed their petition.

The plaintiffs object to the authority of the District Court to permit the withdrawal of pleas in bar, for the purpose of pleading to the jurisdiction; that a plea in bar admits the jurisdiction of the court, and the capacity of the plaintiffs to sue, and that they cannot be deprived of the benefit of that admission. The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried. Such a jurisdiction is essential to and is inherent in the organization of courts of justice. Bartholomew *v.* Carter, 2 M. and G., 125.

But this jurisdiction has been conferred upon the courts of the United States in a plenary form by acts of Congress. 1 Stat. at Large, p. 83, sec. 17; p. 335, sec. 7; p. 91, sec. 32.

It has been uniformly held in this court that a Circuit Court could not be controlled in the exercise of the discretion thus conceded to it. Spencer *v.* Lapsley, 20 How., 264. In the present instance the jurisdiction was properly exercised. An attempt was made, according to the affidavit on which the motion was founded, to confer upon the District Court, by a false and fraudulent averment, a jurisdiction to which it was not entitled under the Constitution. If true, this was a gross contempt of the court, for which all persons connected with it might have been subject to its penal jurisdiction.

The plaintiffs contend that the plea is a nullity, and that they were entitled to sign judgment. It is not a precise, distinct, or a formal plea, but it denies the truth of the averment of the citizenship of the plaintiffs, as they had affirmed it to be in the petition. We may say as Lord Denman said, in Horner *v.* Keppel, 10 A. and E., 17: "Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside; but the plea here is not *quite* bad enough to warrant that remedy."

Judgment affirmed.

JOHN FITCH, APPELLANT, *v.* EDWARD CREIGHTON.

The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property.

The City Council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments.

The contractor who executed the work, and who was a citizen of another State, filed a bill upon the equity side of the Circuit Court to enforce this lien.

The court had jurisdiction of the case.

The courts of the United States have jurisdiction at common law and in chancery; and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State, but from the laws of the United States.

It was not necessary to make the contractor who had sold out a party, nor was the bill multifarious because it claimed to enforce the liens upon several lots.

THIS was an appeal from the Circuit Court of the United States for the northern district of Ohio.

It was a bill filed on the equity side of the court by Creighton, a citizen of Iowa, against Fitch, a citizen of Ohio, under the circumstances stated in the opinion of the court. The Circuit Court decreed against Fitch, who brought up this appeal.

It was submitted on printed arguments by *Mr. Cooke* for the appellant, and *Mr. Swayne* for the appellee.

The principal question in the case was whether the Circuit Court had jurisdiction of the case, which depended upon the facts involved in it. A particular statement of these would not be interesting to the profession generally, and therefore they are omitted. The propositions for which *Mr. Cooke* contended, in support of the demurrer below, were—

I. That the complainant does not show himself possessed of any right which he can enforce directly against this defendant or his property; and—

II. That the liability of the defendant is not such an one as can be enforced against him in a court of equity, without the aid of the statute, which cannot confer jurisdiction upon the courts of the United States.

Mr. Swayne's points, in opposition to the above, were thus stated:

I. It seems to be conceded that, when the local statutes of a State give rights to an individual, the courts of the United States will enforce those rights in cases where they have jurisdiction of the parties.

1. It is not pretended that the States can direct the remedy by which rights are to be enforced, which the Federal courts are bound to pursue.

2. But it is claimed that where the statute of a State creates a right which may be enforced by remedies already existing and resorted to in the latter courts, that these courts will enforce the right by their own known remedies and usages, in cases where they have jurisdiction, although the local statute may direct a special mode of proceeding.

The General Smith, 4 Wheaton's Rep., 438.

II. By the statute and the contract with the city, the complainant acquired, by operation of law, rights which courts of equity, by their long-established rules and usages, will enforce.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the northern district of Ohio. The bill was filed by Edward Creighton, a citizen of the State of Iowa, against John Fitch, a citizen of the State of Ohio.

By the act of March 11th, 1853, Swan's Statutes Ohio, it is provided, "that the City Council shall have power to lay off, open, widen, straighten, extend, and establish, to improve, keep in order, and repair, and to light streets, alleys, public grounds, wharves, landing places, and market spaces; to open and construct, and put in order and repair, sewers and drains; to enter upon or take for such of the above purposes as may

require it, land and material; and to assess and collect and charge on the owners of any lots or lands, through or by which a street, alley, or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, and repairing, said street, alley, or public highway, to be in proportion either to the foot front of the lot or land abutting on such street, alley, or highway, or the value of said lot or land as assessed for taxation under the general law of the State, as such municipal corporation may in each case determine."

Each municipal corporation may, either by a general or special law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment or decree was required to be entered severally; and a charge was required to be enforced for the value of the work or material on such lot or land; and where payment shall have been neglected or refused when required, the corporation shall be entitled to recover the amount assessed, and five per cent. from the time of the assessment. Swan's Stat., 963.

On the 7th of April, 1855, the city of Toledo entered into a contract with Creighton, and one Edward Connelly, who bound themselves to do certain work on the streets, for the sums named in the contract; and that so soon as the work was completed, the street commissioner should give them a certificate to the effect, and on the presentation of the same to the council, it would assess the cost and expenses of the improvement on the lots or lands made liable by law to pay the same, and make out and deliver to the contractors a certified copy of said assessments, and authorize them or assigns to collect the several amounts due and payable for the work and improvement.

Creighton purchased from Connelly his interest in the contract, and went on and performed the work under it, to the acceptance of the city. On the 14th July, 1856, the council made an assessment on the lots abutting on the improvement in Monroe street, to pay the expenses of that work, and di-

rected that the owners of the lots make payment of the assessments to Creighton. Among the rest, lot 640, belonging to John Fitch, was assessed for this work $84.56.

On the 20th May, 1856, the council made an assessment upon the lots abutting on said improvement in Michigan street, to pay for the same, and also directed the owners of these lots to make payments of such assessments to Creighton. Among the lots so assessed were the following, owned by defendant, numbered 547, 538, 539, 544, 1,461; the assessments of the respective lots amounted to the sum of $1,791.76; and subsequently a further assessment was made on the contract of three lots, numbered 686, 751, and 855, which amounted to the sum of $266.47. The above sums were ordered to be paid to the complainant, with five per centum allowed by law.

To this bill the defendant demurred, which, on argument, was overruled. And the court ordered the above sums to be paid in ten days, or in default thereof that the lots be sold, &c.

From this decree an appeal was taken. On the part of the appellant it is claimed, that upon the facts of the case, the Circuit Court had no jurisdiction; that the equity jurisdiction of the courts of the United States depends upon the principles of general equity, and cannot, therefore, be affected by any local remedy, unless that remedy has been adopted by the courts of the United States.

By the 34th section of the judiciary act of 1789, it is declared, "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This section does not relate to the practice of our courts, but it constitutes a rule of property on which the courts are bound to act.

The courts of the United States have jurisdiction at common law and in chancery, and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State, but from the laws of the United States.

In Clark *v.* Smith, 13 Peters, 203, the court say "the State Legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the State courts."

In the case above cited, the Legislature of Kentucky authorized a person who was in possession of land claimed by him, and some one else had a claim on the same land; the possessor was authorized to file a bill against the claimant to litigate his title and remove the cloud from it.

The statute authorizes a suit at law or in equity, but from the nature of the case it would seem that chancery was the appropriate mode.

There was no necessity to make Connelly a party in this case. He made the contract jointly with Creighton. But before the work was commenced Connelly relinquished his right to Creighton, who performed the whole work, and to whom the City Council promised payment. The assessments, too, were made to Creighton, and he was considered the only contractor with the city. No right was held under Connelly. By the statute the city makes an assessment which is to be paid by the owner personally, and it is also made a lien on the property charged. The charge may be collected and the lien enforced by a proceeding at law or in equity, either in the name of the city or its appointee. The complainant is the appointee for this purpose, and his right is too clear to admit of controversy.

This bill is not multifarious; the assessments were assessed on the lots by the foot front, and all against the same defendant.

Lord Cottenham, in Campbell *v.* Mackay, 7 Simon, 564, and in Mylne *v.* Craig, 603, says, to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossi-

ble. Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

We think the statute of the State, and the municipal corporation of Toledo, authorize the assessment of the sums on the lots in question, and that the judgment in the Circuit Court must be affirmed.

WILLIAM H. PHILLIPS, PLAINTIFF IN ERROR, *v.* GEORGE PAGE.

In a patent taken out by Page for certain improvements in the construction of the portable circular saw-mill, he claimed the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it (the saw) by friction rollers, embracing it near its periphery, so as to leave its centre entirely unchecked laterally.

An instruction by the court below, that the claim was as stated above, but adding "in a saw-mill capable of being applied to the sawing of ordinary logs," was erroneous.

Although the improvements of the patentee may have enabled the machine to be applied to the purpose of sawing logs, when before it was applied only to the purpose of sawing light materials, such as shingles, and blinds for windows, yet there is nothing in the patent to distinguish the new parts of the machine from the old, or to state those parts which he had invented, so as to enable the machine to saw logs.

The patent law does not require the defendant to give notice of the time when any person may have possessed the knowledge or use of the invention in question, but only of the name of the person and of his place of residence, and the place where it has been used.

An instruction of the court below, making the time material, was therefore erroneous.

THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of New York.

The principal question related to the construction of Page's patent for improvements in the construction of a portable circular saw-mill, the circumstances of which are stated in the opinion of the court. Under the instructions of the court below, the jury found a verdict for Page, with $50 damages, and $466.14 costs. The bills of exception are stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Keller* for the plaintiff in error, and *Mr. Reverdy Johnson* and *Mr. Latrobe* for the defendant.

The arguments upon the points in the case are omitted, as not being likely to interest the profession generally.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court for the northern district of New York.

The suit was brought in the court below by Page, the defendant in error, to recover damages for the infringement of a patent for certain improvements in the construction of the portable circular saw-mill. After describing minutely the different parts, and manner of constructing the machine, with drawings annexed, and also the use and operation of the respective parts, the patentee sets forth the particular portion of the construction which he claims as his own, as follows:

"I claim the manner of *affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it (the saw) by friction rollers, embracing it near its periphery, so as to leave its centre entirely unchecked laterally.* I do not claim the use of friction rollers, embracing and guiding the edge of a circular saw, as these have been previously used for that purpose; *but I limit my claim to their use, in combination with a saw having free lateral play at its centre.*"

Evidence was given on the part of the defendant, in the course of the trial, tending to prove that, long before the time of granting the plaintiff's patent, and before the date of his invention, machines for sawing shingles from short blocks of

timber, and sawing lath and blinds for windows, with circular saws, varying in size from ten to thirty inches in diameter, had been in public use; in which machines the circular saw was guided by means of guide-pins, embracing it (the saw) near the periphery, and its shaft having end-play, and being entirely unchecked laterally; but it did not appear that such machines had been used in a saw-mill for sawing timber, or in a mill, or a machine of a size or character adapted to the sawing of ordinary logs, or other large unsawed timbers.

When the evidence closed, the defendant's counsel prayed the court to charge the jury, that according to the true construction of the patent, the claim is for the manner of affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near its periphery, so as to leave its centre entirely unchecked laterally.

But the court refused so to charge, and instructed the jury that the claim was limited to the manner of affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near its periphery, so as to leave its centre unchecked laterally, *in a saw-mill capable of being applied to the sawing of ordinary logs.*

And in refusing another prayer, the court charged, that in order to defeat the plaintiff's patent by the use of prior machines of this construction, they must have been machines for the purposes of sawing in mills of a size and character adapted to the sawing of ordinary logs.

There can be no doubt but that the improvements of the patentee in the manner of constructing the portable circular saw-mill described in his specification were designed to adapt it to the sawing of logs in a saw-mill, and which could be carried from place to place, and put into operation by the use of horse-power; and it may very well be, if he had set up in his claim the improvements or particular changes in the construction of the old machine, so as to enable him to adapt it to the new use, and one to which the old had not and could not have been applied without these changes, the patent might

have been sustained. The utility is not questioned, and, for aught there appears in the case, such improvements were before unknown, and the circular saw-mill for sawing logs the first put in successful operation.

But no such claim is set up by the patentee; nor does he distinguish in the description of the parts of the machine, nor in any other way, the old from the new, or those parts which he has invented or added in its adaptation to the use of sawing logs, not before found in the old machine for sawing shingles, blinds for windows, and other light materials. On the contrary, his claim is for the precise organization of the old machine, namely, the manner of affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near to its periphery, so as to leave its centre entirely unchecked laterally. There is nothing new in this combination. It had long been known and used in the circular saw for sawing timbers of smaller dimensions than an ordinary saw-log. Nor does the enlargement of the organization of the machine compared with the old one, (the same being five feet in diameter, and the other parts corresponding,) afford any ground, in the sense of the patent law, for a patent. This is done every day by the ordinary mechanic in making a working machine from the patent model.

The patentee in the present case must carry his improvements farther, in order to reach invention; he must contrive the means of adapting the enlarged old organization to the new use, namely, the sawing of saw-logs, and claim, not the old parts, but the new device, by which he has produced the new results.

The learned judge, by interpolating the new purpose of the improvement, namely, the sawing of logs, not only inserted what was not specified in the claim; but, if it had been, it would not have helped out the difficulty, as it was in effect, upon the construction given, simply applying an old organization to a new use, which is not a patentable subject.

The defect here is both in the specification and in the claim.

The former does not distinguish the new parts from the old, nor is there anything in the specification by which they can be distinguished; and the latter, instead of claiming the old parts, should have excluded them, and claimed the new, by which the old were adapted to the new use, producing the new result.

We are also of opinion the court below erred in rejecting the evidence of the witness as to the prior knowledge and use of the improvement of the patentee.

The 15th section of the patent law provides, that when the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, he shall give notice of the names and places of residence of those whom he intends to prove possessed the prior knowledge, and where the same was used.

In this case, the notice stated that Hiram Davis, who resides at Fitchburg, Massachusetts, had knowledge of the said improvement, and of the use thereof at that place, during the years 1836, 1837, 1838, &c., and that he resided there.

The court, on objection, refused to allow a witness to prove the use of the improvement by Davis prior to the year 1836 at Fitchburg, holding that the notice limited it within that time.

Notice of the time when the person possessed the knowledge or use of the invention is not required by the act; the name of the person, and of his place of residence, and the place where it has been used, are sufficient.

The time, therefore, was not material; nor could it have misled the plaintiff, as he had the name and place of residence of the person, and also the place where the improvement had been used.

With this information of the nature and ground of the defence, the plaintiff was in possession of all the knowledge enabling him to make the necessary preparation to rebut that the defendant possessed to sustain it.

Judgment reversed and venire.

JOHN C. ALMY, JUN., PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF CALIFORNIA.

A stamp duty imposed by the Legislature of California upon bills of lading for gold or silver, transported from that State to any port or place out of the State, is a tax on exports, and the law of the State unconstitutional and void.

THIS case was brought up by writ of error from the Court of Sessions for the city and county of San Francisco, in the State of California.

It was a constitutional question entirely, and is stated in the opinion of the court.

It was argued by *Mr. Blair* for the plaintiff in error, and submitted on a printed argument by *Mr. Benjamin* for the defendants.

Mr. Blair placed his opposition to the law upon two grounds, viz: 1st, that it imposed a tax upon commerce; 2d, that it amounted to a tax upon exports. As the opinion of the court notices only the latter point, the arguments of the counsel on both sides will be confined to that point. *Mr. Blair* said:

The law in question is also in violation of the provisions of the Constitution prohibiting the States from taxing exports; and the reasoning of the court in Brown's case is equally applicable to this branch of the case.

The payment required for the license to enable an importer to sell his imports was declared to be a tax on such imports; the court saying that it was "varying the form without varying the substance," and "treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing."

There is even less room for controversy here, as to the application of the prohibition, than in that case. Every export is taxed by an impost on the paper which represents it, and which is indispensable.

Upon this point *Mr. Benjamin's* argument was as follows:

II. Is a stamp tax on a bill of lading a duty on exports?

It is said to be an indirect tax on exports, because the jury have found "that it is the usual and invariable custom to make and issue such bills of lading," &c., and "no vessel or steamer could practically fill up with, or obtain freight," unless the master executes one.

It is submitted that the argument proves quite too much, and if once admitted, would inaugurate a most dangerous system of construction, under which all right of taxation might be taken away from a State, thus leaving it shorn of powers which were never intended to be abandoned, and which are absolutely indispensable to its existence.

Drays and carts are necessary for loading merchandise on board of ships. "It is the usual and invariable custom to employ them." "No vessel could practically fill up without them." Cannot a State tax drays and carts?

In Mobile harbor, and many others, large vessels cannot load at all without the aid of lighters. Is the State of Alabama without power to tax lighters?

This law taxes policies of insurance, as well as bills of lading. Scarcely an argument will apply to one class of these papers that will not apply to the other. If everything that operates indirectly to enhance the cost of conveying merchandise is a duty on exports, what State tax could not, by ingenious construction, be demonstrated to have that effect?

Nearly all the States tax foreign insurance agencies established within their borders; to pay their tax, rates of premium must be enhanced. Therefore, the ship-owner who pays this enhanced premium must charge a higher freight to the exporter, and it might hence be argued that the tax was unconstitutional. All such lines of argument are fanciful, dangerous, and subversive of the true meaning of the Constitution.

No man is by the law in question forbidden to ship his gold-dust. He may accompany it. He may send an agent to take care of it; he may make a valid parol contract for its delivery abroad, and take twenty witnesses, in order to retain the evidence of his contract; but, if he wishes to reduce it to writing

within the State, he must put his writing on a paper on which the State of California has levied a stamp tax.

It is worthy of notice, that in the draft of the Constitution offered in Convention by Mr. Patterson, of New Jersey, there was an express authority in Congress to raise revenue "by stamps on paper, vellum, or parchment."

1 Elliott's Debates, 175.

Yet, notwithstanding the fact that the attention of the Convention was thus specially directed to this precise tax, no attempt was made to inhibit its exercise by the States.

Suppose a State should, as a source of revenue, establish in its own favor a monopoly of the retail traffic within the State in paper, vellum, and parchment, just as some foreign nations do with tobacco; it is obvious that it might thus fix on paper a price far exceeding its value in open market, and fully equal to a stamp tax, and thereby enhance the cost of all written contracts, including bills of lading, invoices, and marine policies; but in what just sense could this be called either a regulation of commerce between the States or a duty on exports?

The great cause of the present alarming crisis in public affairs is the disposition to which men are so prone of construing the Constitution, instead of reading it; of trenching on the rights of States by interpretation, instead of respecting as sacred all such as are not plainly and expressly prohibited.

Now, this power of taxation by a State is that which was most jealously watched, and apprehensions in relation to a check on its exercise formed the chief objection urged against the adoption of the Constitution. The history of all the State Conventions shows this.

The precise point in this case seems to be covered by the very language of the Chief Justice in the passenger cases. Speaking of the State, he says:

"They are expressly prohibited from laying any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. So far their taxing power over commerce is restrained, but no farther. They retain all the rest; and if money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objec-

tion to it, unless it is a duty on imports, [or exports,] or a tonnage duty, for these alone are forbidden."

7 Howard, 480.

The argument on this whole subject, however, has been so completely exhausted in the various adjudications of this court, with which its members are thoroughly familiar, that nothing more could be required than the simple reference to them already made; and on them the State of California rests her case.

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

The only question in this case is upon the constitutionality of a law of California, imposing a stamp tax upon bills of lading.

By an act passed by the Legislature of that State to provide a revenue for the support of the Government from a stamp tax on certain instruments of writing, among other instruments mentioned in the law, a stamp tax was imposed on bills of lading for the transportation from any point or place in that State, to any point or place without the State, of gold or silver coin, in whole or in part, gold-dust, or gold or silver in bars or other form; and the law requires that there shall be attached to the bill of lading, or stamped thereon, a stamp or stamps, expressing in value the amount of such tax or duty.

By a previous law upon the same subject it was made a misdemeanor, punishable by fine, to use any paper without a stamp, where the law required stamped paper to be used.

After the passage of these acts, Almy, the plaintiff in error, being the master of the ship Ratler, then lying in the port of San Francisco, and bound to New York, received a quantity of gold-dust for transportation to New York, for which he signed a bill of lading upon unstamped paper, and without having any stamp attached to it. For this disobedience to the law of California he was indicted in the Court of Sessions for a misdemeanor, and at the trial the jury found a special verdict setting out particularly the facts, of which the above is a brief summary; and upon the return of the verdict the counsel for the defendant moved for a judgment of acquittal,

upon the ground that the law of California was repugnant to the Constitution of the United States. But the court decided that the State law was not repugnant to the Constitution of the United States, and adjudged that Almy should pay a fine of $100 for this offence. And the Court of Sessions being the highest court of the State which had jurisdiction of the matter in controversy, this writ of error is brought to revise that judgment.

We think this case cannot be distinguished from that of Brown *v.* the State of Maryland, reported in 12 Wheat., 419. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question.

The case was this: The State of Maryland, in order to raise a revenue for State purposes, among other things required all importers of certain foreign articles and commodities enumerated in the law, or other persons selling the same by wholesale, before they were authorized to sell, to take out a license, for which they should pay $50; and in case of refusal or neglect, should forfeit the amount of the license tax, and pay a fine of $100, to be recovered by indictment.

Brown, who was an importing merchant, residing in Baltimore, refused to pay the tax, and was thereupon indicted in the State court, which sustained the validity of the State law, and imposed the penalty therein prescribed. This judgment was removed to this court by writ of error, and it will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the court, delivered by Chief Justice Marshall, shows that it was carefully and fully considered by the court. And the court decided that this State law was a tax on imports, and that the mode of imposing it, by giving it the form of a tax on the occupation of importer, merely varied the form in which the tax was imposed, without varying the substance.

So in the case before us. If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the Constitution of the United States, which in express terms declares that "no State shall, without the consent of Congress,

lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.

In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any

other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In the judgment of this court the State tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to; and the judgment of the Court of Sessions must therefore be reversed.

THOMAS MEEHAN AND CHARLES BALLANCE, PLAINTIFFS IN ERROR, *v.* ROBERT FORSYTH.

By the act of March 3d, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," the surveyor of public lands was directed to survey the lots. A certified copy of such survey is admissible in evidence. The survey in question was made in 1840.

Before the survey was made, Ballance made an entry of the quarter section, of which the lot in controversy makes a part, and a patent was issued to him, by which the United States granted it to him and his heirs, subject to the rights of any and all persons claiming under the act of Congress above mentioned.

This saving clause was designed to exonerate the United States from any claim of the patentee in the event of his ouster by persons claiming under the acts of Congress, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of Congress described in it.

The possession of Ballance under this patent was adverse to that of a claimant under the Peoria grant, and therefore the statute of limitations ran upon it; he having had possession for more than seven years, with a connected title in law or equity, deducible of record from the State or the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of Illinois.

The case is stated in the opinion of the court.

It was argued by *Mr. Ballance* for the plaintiffs in error, and by *Mr. Williams* for the defendant.

Mr. Justice CAMPBELL delivered the opinion of the court.

This is an action of ejectment commenced in the Circuit

Court for the recovery of a part of two lots of land in the city of Peoria by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the Circuit Court (Forsyth) originated in the claim of Antoine Lapance, an inhabitant within the purview of the act of Congress, approved March 3d, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," which was surveyed the first of September, 1840, by the surveyor of public lands, and for which a patent issued on the first day of February, 1847. The plaintiff produced from the surveyor general's office a certified copy of the survey, according to which the location of the claim was made. This testimony was objected to, but was received by the court, and we think properly. An original of the plan of survey is retained in the office of the surveyor general, and a copy given by that officer, who is required to keep it, upon general principles is admissible in evidence. United States *v.* Percheman, 7 Pet., 51.

It was agreed on the trial, that the defendant Ballance, and those under him, had been in possession of the premises more than ten years before the commencement of the suit. This possession was shown by the facts, that he had cultivated a portion of the quarter section described in his patent for more than twenty years, and had resided on the quarter section for twelve years, and had paid taxes upon this parcel of land as a part of the said quarter section, but not as a separate subdivision. The plaintiff had not paid any of the taxes during that period. The defendant Ballance made an entry of the quarter section, of which the lot in controversy forms a part, in 1837, and a patent issued to him in 1838, by which the United States gave and granted to him and his heirs, subject to the rights of any and all persons claiming under the act of Congress of 3d March, 1823, before referred to.

The defendant moved the court to instruct the jury, that if they believe from the evidence that said Ballance has had the actual possession by residence on the land in controversy for more than seven years, under the title he has exhibited, the plaintiff cannot recover; and that the words in the patent of Ballance of January 28, 1838, "subject, however, to the rights

of all persons claiming under the act of Congress of March 3d, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois,' cannot operate as to lessen the estate vested by the granting part of the deed."

The court declined to give these instructions, but charged the jury: "That to constitute an adverse possession against the French claimants by the possession of another portion of the quarter section by the defendant, as his tenant, entry and possession must have been under a claim of title inconsistent with that of the French claimants. If the entry and possession were subject to the rights of the claimants existing under the acts of Congress, then such possession as stated could not be adverse, so long as that possession did not actually extend to the lot sued for."

The court further instructed the jury: "That when the defendant made application for a pre-emption, he stated it was made subservient to these French claims; and when the patent was issued by the Government to him for this fractional quarter, it was made subject to these claims; therefore, the grant made by the Government, as contained in the patent, did not necessarily operate as a conveyance of the entire quarter section to the grantee, but the clause inserted in the patent had the effect of excluding from the operation of the grant that portion of the quarter covered by these French claims; consequently, if at the time of the grant to Ballance there was any one capable of taking lot 63, under the acts of Congress of 1820 and 1823, then lot 63 was excluded by law and by the terms of the grant, and was excepted, (in other words, lot 63 was not granted to Ballance,) and he took his title subject to such exclusion or exception."

We think that the Circuit Court erred in its interpretation of this patent. The patent recites that "full payment" had been made by the grantee for the southwest fractional quarter of section nine, in township eight north, of range eight east, containing one hundred and forty-seven 43-100ths acres, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general; which said tract has been purchased by Charles Ballance. It proceeds to

declare that the United States had given and granted the said tract above described, to have and to hold the same to him and his heirs, subject, however, to the rights of any and all persons claiming, &c., &c. This saving clause was designed to exonerate the United States from any claim of the patentee, in the event of his ouster by persons claiming under the acts referred to, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of Congress described in it. The possession of Ballance, under this patent, was adverse to that of the claimants under the acts of 1820 and 1823, in every case in which their claim was not specifically admitted by him. He was in no sense their tenant, nor did the saving in the act create any fiduciary relation between him and any other person, so as to prevent the operation of the statute of limitations. The patent does not impose upon him any duty to recognise these claims. It only requires him to accept the title of the United States with knowledge that such claims exist, and that they do not intend to deny or to destroy them, nor to defend his title against them.

The case of Bryan *v.* Forsyth, 19 How., 334, involved a controversy for a lot in the city of Peoria, similarly situated as that which forms the subject of this suit. The court, in that case, said that a patent with a saving like that we are considering was a fee-simple title on its face, and is such a title as will afford protection to those claiming under it, either directly or having a title connected with it, with possession for seven years, as required by the statute of Illinois.

The act of limitations of Illinois (Revised Statutes, 349, sec. 8) protects the claim of a person for lands, which has been possessed by actual residence thereon, having a connected title in law or equity, deducible of record from that State or the United States.

The title of the defendant, and the possession which he was admitted to have had, fulfilled the requisitions of the law, and the court should have given the instructions asked for, and erred in giving the instructions submitted to the jury.

Judgment reversed and cause remanded.

RICHARD GREGG AND CHARLES BALLANCE, PLAINTIFFS IN ERROR, *v.* ROBERT FORSYTH.

The possession of Ballance in the fractional quarter section of land spoken of in the preceding report of the case of Meehan and Ballance *v.* Forsyth, so as to entitle him to the benefit of the statute of limitations, need not have been by himself personally, but possession by a tenant under him enured to his benefit.

The circumstance that Ballance had laid out the land into lots and blocks did not make it necessary for him to reside upon every lot. The law only required him to possess and reside upon the premises claimed by his title papers.

The volumes of American State Papers, Public Lands, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof.

A party cannot object to the reading of a record and deed of sale, upon the ground that the proceedings had been irregular, when the parties to the decree had not complained of it. The objectors were strangers to these proceedings.

THIS case, like the preceding, of which it was a branch, was also brought up by writ of error from the Circuit Court of the United States for the northern district of Illinois, and was argued together with it by the same counsel.

Mr. Justice CAMPBELL delivered the opinion of the court.

This was an action of ejectment for a lot of land in the city of Peoria, in the State of Illinois, commenced by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the Circuit Court is shown by a patent of the United States in favor of the legal representatives of Antoine Lapance, who was an inhabitant or settler within the purview of the act of Congress approved 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," which patent bears date the first day of February, 1847, and is founded upon an official survey of the first of September, 1840. The plaintiff deraigned his title from the patentees. In tracing his title he

read a document relevant to the cause from a volume of American State Papers, Public Lands, selected and edited under the authority of the Senate of the United States, by its Secretary, and printed by Duff Green. This was objected to, and the question reserved by the defendants. The volumes of the American State Papers, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof.

Watkins *v.* Holman, 16 Pet., 25. The plaintiff read a copy of a deed from the public records, the original of which was not in the possession of the plaintiff, and which, upon inquiry of the persons with whom it had been deposited, he was informed had been lost. This testimony authorized the admission of the copy as evidence. The deed in question had been regularly recorded. No suspicion attached to the instrument, and there was no reason to suppose that the better testimony was fraudulently withheld or could have been obtained by further inquiry. Minor *v.* Tillotson, 7 Pet., 99.

He also read in evidence a record of a suit of partition in the Circuit Court of Peoria county, which resulted in a decree of sale of the interests of a number of the parties, under which the plaintiff derived his title as a purchaser. The defendants objected to the record and deed of sale, because the sale had not been conducted with regularity, and the decree of sale had been rendered against infants, by default, and because it did not prescribe the manner of the sale. These, with other objections, were properly overruled by the Circuit Court. The defendants were strangers to these proceedings, and cannot be allowed to object to a result of which the parties to the decree have not complained.

The title of the defendants consisted of a patent from the United States to the defendant, Ballance, in January, 1838, for a fractional quarter section of land that includes the lot in controversy, and containing a saving of the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." He made proof

that he had resided on this quarter since 1844, and had cultivated portions of it for a long time previously, and had before and since that date let other portions of it to tenants who occupied it under him, and that the particular lot in controversy had been occupied by one of these tenants, who had upon it a distillery. Among other instructions, the defendants requested the court to charge the jury, "that if they should believe from the evidence that said Ballance, being in possession under the title he has exhibited, leased the particular spot of ground in controversy to Almiron S. Cole more than seven years before the commencement of this suit, and that said Cole took possession thereof, and built a steam distillery and other fixtures thereon more than seven years before the commencement of this suit, and that said Cole held possession thereof, and occupied it as a place of business, until he sold said establishment to Sylvanus Thompson, and that Sylvanus Thompson and his son-in-law, Richard Gregg, the defendant, occupied the same until the death of Thompson, and that said Gregg occupied the same until the commencement of this suit, the plaintiff is not entitled to recover in this suit; that it was not necessary for this defence that either the said Cole, Thompson, or Gregg, should have had his dwelling-house on the particular lot; it is sufficient if they lived in the vicinity and occupied the lot in controversy as their place of business." The Circuit Court refused to give these instructions, but charged the jury, "that if Ballance had his house on one part of the quarter, and his improvement extended over and included the lot in controversy, so as to be connected with his residence, and to form part thereof, or it was used in connection therewith, that would, within the meaning of the law, constitute actual residence. If Ballance built on one part of the quarter, and this lot was left vacant and unoccupied and unimproved, that would not, as to that lot, constitute an actual residence.

If Ballance, his tenants, or those holding under him, actually resided on a lot adjoining lot 63 for seven years immediately preceding the commencement of this suit, and during all that time occupied lot 63 as a place of business, as part and parcel of the premises so resided on by them, that would con-

stitute an actual residence within the meaning of the law, as to this lot in controversy. It is proper for the jury to consider the circumstances of the subdivision of the land into lots and blocks by Ballance, in April, 1846, and whether a severance of the holding as to the particular lots and blocks so subdivided was thereby enacted. When ground is subdivided in that manner under our law, there can be no doubt that different lots and blocks may be so occupied as to constitute an actual residence in them all; but ordinarily, in case of subdivision, the construction of a house on a separate lot or block, and a residence therein, without any connection with adjoining or neighboring lots or blocks, does not constitute an actual residence as to the whole. It is for the jury to determine whether the facts and circumstances stated by the defendant, Ballance, ot ,hose claiming under him, made them actual residents of the lot in controversy, for seven years before the commencement of this suit. If they did, then the defendants are within the protection of the statute; otherwise not."

This court, in the cases of Bryan *v.* Forsyth, 19 How., 334, and again in Meehan *v.* Forsyth, at this term, have decided that the saving in the patent under which the defendants claim did not create any fiduciary relation between the claimants under the act of Congress of 1823, referred to in it, and the patentee; and that the possession of Ballance, under his patent, was an adverse possession, unless another relation had been created by contract between them subsequently to the issuing of the patent. The present inquiry is, by what evidence must the actual residence on the land be supported to enable the patentee to have the benefit of the act of limitations for seven years? And it has been generally held, that the residence and possession of land for seven years by a tenant inures to the benefit of the landlord, so as to secure for him the protection of the act; and that this protection is not confined to the particular close upon which the claimant resides, but also extends to the entire parcel of land of which the legal possession has been maintained as a consequence of his actual possession and residence.

Poage *v.* Chinn, 4 Dana Ky. R., 50.

The case of Williams *v.* Ballance, 23 Ill., 193, involved a controversy similar to that before the court.

The inquiry there was as to the validity of the residence and possession of Ballance to support his defence of the statute of limitations, it being the residence and possession established by the testimony in this suit. The Supreme Court of Illinois inquires whether Ballance occupied the premises described in the patent since 1844, by actual residence thereon. "The fact," says the court, "is that he did, but he did not reside upon every square yard of the premises, nor upon the particular lot. Nor was this necessary. He resided upon the legal subdivision described in the patent, the evidence of his title, and possessed and occupied it by himself and tenants. We think the laying out the land into town lots did not deprive him of the benefit of the statute of limitations of 1835, as to all the fractional quarter, except the particular lot upon which his house stood. He had a right to divide it into as many lots, or portions, or divisions, as he pleased, and put a separate tenant on each, and their occupation would be his possession: and the law only required him to possess and reside upon the premises claimed by his title-papers, but the law does not say upon what portion he should reside, and, above all, it does not declare that he should reside upon every portion of it." The instructions of the Circuit Court are inconsistent with the law as thus laid down by the Supreme Court. In our opinion, the possession established by Ballance in this case was such as placed him under the protection of the statute.

Judgment reversed and cause remanded.

CHARLES BALLANCE, APPELLANT, *v.* ROBERT FORSYTH, LUCIENE DUMAIN, AND ANTOINE R. BOUIS.

After the mandate went down to the Circuit Court, in the case of Ballance *v.* Forsyth, 13 Howard, 18, Ballance filed a bill upon the equity side of the court, setting forth the same titles which were involved in the suit at law, and praying relief.

It was not allowable for him to appeal from the judgment of the Circuit Court and Supreme Court to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated.

The objections to the title of his adversary should have been urged upon the trial of the suit at law; and if they are founded upon alleged errors in the location and survey, all such questions are administrative in their character, and must be disposed of in the Land Office. He ought to have made opposition there; if he did not, he is concluded by his laches.

In the record there is a paper purporting to be an amended bill. It is doubtful whether this was properly filed; and if it was, it presents no ground of relief.

THIS was an appeal from the Circuit Court of the United States for the northern district of Illinois.

It was a sequel to the case of Ballance *v.* Forsyth, reported in 13 Howard, 18. After the mandate went down from this court, Ballance filed a bill on the equity side of the court, setting forth the same titles that were involved in the suit at law, and praying relief upon certain special grounds, which it is not necessary to enumerate.

It was argued by the same counsel as the two preceding cases.

Mr. Justice CAMPBELL delivered the opinion of the court.

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. S. C. R., 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.

He further objects to the title of his adversaries. He insists, that in the location of their claim under the acts of May, 1820, and March, 1823, referred to in the report of the case as the source of their title, there was an erroneous location and sur-

vey, and that a larger extent of ground was conceded to them than they were entitled to; that the plan of survey did not conform to the requirement of Congress, and that their proofs were not filed in time. If either of these objections is of sufficient force to invalidate the title and to render it void, it should have been urged upon the trial at law, and it is too late after judgment upon the title to employ it to contest the issuing of the execution. But if they are mere irregularities, the court of chancery has no jurisdiction to notice them. It is the settled doctrine of this court, that in the location and survey of claims arising under acts of Congress like those of May, 1820, and March, 1823, the Executive Department of the Government has, in general, exclusive jurisdiction, and that all questions arising upon their location and survey are administrative in their nature, and must be disposed of in the Land Office.

The plaintiff was aware of the existence of these claims, and of the jurisdiction to which their adjustment was confided.

His patent contains an explicit reservation of the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." If he pretermitted his opposition to their location and survey before the General Land Office, he is concluded by his laches. If his opposition was made unsuccessfully, the decision of that department upon his objections is binding upon him.

Besides these objections, the plaintiff has introduced into the record a claim for the improvements upon the lots recovered by the judgment of the Circuit Court. It is not at all clear that the amendments to the bill in which this claim is contained were filed with leave, and form any part of the bill. It is not charged in them that the plaintiffs in the suits at law have opposed any obstruction to his removal of the improvements, and the entire statement of the bill concerning them is vague and unsatisfactory. We are unable to find in them any ground upon which the suspension of the execution of the judgment can be justified.

The decree of the Circuit Court is affirmed.

HENRY M. KELLOGG AND OTHERS *v.* ROBERT FORSYTH.

The statutes of Illinois require that a declaration in ejectment shall be served upon the actual occupant, and the practice of that State authorizes the appearance of the landlord and his defence of the suit, either in his own name or that of the tenant with his consent.

And when a landlord has undertaken the defence of a suit in the name of the tenant with his consent, the tenant cannot interfere with the cause to his prejudice.

Therefore, when the defendant in ejectment in the court below died after judgment, and his attorney and landlord, who had conducted the suit in the name and with the consent of the deceased, sued out a writ of error in the name of the heirs, gave bond for the prosecution of the writ and for costs, a motion to dismiss the writ will not be entertained, although the heirs of the deceased authorize the motion to dismiss.

It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and prosecuting the writ of error in good faith.

The motion to dismiss the writ of error is therefore overruled.

THIS was a branch of the three preceding cases, coming up from the same court.

Mr. Williams, counsel for the defendant in error, moved to dismiss the writ for the following reasons, viz:

That it is manifest by the record filed in this court in the said cause that the said writ of error was issued on the 15th day of July, 1859.

That the clerk's return thereto was filed with the clerk of this court on the 3d day of October, 1859.

That said return contains nothing but affidavits of the death, &c., of the original defendant, the writ of error, a bond to prosecute the same, a citation and acknowledgment of the service thereof.

That the detached record filed by the plaintiff, with the said return, was certified by the clerk of the Circuit Court on the 25th day of October, 1856, and is not attached to said return, or in any way referred to therein.

And therefore, he says, for said irregularities in the said proceedings patent on the face of the record of said cause, the said writ of error ought to be dismissed.

See Rules, Nos. 8 and 9.

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendant in error recovered a judgment in ejectment in the Circuit Court of the United States for the northern district of Illinois against William Kellogg, deceased, as tenant in possession of a parcel of land in that district. After the judgment, the defendant died. The attorney of the decedent, who was also his landlord, and who had conducted the suit on behalf and in the name of the tenant, with his consent, sued out a writ of error to this court in the name of the heirs of said Kellogg. The bond for the prosecution of the writ, and the stipulation for costs in this court, have been supplied by the said attorney. One of the heirs of Kellogg objects to the prosecution of the writ of error, and alleges, on behalf of himself and his coheirs, that it is prosecuted without authority, and that they have no desire that it should be maintained, and authorize the attorney of the defendant in error to move for its dismissal. It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and that he is prosecuting the writ of error in good faith. That he is responsible for the costs and damages that may arise from the use of the names of the plaintiffs in error. The statutes of Illinois require that the declaration in ejectment shall be served upon the actual occupant, and the practice of the courts of that State authorizes the appearance of the landlord, and his defence of the suit, either in his own name or that of the tenant, with his consent. Williams *v.* Brunton, 3 Gilman R., 600.

And when a landlord has undertaken the defence of a suit in the name of the tenant, with his consent, the tenant cannot interfere with the cause to his prejudice. Doe *v.* Franklin, 7 Taun., 9. We think it was competent to the landlord to use the names of the plaintiffs to prosecute his writ of error upon his engagement to bear all the costs and expenses of the suit. Should the judgment be reversed, and the cause remanded to the Circuit Court for further proceedings, he may apply in that

court for leave to become defendant, instead of the heirs of the tenant.

Motion to dismiss overruled.

THOMAS RICHARDSON, PLAINTIFF IN ERROR, *v.* THE CITY OF BOSTON.

The decisions of this court in the cases of the City of Boston *v.* Lecraw, 17 How., 426, and Richardson *v.* City of Boston, 19 How., 263, referred to and explained.

Indictments against the city of Boston, in 1848, for permitting unhealthy vapors and exhalations to arise in that part of the city which the sewer in question was erected to remedy, were admissible in evidence, on the part of the city, to show that the conduct of the city did not tend to oppression, and as part of the history of the case. An instruction of the court below was correct, viz: that a former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, because it was founded on erroneous instructions on the law.

So, also, an instruction was correct which told the jury that there was no evidence in the case which would authorize them to find that the city of Boston had ever dedicated to the public use a public highway, town way, dock, or public way, between the wharves in question, for the access of boats and vessels between said wharves to high-water mark or the egress therefrom to the sea.

These instructions were in conformity with the previous decisions of this court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Rhode Island.

It was an action for the continuance of an alleged nuisance from 13th September, 1850, to 15th April, 1852. It will hereafter appear why the first of these dates was named.

The nuisance charged is described in two preceding cases, viz: City of Boston *v.* Lecraw, 17 How., 426, and Richardson *v.* City of Boston, 19 How., 263. Without noticing at present the first-named case, it may be proper to give the history of the present one.

The action was brought by Richardson in the Circuit Court of Massachusetts to October term, 1850.

1851, March. General issue pleaded, and special plea; plaintiff demurs to special plea.

1851, April. Plaintiff has leave to amend his declaration by adding two counts.

1851, May. A statement of facts submitted.

1851, October. Agreement of counsel that the case should be carried to the Supreme Court.

1852, May. Plaintiff has leave to amend declaration.

1852, October. Boston files petition to remove the case, because Mr. Justice Curtis had been counsel, and Judge Sprague was interested; removed to Rhode Island.

1853, June. Argued before Judge Pitman on the agreed statement of facts; verdict guilty; damages and costs, $2,026.87 up to 13th September, 1850; judgment on sixth count; motion for new trial; pending which, the case of Lecraw *v.* City of Boston was decided by this court, as reported in 17 How.; case continued by agreement.

1855, June. New trial granted; plaintiff amends writ and declaration by adding a count, which is the subject of comment by this court in the present opinion; verdict not guilty; plaintiff sues out writ of error, and brings the case up to this court to December term, 1855.

1856, December term of this court. Case tried, and reported in 19 How., 263; judgment reversed.

1857, November term of Circuit Court. Mandate from this court presented; new trial ordered.

1858, June term. Plaintiff amends writ and declaration by striking out the words constituting the *ad damnum* in said writ, as the same now stands, and inserting in lieu thereof the words following, viz: "ten thousand dollars."

By S. BARTLETT, *his Attorney.*

And now, by agreement of parties, and with the leave of the court here, plaintiff amends the several counts of his declaration by striking therefrom such parts thereof as claim damages for the injury to the ends of his wharves by material deposition near the same, by means of the structure complained of.

The case then went on to trial before Mr. Justice Clifford

and Judge Pitman. Under the instructions which were given by the court, the jury found a verdict for the defendant, and the plaintiff again brought the case up to this court by a writ of error.

The bill of exception was very long, and included the record of the former case, together with a vast quantity of other matter. The instruction of the court, admitting this record in evidence, was as follows:

"That the record of the former verdict and judgment is admissible in evidence; but inasmuch as it appears that the verdict was found by the jury under an erroneous instruction given by the court, the judgment is entitled to very little weight upon the question of the right to recover in this case, and none whatever upon the question whether the supposed way or dock before described was duly laid out and established by the town of Boston, or the authorities thereof, pursuant to law, either as a public highway, town way, or public way, for the access of boats and vessels to high water, or the egress therefrom to the sea, as is alleged in the seventh count of the plaintiff's declaration."

By his Honor Judge Pitman.

The record above referred to was in a case decided by me upon an agreed statement of facts, which was excluded in this case. It was therein admitted by the defendant that the place between the said wharves was "an ancient public dock or highway." This fact, and the case having been submitted to Judge Sprague, and decided by him in favor of the plaintiff before the case was sent to the Rhode Island district, I was disposed to decide the same way, unless I saw it was manifestly erroneous. It was to be determined under the law of Massachusetts, with which I believed he was much better acquainted than myself. I did not, therefore, so critically examine the documents in the case, and their legal effect, as I have since done. Since the decision of the Supreme Court of the United States in the case of Lecraw *v.* City of Boston, I have considered the opinion erroneous which I then delivered, and the judgment as entitled to no weight for that reason as evidence to a jury, and therefore I excluded the judgment

from the consideration of the jury in the former trial. I am now of the opinion that it is entitled to no weight, though it be admissible.

I did not decide that the supposed way was laid out as a way for boats and vessels by the town of Boston or its authorities. I instructed the jury that the plaintiff was entitled to recover upon the sixth count of his declaration, the one on which he rested his case, and they found a verdict accordingly.

JOHN PITMAN,

District Judge U. S., R. Island District.

SEPTEMBER 16, 1858.

The case was argued in this court by *Mr. Badger* and *Mr. Carlisle* for the plaintiff in error, and *Mr. Cushing* and *Mr. Chandler* for the defendant.

The arguments of the counsel upon the construction of the previous decisions of this court and upon the admissibility of the indictments, (a question reserved in the course of the trial,) and also upon the powers and acts of the town council as far back as 1635, are considered to be so local in their application as to justify the reporter in omitting them.

Mr. Justice GRIER delivered the opinion of the court.

This is the third time in which this claim to have damages from the city of Boston, for erecting drains and sewers on their own land for the preservation of the health of the city, has come before us.

The plaintiff is the owner of two wharves, called Bull's wharf and Price's wharf, running from high-water to low-water mark. The space between these two wharves belongs to the city of Boston, being situated at the foot of Summer street; and as it was but thirty feet wide, it became, by the mere accident of its position, a very convenient dock, or slip, for plaintiff, so long as the city did not see fit to reclaim their land. Formerly, the drains and sewers which ran under Summer street discharged at the end of that street at high-water mark; but, as the city increased, this discharge of drainage

became pestilential, and a nuisance to the neighborhood. To remedy this evil, the city was compelled to extend their drains out to low-water mark, and this is the nuisance complained of in this and the other suits.

The case of Lecraw *v.* Boston (to be found in 17th Howard, 426) first introduced this controversy to this court. Lecraw was tenant of Richardson, and his title consequently the same. It was claimed that the city of Boston, by not wharfing out their land at the end of Summer street, had dedicated it to the public, or rather to the private use of Richardson, to whose wharves it afforded a most convenient dock or slip. This claim was declared by this court to be wholly without foundation; and that "whether it was called 'town dock' or 'public dock,' it would furnish no ground to presume that the city had parted with their right to govern and use it in the manner most beneficial to the citizens."

It is not our purpose to again discuss this question, or again repeat the arguments and principles on which our judgment was founded. The correctness of that decision has not been impugned or denied, and it needs no interpretation.

During the pendency of this suit of Lecraw, the tenant, and before its decision in this court, Richardson had brought a suit for damage to his reversion by the same alleged nuisances, and the verdict and judgment being for less than two thousand dollars, the city could not have a writ of error to reverse it, as in the other case. When the present case came on for trial, the decision of this court in the Lecraw case being known, in order, if possible, to avoid the effect of that decision, a new count was added to the declaration, drawn with great ingenuity and subtlety, charging that "there had *been* A HIGHWAY, *or* TOWN WAY, *or* PUBLIC WAY, *to the sea or low water, duly laid out and established pursuant to law;*" and that the drains made by the city had "caused mud, earth, and other materials, to be thrown and deposited upon and near the said wharves."

The report of our decision on this case will be found in 19th Howard, 263.

We then decided that a former verdict and judgment in an

action on the case for continuance of the same nuisance was not conclusive evidence, but is permitted to go to the jury as persuasive evidence. We stated in what cases it ought to have weight, and in what it could have little or none, as where the former verdict was the result of an erroneous instruction on the law by the court.

As the additional count, on which the plaintiff relied, was rather equivocal or ambiguous, as to what was meant by a "highway or town way" to the sea or low-water mark, we decided that public officers of a town have no power to lay out a town way between high water and the channel of a navigable river. A board of pilots may mark by buoys the best channel for vessels in a bay; but this would hardly be called a "town way on the ocean." Indeed, it did not seem to be seriously contended on the argument that the selectmen in 1683 had assumed or intended to extend a street or town way *by water* over the great ocean highway. But as the city of Boston was owner of the soil between high and low-water mark, it had equal right to reclaim the land as other owners; and having done so, a street or "town way" might be established thereon.

The court decided that, if the land was so reclaimed, and a highway laid out on it, the right to use it as a street or highway on land becomes appurtenant to the property of the adjoiners, who might well maintain an action for a nuisance on such street or highway.

The plaintiff had alleged in this count that he had received damage to his wharf by accretions of mud, &c., below low-water mark, and there was some evidence to support the allegation. The court decided that this fact should have been submitted to the jury. It was a question entirely distinct and separate from a claim of right of highway in the dock.

With this history of the antecedents of this case, there can be no difficulty in disposing of the exceptions.

The first exception is to the admission of the bills of indictment against the city. They constituted part of the history of the case, and were referred to in the testimony of the plaintiff, and were, therefore, not wholly irrelevant. They tended

to show "that the conduct of the city," as disclosed by the evidence, *did not* "tend to oppression," as has been charged in the argument in this court.

The next exception is to the charge of the court in their instruction, that the former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, because it was founded on erroneous instructions on the law. This instruction was in exact conformity with the ruling of this court. The verdict was on an agreed statement of facts, not now disputed, on which the court gave an opinion, since decided by this court to be a mistake. Like many other matters given in evidence to support a case, this verdict was received as not irrelevant, although the proof on the other side might show it to be worthless.

The last exception is to the charge of the court, "that there is not any evidence in the case which will authorize the jury to find that the supposed way or dock between the plaintiff's wharves, from high to low-water mark, for the free egress and ingress of boats and vessels to and from the same, as alleged and described in the seventh count in his declaration, was ever dedicated by the town or city of Boston to the public use, either as a public highway, town way, dock, or public way, for the access of boats and vessels between said wharves to high-water mark, or the egress therefrom to the sea. That there is not any evidence in the case which will authorize the jury to find that the supposed way or dock between the plaintiff's wharves, from high to low-water mark, for the egress and ingress of boats and vessels to and from the same, as alleged and described in the seventh count in his declaration, was ever duly laid out and established by the town of Boston, or the authorities thereof, pursuant to law, either as a public highway, town way, or public way, for the access of boats and vessels between said wharves to high-water mark, or the egress therefrom to the sea."

This instruction is in entire conformity with the previous decisions of this court on this subject.

There was nothing, in the opinion of this court, which should subject it to the misconstruction of having decided that a

"*town way*" *for boats and vessels* could be laid out on the high seas, or of imputing to the town officers such an obliquity of understanding as the assumption of such a power would argue; on the contrary, the court decided that the public officers had no such power; but that the city, after it reclaimed the land to high-water mark, might continue Summer street as a highway on land, for a nuisance, to which the plaintiff might sustain an action; and this case was remanded in order to give the plaintiff an opportunity to have the verdict of the jury on this subject; and also for any injury he might have sustained by the drains causing an accumulation of matter at the outer end of the plaintiff's wharves. The record shows that the plaintiff abandoned any claim for damages for either of these causes, and he was, of course, left without any case to be submitted to the jury.

Judgment of the Circuit Court is therefore affirmed, with costs.

JAMES NATIONS AND JOSEPH NATIONS, PLAINTIFFS IN ERROR, *v.* NANCY ANN JOHNSON AND JAMES JOHNSON.

In a suit in the District Court of the United States for the western district of Texas, a transcript of a record of the high court of errors and appeals and the chancery court for the northern district of the State of Mississippi was properly allowed to be offered as conclusive proof of the value of certain slaves, and of the amount of their annual hire until given up.

The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publication in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine.

These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled.

The American and English cases upon this point examined.

The decree of the court was also properly allowed to go to the jury as evidence of the value of the hire of the slaves after its rendition; evidence having also been offered at the trial of the value of such hire at that time.

The case having been on the chancery side of the court and transferred thence to the law docket, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side.

Nations et al. v. *Johnson et al.*

THIS case was brought up by writ of error from the District Court of the United States for the western district of Texas.

All the facts in the case, and also the proceedings of the court below, are set forth in the opinion of this court.

It was argued by *Mr. Paschal* for the plaintiffs in error, no counsel appearing for the defendants.

Mr. Paschal commenced his argument by stating it as a general principle, that a judgment obtained by publication and without personal service cannot be the foundation of an action in another State, nor, indeed, in the State where the suit is brought; that all suits are either *in personam* or *in rem;* that when *in personam*, there must be personal service to give jurisdiction; when *in rem*, the remedy is exhausted when the *res* is disposed of. Amongst other authorities, he cited 3 Howard, 336, and 11 Howard, 437. He then considered the effect of the statute of Mississippi, which he said did not change the principle. When the suit was dismissed, it was a final judgment, a discharge of the defendants, who had no longer a day in court. A writ of error is an original writ.

2 Tidd's Practice, 1134.

Coke Littleton, 298 *b*.

2 Wm. Sand, 5 Ed., 100.

And a writ of error, like a *scire facias*, is considered a new action, and, therefore, upon bringing it, the defendant in the original action may change his attorney, without obtaining a judge's order therefor.

2 Tidd's Practice, 1141.

Batchellor *v.* Ellis, 7 Dunford and East., 337.

Mr. Paschal then proceeded to examine the authorities as to the nature of a writ of error.

11 Howard, 165, 437.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the District Court of the United States for the western district of

Texas. It was a petitory suit, commenced by the present defendants, and was founded upon a certain final decree rendered at the April term, 1854, by the district chancery court, held at Carrollton, in the State of Mississippi, for the northern district of that State. Among other things, the petitioners allege that Nancy A. Johnson, then Nancy A. Alvis, and a minor, by her next friend, brought a suit by bill of complaint in that court against the present plaintiffs to recover three slaves belonging to her, together with hire for the same for a specified time; that she subsequently intermarried with James Johnson, who was admitted with her to prosecute the suit; that the cause was afterwards submitted to the court for a final hearing, and a decree entered dismissing the bill of complaint at the cost of the petitioners. They also allege that they prosecuted a writ of error to the high court of errors and appeals in that State, and that the decree of the district court of chancery was there reversed, and a decree entered in their favor. That decree, as set forth in the petition, shows that the appellate court was of the opinion that the slaves in controversy were the property and separate estate of the first-named complainant. Wherefore it was considered by the court that the decree of the vice chancellor ought to be reversed, and it was so ordered, adjudged, and decreed; and the court proceeding to pronounce such a decree as the subordinate court should have rendered, entered a decree that the complainants do have and recover of the respondents the slaves then in controversy, for the sole and separate use and right of the first-named complainant, and requiring the respondents to restore the slaves and deliver the possession of the same to the said complainant, or her authorized agent. It is also recited in the decree that the court was of the opinion that the complainant was entitled to recover hire for the slaves from the time they were taken from her possession by the respondents. To carry out the directions of the court, it was further ordered, adjudged, and decreed, that the cause be remanded to the subordinate court, and that an account be taken of the hire of the slaves, and for such other and further proceedings as may be required in the premises. After the mandate went down, the cause was sent to a com-

missioner to carry into effect the directions of the appellate court. He made a report, showing that on the fourth day of February, 1854, the reasonable hire for the slaves amounted to the sum of twenty-two hundred dollars; and he also reported that the hire of the slaves was reasonably worth two hundred dollars per annum. That report was confirmed by the court, and on the fourteenth day of April of the same year a decree was entered in favor of the complainants, that they do have and recover of the respondents the said sum of twenty-two hundred dollars with interest; and also, that they do have and recover of the respondents at the rate of two hundred dollars per year for the hire of the slaves, from the date of the report until they shall be surrendered up according to the decree in the cause. As a part of the decree, it was also ordered and directed that execution issue, as at law, for the amount awarded to the complainants, together with the costs of suit. Plaintiffs also allege in their petition or declaration, that those decrees or judgments were in full force, and that they have never in any manner been annulled, reversed, satisfied, or discharged, either in whole or part. Process was duly served upon the defendants in this case, and on the fifth day of December, 1854, they appeared and made answer to the suit. From the minutes of the clerk it would seem that the suit was entered, in the first place, as a suit at law, and it was certainly so treated by the defendants in their first answer. Those proceedings, however, are of no importance in this investigation, because the record states, that on the fourth day of December, 1856, the cause was docketed on the chancery side of the court; and on the second day of June, 1857, the defendants again appeared and filed their answer to the petition, without objection to the transfer which had been made of the cause. To that answer the plaintiffs excepted on various grounds, and after a full hearing the exceptions were sustained, and the answer was stricken out by the order of the court. Both parties again appeared before the court, sitting in chancery, on the 11th day of June, 1857, when, as the record states, "upon motion, and merits examined by the court, it was ordered that the cause be transferred to the law docket." No objection was

made to that order by either party, and for aught that appears to the contrary, the transfer was made by consent. Leave was subsequently granted to the plaintiffs to amend their petition, and on the twenty-sixth day of January, 1858, they filed an amendment to the same, alleging that they were citizens of the State of Tennessee, and that the defendants were citizens of the State of Texas. They also alleged in their amended petition, that the slaves in controversy were of the value of three thousand two hundred dollars, and prayed judgment in their favor for the recovery of the slaves, and in default of the delivery of the possession of the same, they also prayed judgment for their value, and "for general relief."

Exceptions were filed by the defendants to the amended petition, but the exceptions were overruled by the court. At the same time the defendants filed an additional answer to the petition, denying all the allegations and charges therein contained, and also pleaded the statute of limitations in two forms, as set forth in the transcript. Afterwards, on the sixth day of February, 1858, the defendants had leave to plead *nul tiel record* to the respective decrees set forth in the plaintiffs' petition. On that issue the court found for the plaintiffs, and overruled the plea, and the parties went to trial upon the plea denying all the allegations and charges contained in the plaintiffs' petition, and upon the pleas setting up the statute of limitations. To support the issue on their part, the plaintiffs introduced duly certified copies of the two records and decrees set forth in their petition, and proved by competent witnesses the value of the slaves at the time of the trial. By that testimony it appeared that one of the slaves was of the value of eight hundred dollars, and that the other two were each of the value of nine hundred dollars. Defendants offered to prove that they removed from Mississippi on the twentieth day of January, 1850; that they became citizens of Texas, and were domiciliated there on the twenty-first day of February of that year, and that they had ever since resided there as citizens of that State. That testimony was excluded by the court upon the objection of the plaintiffs, and the defendants excepted to the ruling. They offered no other evidence, and under the

instructions of the court the jury returned their verdict for the plaintiffs. At the trial, the defendants requested the court to instruct the jury that—

1. The transcript from the record to the high court of errors and appeals, and the chancery court for the northern district of the State of Mississippi, is not evidence sufficient to entitle the plaintiffs to recover.

2. That that portion of the decree of the chancery court fixing the hire of the negroes at two hundred dollars a year, from and after the date of that decree, is no evidence of the value of the hire of said negroes; and unless the plaintiffs have introduced some evidence independent of that record, proving the value of the hire, the jury cannot allow hire from the date of the judgment rendered by the vice chancellor.

But the court refused so to instruct the jury, and did instruct them that the record was conclusive proof that the title of the slaves was in the plaintiffs, and of the value of their hire up to the fourth day of February, 1854, as shown by the record; and the jury were also instructed to return a verdict in favor of the plaintiffs for the additional hire, at the rate of two hundred dollars per annum, from the date of the decree. Instructions were also given to the jury as to the other matters of claim set forth in the petition; but inasmuch as they are not now made the subject of complaint, we shall pass the exceptions over without remark, except to say that they are evidently without merit.

On this state of the case three questions are presented for decision:

1. It is insisted by the plaintiffs in error that the court erred in charging the jury that the record offered in evidence was conclusive proof as to the title of the slaves in controversy, and of the value of their hire to the date of the decree. That theory is based upon certain facts which are apparent in the record of that suit, and the question is raised both by the instructions given to the jury and by the refusal of the court to charge as requested. It appears from the record of the suit, that the bill of complaint was filed in the district chancery court for the northern district of Mississippi on the twenty-

sixth day of November, 1846, and that the respondents entered their appearance on the twenty-third day of November, 1847, and made answer to the suit. Testimony was taken on both sides, and the respondents continued to prosecute their defence to the suit until the eleventh day of April, 1850, when, upon final hearing, the bill of complaint was dismissed at the cost of the complainants. Respondents' attorney then withdrew his appearance; but the record states that the complainants, on the same day, prayed an appeal, which was granted, upon their giving bond for costs in ninety days, "and by consent it is agreed" that the appeal be taken directly to the high court of errors and appeals. Complainants, however, failed to prosecute the appeal within the appointed time, and consequently were obliged to prosecute the appeal by writ of error. It is not now questioned that a writ of error, under the circumstances of the case, was the proper process, by the law of that State, for the removal of the cause into the appellate court; but it is insisted that the subsequent decrees are void, because the respondents were not legally notified of the pendency of the writ of error. Personal service was not made on either of the respondents, and they never appeared in the appellate court. On the contrary, it appears that the attorney of the complainants, on the eighteenth day of January, 1852, filed an affidavit in the cause, that the defendants in error were not residents of the State, and that they had no attorney of record on whom process could be served. Provision, however, is made by the law of that State for service by publication in cases of this description. By the act of the twenty-ninth of January, 1829, it is provided, that "whenever a cause shall be removed to the Supreme Court by writ of error, and the court is satisfied that the defendant in error is a non-resident, and has no attorney of record within this State, it shall be the duty of said court to cause notice of the pendency of said cause to be published for three weeks in some public newspaper, the first of which shall be at least three months before the sitting of the next term of the court in which the case is pending, within this State; on proof of which publication, the court shall proceed to hear and determine said cause,

in the same manner as if process had been actually served upon the said defendant." Hutchison's Dig., p. 931.

That regulation, by a subsequent act passed on the second day of March, 1833, is made applicable to the high court of errors and appeals, and it was conceded at the argument that the publication was made under that provision. On the filing of the affidavit, showing that the defendants in that suit were non-residents of the State, it was ordered by the court, that unless they appeared on the third Monday of October, 1853, "the court will proceed to hear and determine the cause in the same manner as if process had been actually served; and it was further ordered that a copy of the order be published in a certain public newspaper published at the capital of the State, once a week for three weeks." Publication was accordingly made, as appears by the decree in the cause, and on the twenty-third day of January, 1854, the decree was entered reversing the decree of the subordinate court; and the question is, whether the notice was sufficient to give the appellate court jurisdiction of the case and the parties. That the subordinate court had full jurisdiction is admitted. Both of the respondents appeared in that suit, and litigated the merits for the period of three years. From the evidence in the case, it appears that they got possession of the slaves in Tennessee, in violation of the rights of the first-named complainant, and removed them to the State of Mississippi. Suit was brought against them in a subordinate court of the latter State, and after three years' litigation, and when they had succeeded in dismissing the bill of complaint, they removed to Texas, carrying the slaves with them, although they knew the complainants intended to seek a revision of the decree in the appellate court. All of the equities of the case are therefore with the present defendants. Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court. Whenever the parties to a suit, and the subject-matter in controversy between them, are within the regular jurisdiction of a court of equity, the decree of that

court is to every intent as binding as would be the judgment of a court of law. Accordingly, it was held by this court, in Pennington *v.* Gibson, 16 How., 65, that in all cases where an action of debt can be maintained upon a judgment at law to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount, and that the records of the two courts are of equal dignity and binding obligation. Had the decree, therefore, been rendered in the subordinate court before the appeal, the right of the plaintiffs below to recover in this suit would have been beyond question, unless there is some other error in the record. Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers. Gregnon's Lessee *v.* Astor, 2 Howard, 319; Voorhees *v.* the Bank of U. S., 10 Pet., 449. Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts, and it was held by this court, in Webster *v.* Reid, 11 How., 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entered. Numerous cases, also, are cited by the counsel of the present plaintiffs, applicable to the judgments or decrees of a court exercising original jurisdiction, which assert the general rule that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And some of them go much further, and lay down the rule as applicable to the inception of the suit, that notice by publication is insufficient to support the judgment in any jurisdiction, except in the courts of the State where it was rendered. Boswell's Lessee *v.* Otis et al., 9 How., 350; Oakley *v.* Aspinwall, 4 Comst., 513. None of these cases, however, precisely touch the question under consideration. Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily

absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. Contrary to the views of the counsel for the present plaintiffs, we think there is some distinction between the notice required to be given to an appellee or defendant in error and the service of process in the original suit. A writ of error is said to be an original writ, because, at common law, it was issued out of the court of chancery; but its operation is rather upon the record, than the person. Under the judiciary act, says Marshall, Ch. J., the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record, by removing the record into the supervising tribunal. Suits cannot, under the judiciary act, be commenced against the United States; and yet writs of error, accompanied by citations, have uniformly issued for the removal of judgments recovered in favor of the United States into this court for re-examination. Such cases are of daily occurrence, and the judgments are here reversed or affirmed, as they are with or without error; and it has never been supposed that the writ of error in such cases, though sometimes

involving large amounts, was a suit against the United States. Plainly, therefore, there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action; and such, it is believed, is the general understanding of the legal profession in the United States. Cohens *v.* Virginia, 6 Pet., 410; Clark *v.* Matthewson, 12 Pet., 170.

No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the appellate court; and where, as in this case, personal service was impossible in the appellate court, through the act of the defendant in error, it must be held that publication, according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. Constructive notice, says Mr. Justice Baldwin, in Hollingsworth *v.* Barbour et al., 4 Pet., 475, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders for publication, and providing that the publication, when made, shall authorize the courts to decree. Regina *v.* Lightfoot, 26 Eng. L. and Eq., 177.

As stated by this court in Harris *v.* Hardeman et al., 14 How., 339, a judgment upon a proceeding *in personam* can have no force as to one on whom there has been no service of process, actual or constructive, and who has had no day in court or notice of any proceeding against him. Judgment in that case had been rendered without any sufficient notice, either actual or constructive, and of course it was held to be irregular; but the opinion of the court clearly recognises the principle that constructive notice in certain cases may be sufficient to bind the party. Every person, as this court said in the case of the Mary, 9 Cran., 444, may make himself a party to an admiralty proceeding, and appeal from the sentence; but notice of the controversy is necessary, in order to enable him to become a party. When the proceedings a e against the person, notice is served personally, or by publica-

tion; but where they are *in rem*, notice is served upon the thing itself. Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction, so as to render a personal service of the citation impossible. On that state of facts, service by publication, according to the law of the jurisdiction and the practice of the court, we think, is free from objection, and is amply sufficient to support the judgment of the appellate court. Mandeville et al. *v.* Riggs, 2 Pet., p. 489; Hunt et al. *v.* Wickliffe, 2 Pet., 214.

2. It is insisted, in the second place, by the counsel of the plaintiffs, that the court erred in allowing the decree to go to the jury as evidence of the value of the hire of the slaves subsequently to the fourth day of February, 1854. That theory overlooks the fact, that testimony had been introduced by the present defendants showing the value of the slaves at the time of the trial; and that the decree was to be taken in connection with the parol testimony, showing that the slaves were still living, and in the possession of the parties originally charged with their abduction. No evidence had been offered by the defendants, and, in view of the circumstances, we think the charge was correct, and that the prayer for instruction was properly refused.

3. While the cause was pending on the chancery side of the court, on motion of the plaintiffs, the court struck out the answer of the defendants, and it is now insisted that the action of the court in that behalf was erroneous. All we think it necessary to say, in reply to this objection, is to remark that the cause was subsequently transferred to the law docket without objection, and that a bill of exceptions does not bring into this court any of the prior proceedings for revision. Whatever may be the practice in the State courts, counsel must bear in mind that there is a broad distinction between a suit at law and a suit in equity, and must understand that this court cannot and will not overlook that distinction.

The judgment of the District Court is affirmed, with costs.

GEORGE R. SAMPSON AND LEWIS W. TAPPAN, MERCHANTS DOING BUSINESS UNDER THE NAMES AND FIRM OF SAMPSON & TAPPAN, CLAIMANTS OF THE SHIP SARAH, HER TACKLE, APPAREL, AND FURNITURE, APPELLANTS, *v.* SAMUEL WELSH, JOHN WELSH, AND WILLIAM WELSH, TRADING AS S. & W. WELSH.

Upon a libel to recover damages against ship owners, a decree passed against them for over $2,000, with leave to set off a sum due them for freight, which would reduce the amount decreed against them to less than $2,000. The party elected to make the set off, saving his right to appeal to this court.

The reduced decree was the final decree, and the party cannot save a right of appeal where it is not allowed by act of Congress.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Pennsylvania, sitting in admiralty.

It was a case of libel under the circumstances which are stated in the opinion of the court, and was submitted on printed arguments by *Mr. Wharton* and *Mr. Kane* for the appellants, and *Mr. Fallon* and *Mr. Serrill* for the appellees.

The arguments of the counsel were directed to the merits of the case, which it is not necessary to state under the view taken of it by the court.

Mr. Chief Justice TANEY delivered the opinion of the Court.

This case is brought up by an appeal from the Circuit Court of the United States for the eastern district of Pennsylvania.

A libel was filed in the District Court for that district by S. & W. Welsh, the appellees, against the ship Sarah, (of which Sampson & Tappan, the appellants, are the owners,) to recover compensation for damages sustained by a cargo of coffee shipped on board the Sarah, at Rio, and consigned to the libellants; and also to recover compensation for sundry disburse-

ments made by the libellants for the payment of wages and provisions for the ship.

The ship-owners appeared, and answered; but it is unnecessary to state more particularly the facts in controversy between the parties, because the final decree of the Circuit Court was for less than two thousand dollars, and consequently no appeal from its decree will lie to this court.

At the hearing in the District Court the libel was dismissed; but upon an appeal to the Circuit Court this decision was reversed, and a decree passed by the Circuit Court in favor of the libellants for the sum of $2,302.78, with leave to the respondents to set off the balance due them for freight, if they should elect to do so. Afterwards, the respondents appeared in court, and elected to set off this balance against the sum decreed against them, which reduced the amount to $1,071.27. But in making this election, the proctors for the respondents stated in writing, and filed in the court, that the election to set off was made without any waiver of their right to appeal from the decree. After this election was made, the court, on the 31st of August, 1858, passed its decree in favor of the libellants for the above-mentioned sum of $1,071.27, with interest from July 20, 1858. This was the final decree of the court, and the one from which the appeal is taken; and, as it is below $2,000, no appeal will lie under the act of Congress. And neither the reservation of the respondents in making their election, nor even the consent of both parties, if that had appeared, will give jurisdiction to this court where it is not given by law.

The appeal must therefore be dismissed for want of jurisdiction.

SUSAN VIGEL, PLAINTIFF IN ERROR, *v.* HENRY NAYLOR, ADMINISTRATOR OF GEORGE NAYLOR, DECEASED.

On a petition for freedom, the petitioner proved that one Kirby had emancipated all his slaves by will; some immediately and some at a future day.

The petitioner, in order to bring herself within this category and show that she

had been the slave of Kirby, offered to prove that her mother and brother and sister had recovered their freedom by suits brought against George Naylor, whose administrator, Henry Naylor, the defendant in the present suit was; and that it was very unusual to separate from the mother a child so young as the petitioner was at the time of Kirby's death.

Proofs of these circumstances were not allowed by the court below to go to the jury. In this the court was in error.

The recoveries of the mother and sister against George Naylor ought to have been allowed to go to the jury. They were not *res inter alios acta.* This case distinguished from that of Davis *v.* Wood, 1 Wheaton, 6.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia.

It was a petition for freedom filed by Susan Vigel, under the circumstances which are stated in the opinion of the court.

It was argued by *Mr. Blair* for the plaintiff in error, and *Mr. Bradley* for the defendant.

Mr. Justice CATRON delivered the opinion of the court.

Susan Vigel sued Henry Naylor, administrator of George Naylor, by a petition for freedom in the Circuit Court of this District. He pleaded that she was his slave. On the trial of this issue, she offered in evidence the will of John B. Kirby, by which all his slaves over thirty-five years of age were emancipated; and all those under that age were to be emancipated—the males at thirty-five, and the females at thirty years of age. This was allowed by an act of the Legislature of Maryland of 1796, ch. 67, sec. 13.

A witness testified on the petitioner's behalf, "that a few days after the death of Kirby, which took place in 1828, George Naylor brought to his house, where witness was then at work, the petitioner, her mother, and her sister; and said George Naylor stated to the witnesses at the time, that he had brought said negroes from the residence of said Kirby; and that the petitioner was then between six and eight years of age."

The petitioner then offered to prove that her brother Richard, and her mother Sarah, and her sister Eliza, had obtained

their freedom under the will of Kirby; that Sarah, the mother, and Eliza, had recovered their freedom by suits brought against George Naylor, which were defended by him. In the one instituted by Sarah, judgment was rendered in 1838; and that brought by Eliza was decided in her favor in 1842. The petitioner also offered to prove that it is very unusual for children of the age of the petitioner at the time of Kirby's death to be separated from their parents; but the court excluded the testimony offered from the jury; to which exception was taken.

The defendant then proved by two witnesses, that they had known the petitioner from her birth, and that she was born the property of George Naylor; and that she never was out of his possession, or that of his successor and administrator. It is objected that no records of the verdicts and judgments were offered to prove the recoveries. The bill of exceptions states, generally, that she offered to prove the facts, but the court refused to hear the evidence.

Transcripts of the records being the best evidence, and their production necessary, it is manifest that the offer to prove the recoveries was not refused for the reason that the record evidence was absent, but because the recoveries were deemed irrelevant, or that they were *inter alios acta*, and therefore incompetent as proof in the cause for any purpose. And the first question is, was the evidence offered relevant, when taken in connection with the parol evidence?

The girl was six or eight years old when George Naylor brought her home in 1828, with her mother and sister, from the late residence of Kirby, the testator. It was offered to be proved, and we must take it to be true, that it could have been proved that it was unusual to separate the mother from a slave-child as young as the petitioner was at the time Kirby's will took effect.

If Sarah, the mother, Richard, the brother, and Eliza, the sister, were the slaves of Kirby at his death, and acquired their freedom under his will, does this circumstance furnish evidence from which a jury might infer, in connection with other evidence, that the petitioner was also the slave of Kirby when

he died, and entitled to her freedom on arriving at thirty years of age? It is immaterial whether the evidence offered and rejected was weak or strong to prove the fact. The question is, was it competent to go to the jury? Castle *v.* Bullard, 23 How., 187. If so, it was for them to judge of its force and effect. If this child had been only one year old or under when Naylor got possession of her and of her mother, and other children in company with her, the presumption would be stronger, that her condition and that of her mother was the same, and both the slaves of Kirby, and were manumitted by his will.

By the rejection of the evidence the case was stripped of all proof that Susan, the petitioner, ever belonged to Kirby, the testator; whereas, had it been admitted, it would have proved that Susan's mother, and her other children, belonged to the estate of Kirby after his death, and were emancipated by his will; and having emancipated *all* his slaves, a presumption could have been founded on this proof by the jury, that an infant child of the same family was the slave of Kirby also, especially as Naylor brought the slaves as a family from Kirby's late residence.

2. Was the record of the judgment *inter alios acta*, and therefore incompetent?

In the case of Davis *v.* Wood, (1 Wheat., 6,) it was held by this court that a judgment in favor of the mother establishing her freedom against Swan, a third person, could not be given in evidence in a suit by the child of that mother as tending to prove his freedom. On the trial below, the petitioner offered to prove by witnesses, that they had heard old persons, now dead, declare that a certain Mary Davis, now also dead, was a white woman, born in England, and such was the general report in the neighborhood where she lived; and further offered to prove by the same kind of testimony, that Susan Davis, the mother of the petitioner, was lineally descended in the female line from the said Mary; which evidence by hearsay and general reputation the court refused to admit, except so far as it was applicable to the fact of the petitioner's pedigree. And the ruling below this court affirmed.

There is no question arising in the cause before us involving the consideration to what extent hearsay evidence to prove the status of freedom is admissible, and therefore we refrain from discussing the first point decided in Davis *v.* Wood. In that case, Susan, the mother of John, was sold by Wood, the defendant, to Caleb Swan; and she and her daughter, Ary, who had likewise been sold, sued Swan for their freedom, and recovered it. This record of recovery was offered in evidence on behalf of John, but was rejected on the trial.

This court held, that "as to the second exception, the record was not between the same parties. The rule is, that verdicts are evidence between parties and privies. The court does not feel inclined to enlarge the exceptions to this general rule, and therefore the judgment of the court below is affirmed."

This is the judgment with which we have to deal. The difference in the case under consideration and the one found in 1 Wheat., is, that here Susan's mother and sister recovered their freedom from Naylor, he being the defendant in both actions. There the mother and daughter recovered their freedom from Swan, who had purchased them of Wood.

This court having cut off all evidence by hearsay and general reputation—1st, that the female ancestor of the petitioners was a white English woman, and free; and 2d, that the record of the recovery of freedom by John's mother and sister from Swan was incompetent—of course the petitioner had to go out of court, having proved no case.

There the verdict was not between the same parties. Here the suit was between George Naylor and the mother of Susan; as between the mother and Naylor, the verdict was conclusive of her right to freedom; and Susan, the child, was a privy in blood to the mother, (being her heir, if free,) and as such heir, comes within the rule laid down in Davis *v.* Wood, and could avail herself of that verdict as equally conclusive, if she could further prove that she was born after the impetration of the mother's writ. Alexander *v.* Stokely, 7 Sergt. and R., 300; Pegram *v.* Isabell, 2 Hen. and M.; Chancellor *v.* Milton, 2 B. Monroe, 25. Or, if she could prove that she was born after Kirby's death, and that her mother recovered her freedom

under his will—and which facts might have been established by further proof—these circumstances could be let in as additional evidence. 2 Hening and M., 211.

Owing to the lapse of time since Mr. Kirby died, the petitioner sought to establish her case by circumstantial evidence. It was rejected; for what particular reason, does not appear.

As already stated, we think the evidence offered had weight enough in it to be pertinent, and ought therefore to have been submitted to the jury. 23 How., 187.

How it was proposed to be proved that Richard was a free man, and acquired his freedom under the will, does not appear; but as to Eliza, the sister, a record of recovery by her of her freedom against Naylor was offered as evidence, and rejected. The record could have proved the existence of the verdict and judgment as a FACT, and the legal consequences flowing from the fact, namely, that the petitioner, Eliza, was a free person. As to George Naylor and his representative, her status of freedom is a conclusive fact. And what is the effect of the record as respects other persons? Eliza sued George Naylor, declaring that she was free. He replied that she was his slave. She had a verdict that she was free. By the verdict and judgment, she took to herself all Naylor's title; it was *vested* in her as Naylor had it. Harris *v.* Clarissa, 6 Yerger's Ten. R., 243. He had had her in possession twelve years, and had title by the act of limitations of six years, as to other contestants who might set up claim to her as a slave. She can rely on his title as if he had manumitted her; the record has this effect. It stands on the footing that a recorded deed of manumission to her from Naylor would stand, or that a recorded bill of sale from him to a purchaser would stand. In either case, the title-paper could be given in evidence to prove the title; and the title thus acquired must be deemed valid until some one else legally establishes a better. This record evidence may be used in any suit by a third person, where the evidence is pertinent, of which the court must judge from facts and circumstances appearing on the trial; and to this effect are the adjudications of the State courts generally. Pegram *v.* Isabell, in Virginia, 2 Hen. and M., 210; Alexander *v.* Stokely, 7 Sergt.

and R., 290, in Pennsylvania; Vaughan *v.* Phebe, Martin and Y. R., 6, in Tennessee; Chancellor *v.* Milton, 2 B. Monroe's R., 25, in Kentucky. In Maryland, no decision is found on the subject.

In the next place, the record operates on the *status* of the person; it sets him free or pronounces him a slave, and binds him by the verdict either way. Shelton *v.* Barbour, 2 Wash. Va. R., 82.

In some of the States, the suit may be in equity, and the status of freedom be established by a decree. Fisher's negroes *v.* Dobbs et al., 6 Yerg., 119; Reuben *v.* Paraish, 6 Humphrey's R., 122.

It is ordered that the judgment of the Circuit Court be reversed, and the cause remanded for another trial.

MIGUEL DAVILA, PLAINTIFF IN ERROR, *v.* DAVID MUMFORD AND JESSE MUMFORD.

The statute of limitations of Texas provides in its fifteenth section, "that every suit to be instituted to recover real estate, as against him, her, or them, in possession *under title or color of title*, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards; but in this limitation is not to be computed the duration of disability to sue from the minority, coverture, or insanity of him, her, or them, having cause of action. By the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a consecutive chain of such transfer down to him, her, or them, in possession, without being regular; as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, land warrant, or land scrip, with a chain of transfer down to him, her, or them, in possession; and provided, that this section shall not bar the right of the Government."

And the sixteenth section provides, "that he, she, or they, who shall have had five years like peaceable possession of real estate, cultivating, using, or enjoying the same, and paying tax thereon, if any, and claiming under a deed or deeds *duly registered*, shall be held to have full title, precluding all claims, but shall not bar the Government; and, saving to the person or persons hav-

ing superior right and cause of action, the duration of disability to sue arising from nonage, coverture, or insanity."

The construction of the fifteenth section is this: that although the elder title was on record, the constructive notice thereof to the holder of the junior title was not sufficient to charge the latter with a "want of intrinsic fairness and honesty," so as to prevent the bar of the statute from running.

The sixteenth section commented on, but its meaning not definitively adjudged.

An act of the Republic of Texas cured whatever defects existed in the power of the commissioner who issued the grants to the defendants.

THIS case was brought up by writ of error from the District Court of the United States for the western district of Texas.

The principal question in the case was the construction of the statute of limitations passed by the State of Texas, which is discussed in the opinion of the court, and need not be stated in this place.

It was argued by *Mr. Hale* for the plaintiff in error, and submitted on a printed argument by *Mr. Ballinger* for the defendants. A cursory view only of the arguments can be given.

Mr. Hale cited authorities in the civil law, and then proceeded to comment on the law of Texas.

This was the state of the law when the Republic of Texas obtained its political existence, and it continued to be the rule of construction until the adoption of the common law, as a system, in 1840. The thirty-ninth section of the act of December 20, 1836, (Hart. Dig., 2375,) was merely a partial innovation, and is to be construed in reference to the still-existing rule.

Hart. Dig., 2396.

The introduction of the common law by the act of January 20, 1840, did not introduce the English statutes, and the former law as to prescription remained unchanged up to the passage of the act of February 5, 1841.

Gautier *v.* Franklin, 1 Tex., 746.

This act, thus passed, under the combined influence of the common and civil law, as co-existing systems, derived its provisions in some measure from both; and while the fourteenth

section is a rude attempt to adopt the doctrine of disseizin, the fifteenth and sixteenth sections follow distinctions known only to the Spanish jurisprudence and to the legislation of our Western States. Title or color of title—the *titulo justo* and *colorado* of the Spanish jurists—are not required in the English law to work a disseizin, nor do they confer a right to a shorter period of prescription. They only extend the effect of the actual disseizin to the boundaries claimed by the deed under which the entry is made, and no reference is had, therefore, to the derivation of the title or the mode of its acquisition. But in the peculiar land law of those Western States which contributed most to the settlement of Texas, a possession held under a connected title was sometimes made to confer greater privileges, and to be sufficient for prescription in a shorter term. (See in Tennessee, act of 1797, c. 43, sec. 4; in Louisiana, Code Civ., arts. 3445, 3414, 3415; Illinois, act of 1839, "to quiet possessions," etc.)

Under this new rule of limitation it was no longer indifferent to inquire into the character of the title of the possessor or the mode by which he obtained it, for both the character and the mode qualified the possession. The courts of Tennessee, Louisiana, and Illinois, while this rule continued in force, have therefore held that the occupant, claiming the benefit of this short period of limitation, must show that he had held with a just confidence in his title and an honest belief in its superiority. "Color of title," says the Supreme Court of Tennessee, "is where the possessor has a conveyance of some sort, by deed, or will, or inheritance, which he may believe to be a title. This cannot be said of any bond or entry, which only entitles the party to a conveyance hereafter. Every one knows that is not a title, and of course cannot improve under it with a belief that he is improving under a legal title."

Wilson *v.* Kilcannon et al., 4 Hay., 185.

And again: "The reason of the law is attained when we require a *bona fide* deed for land (which has been granted) to the defendant himself. It shows that he is not a trespasser, and that he took possession of the land, believing it to be his own."

Hampton *v.* McGinnis, 1 Tenn., 291.

This seems to have been the construction adopted by this court when defining "a color of title—a deed acquired in good faith."

Patton's Lessee *v.* Easton, 1 Wheat., 476.

Gregg *v.* Sayre and wife, 8 Peters, 253—4.

Andrews *v.* Mulford, 1 Hayw. N. C., 320.

The Supreme Court of Louisiana has often said, in accordance, indeed, with the direct provisions of the civil code, that a title acquired in bad faith or with a knowledge of the better title will not sustain prescription.

Reeves *v.* Towles, 10 La., 283—6.

Devall *v.* Chopin et al., 15 La., 578.

Sandoz *v.* Gary, 11 Rob., 531.

Hughey *v.* Barrow, 4 Ann., 252.

And upon this point, a reference may also be made to the nice distinctions of the French jurists.

Tropl. Prescription, arts. 918, 933.

Duranton, vol. 21, No. 386.

Merlin, Repertoire, tit. Prescription, 1, 5, 4.

And compare Cod. Nap., art. 550.

In none of the Western States, however, except in Louisiana and Illinois, is there any expression in the statutes of limitation which seems to indicate that good faith is necessary in the shorter periods of possession, and the courts of the other States have, therefore, been compelled to decline to introduce, by construction, an exception not contained in the law. The difference, in this respect, of the act of limitation of Texas, gives a greater weight to our position, since it shows an intention to require an additional requisite in the definition of "color of title," and to look for a rule rather to the principles of the civil than the common law.

This view is, if not confirmed, at least supported by the intimations derived from the course of judicial decision in Texas. In the case of Charle *v.* Saffold, (13 Tex., 94,) the question was, whether a void will was sufficient color of title, not to sustain a possession of three years under the fifteenth section, but to extend an adverse possession of ten years to the bound-

aries of the entire tract under the fourteenth section. And the court assumes that it is sufficient for this purpose, and remarks: "The object of the statute, in its longer terms, is not to settle questions in relation to good or bad faith, the right or the wrong of possession; it proceeds on other principles." (P. 112.) In Marsh *v.* Weir, (21 Tex., 97,) the court refuse to apply the general doctrine of Charle *v.* Saffold to "color of title," as defined in the fifteenth section. "The definition of 'color of title' in this section is certainly very different from that which has been given by courts to these terms; that is, 'that which in appearance is a title, but which in reality is no title.' (Wright *v.* Mattison, 18 Howard R., 56.) That is not the color of title defined in this section; and the statute having defined the terms, we must look to the statute for their meaning." (P. 109.) And the court, therefore, hold that a grant which had been revoked or pronounced null by the political authority was not a basis for the limitation of three years. The same position is also taken and extended in the case of Smith *v.* Power, (23 Tex., 29.)

It is useless, therefore, to advert to the decisions of the courts of the common-law States, which have given other attributes to a colorable title, or to the cases which have been decided in this court upon the common-law theories of adverse possession and decision. The act of limitations of Texas is based upon a different view, and requires the application of other analogies.

A portion of *Mr. Ballinger's* reply was as follows:

To ascertain what is meant by "color of title," *Mr. Hale* refers to the civil law; but the act itself is its complete expositor. Our Supreme Court say, "the statute having defined the meaning of the terms employed, we are not at liberty in construing this section to resort to other sources for their definition and meaning." (21 T., 109.) It is a direct deraignment of title from the Government; not strictly "regular;" one which purports to transfer the right, but does not in a perfect and formal manner. A patent would be title. That did not need to be expressed. But the statute, in apposition to it,

explains color of title as from the Government. The location of a head-right certificate, land warrant, or scrip, is declared color of title. It leaves the fee in the Government, but is a character of right to maintain ejectment, (sec. 1 same Act Lim., Hart. Dig., 3230,) and is a vested right of property.

Howard *v.* Herry, 7 Tex., 266.

Hamilton *v.* Avery, 20 T., 635.

So if the mesne conveyances are not "regular," which is at once illustrated—"as if" not registered, or only in writing, without a seal, (13 T., 131,) "or such like defect," &c.; the plain intent being to embrace any instrument purporting and intended to be a conveyance, and equitably conveying the right of the grantor, although defective in strict law. A bond is not color of title, because it does not purport to be a transfer. (13 T., 128.) "Color of title" had its fixed signification in the statutes of Texas with reference to the character of the conveyance, *ex facie*, and not to its operation from extrinsic causes, or to any good faith in its holder. The 37th section, "Act organizing inferior courts," &c., December 20, 1836, provides that any person who owns or claims land of any description, by deed, lien, or any other color of title, shall have the same recorded, &c. The 38th section specifies the proof to be made in order to record "all titles, liens, mortgages, or other color of title."

Hart. D., 2754—5.

The 39th section is the first limitation law of Texas. It provides that—

"Any actual settler who is a citizen of this Republic, who may have and hold peaceable possession of any tract or parcel of land under a color of title, duly proven and recorded in the proper county, for a term of five years from and after recording of said color of title or titles, his, her, or their claim, shall be considered good and valid, barring the claim or claims of any and every person or persons whatsoever," &c.

The only decision that I call to mind upon this act of limitation is Jones *v.* Menard, (1 T., 171,) in which a possession of five years after record of the junior grant was held a bar. It is true there is no discussion of the point whether the junior

grant is color of title, for the simple reason that no one thought to doubt it. In Marsh *v.* Weir, (21 T. 97,) the construction of the 15th section, act 1841, is discussed. It was held that a grant expressly revoked or annulled by the Ayuntamiento was not title or color of title, because it was then "as though it had never issued—absolutely and to all intents and purposes a nullity;" but that a junior and inferior grant, good as against the Government, "apparently valid, but liable to be avoided and annulled by some matter extrinsic of the grant," does constitute color of title. In Smith *v.* Power, (23 T., 33,) the matter is settled with the utmost precision. The Chief Justice says:

"To constitute such title or color of title, there must be a 'chain of transfer from or under the sovereignty of the soil.' This necessarily presupposes a grant from the Government as the basis of such transfer. And the grant must be effectual to convey to the grantee whatever right or title the Government had in the land at the time of making the grant. It need not necessarily carry with it the paramount title; but it must be title as against the Government, valid in itself, when tested by itself and not tried by the title of others. It must have intrinsic validity as between the parties to it, though it may be relatively void as respects the rights of third persons."

The case of Scott *v.* Rhea, (5 T., 258,) again before the court, (21 T., 708,) shows clearly that want of notice of the prior title is not an element of "title or color of title" under the statute. (And to same effect see Wheeler *v.* Moody, 9 T., 372; Horton *v.* Crawford, 10 T., 382; Castro *v.* Wurzbach, 13 T., 128; Mason *v.* McLaughlin, 16 T., 24; Williamson *v.* Simpson, Id., 444.)

The case of Christy *v.* Alford, (17 How., 601,) shows that such a construction was unheard of then in the court below and in this court. (See agreement of counsel as to facts, p. 604.) There has never been a plea of three years' limitation in Texas which did not involve this question. Should it not be considered settled that it has never even been mooted?

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the District Court of the United States for the western district of Texas.

The suit was brought against the defendants and others to recover the possession of eleven square leagues of land, situate in what was formerly known as the county of Milam, on the right bank of the river San Andres, otherwise called Little river, where Buffalo creek and Donaho's creek enter said river, with specified boundaries.

The plaintiff gave in evidence a grant from the Government of Coahuila and Texas, within the limits of the colony of the empresarios, Austin and Williams, dated 18th October, 1833, and rested.

The defendants gave in evidence grants from the same Government of a league each, situate within the boundaries of the eleven leagues, the one to David Mumford, dated 20th March, 1835, the other to Jesse Mumford, dated 25th February, the same year; the former went into possession in the spring of 1844, and continued in the possession and cultivation of the tract down to the time of trial; the latter took possession in the year 1850, and continued the cultivation and improvement down to the trial.

The defence relied on is the statute of limitations.

The court charged that the plaintiff and defendants both claimed under titles emanating from the sovereignty of the soil; that the plaintiff's was the elder in point of date, and must be regarded as paramount, unless the defendants were protected by the statute of limitations set up in defence. That if the jury believed from the evidence the defendants had held actual adverse and peaceable possession, in their own right, for more than three years next before the commencement of the suit, under color of title, and that the plaintiff's cause of action accrued more than three years prior to the suit, the jury should find for the defendants.

The court further charged, that if the jury believed from the evidence that the defendants had held actual adverse and peaceable possession in their own right, cultivating, using, and enjoying the lands, and paying taxes thereon, and claim-

ing under a deed or deeds duly recorded, for more than five years next before the commencement of the suit, they should find for the defendants.

The 15th section of the act of limitations of Texas provides, "that every suit to be instituted to recover real estate as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards;" and provides that, "by the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a consecutive chain of such transfers down to him, her, or them, in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty."

The principal ground taken against the operation and effect of the three years' limitation in the present cause is, that the elder title being on record, the defendants had constructive notice of the same at the time of the grants to them, and hence that the title is subject to the charge of the "want of intrinsic fairness and honesty" within the meaning of the statute, which it is claimed removes the bar of three years' adverse possession.

It is admitted that this clause of the statute has not yet received a construction by the courts of Texas, and there is certainly some difficulty in ascertaining the precise meaning intended by the Legislature from the phraseology used. The better opinion, we think, is, that the want of intrinsic fairness and honesty, in the connection in which the words are found, relates to some infirmity in the muniments of title, or deduction of title, of the defendant, indicating a want of good faith in obtaining it.

The statute, in defining what is intended by possession, "under title, and color of title," in order to operate as a bar within the three years, declares, that by the term "title" "is meant a regular chain of transfer from or under the sovereignty of the soil," which, as is apparent, is the case before us,

the title of the defendants being directly from the Government; and "color of title" is declared to be "a consecutive chain of such transfer down to him, her, or them, in possession, *without being regular*, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty;" clearly referring, as we think again, to the muniments of the title, and defects therein.

To refer these words to a constructive or actual notice of an elder title would, in the practical effect of the limitation, be a virtual repeal of the statute, especially in all cases in which the elder title is of record.

A statute of limitations is founded upon the idea of an elder and better title outstanding, and prescribes a period of possession and cultivation of the land, under the junior or inferior title, as a bar to the elder, for the repose of society; thereby settling the title by lapse of time, and preventing litigation.

As it respects the five years' limitation, the objection is, that the grants were not duly registered, and hence the possession not within the 16th section of the act. The grant to David Mumford was registered on the 21st July, 1838, and that to Jesse on the 4th October of the same year.

It is insisted, however, that the registries were a nullity, on the ground that the execution of the grants had not been properly proved or acknowledged, in order to be admitted of record.

In the case of the grant to David, the recorder certifies that the deed was presented to him, proven, and duly recorded in his office the day above mentioned; and in that of Jesse, that the deed was proved for record by J. B. Chance, who made oath that he was familiar with the handwriting of the commissioner, W. H. Steele, and also of the assisting witnesses, and that he believed the several signatures to be genuine.

There is some difficulty in determining, from the various decisions of the courts of Texas upon the registry act of 1836, whether or not the certificates of proof of the grants in the present case were sufficient to permit them to registry at the

time they were filed for record. It is claimed for the defendants that the recording of the grants was confirmed by the act of 1839, which provided that "copies of all deeds, &c., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." This act relates to the colonists' titles delivered to the grantee, the originals remaining as public archives. The deeds in the present case are copies of the originals remaining in the archives, and are certified by Steele, the commissioner, that they agree with the original titles which exist in the archives, from which they are taken for the parties interested, the day of their date, in the form provided by the law. In addition to this certificate, the copies, which it seems are executed by the commissioner, and are second originals, were proved before the recorder at the time they were admitted to registry. But be this as it may, we are not disposed to look very critically into the question of the registry, though we cannot say the court was in error in respect to it, inasmuch as the defence was complete under the statute of three years' limitation, as already explained.

An objection has been taken that the grants of the defendants are a nullity, upon the ground that Steele, the commissioner, had no authority to act in that capacity in the colony of Nashville, or Robertson, at their date. But this defect was cured by the act of the Republic of Texas in 1841, as has been repeatedly held by the courts of Texas. (2 Tex. R., 1 and 37; 9 Ib., 348, 372; 23 Tex. R., 113 and 234; 22 Ib., 161 and 21; Ib., 722; 20 How. R., 270.)

The judgment of the court below affirmed.

JAMES A. CHANDLER, PLAINTIFF IN ERROR, *v.* OTTO VON ROEDER, HAMILTON LEDBETTER, AND CHARLES VON ROSENBURG.

It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently,

when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence, is a question for the judge; whether there be sufficient evidence, is for the jury.

Therefore, where, in a land suit in Texas, the defendants pleaded the statute of limitations, and the documentary evidence showed that neither the plea of five years' possession nor three years' possession (see preceding case in this volume) could be sustained, it was errroneous for the judge to leave that question to the jury.

It was also error in the judge to exclude testimony to show that the deed was fraudulent under which the defendant claimed. The Supreme Court of Texas have decided that conveyances made with an intent to defraud creditors are void.

The decision of the court upon another point having been favorable to the plaintiff, he has no cause of complaint against the ruling of the court.

THIS case was brought up by writ of error from the District Court of the United States for the western district of Texas.

It was a petition by Chandler in the nature of an action of trespass, as well to try title to a certain league of land in Texas as to recover damages.

The nature of the case and the rulings of the court below are stated in the opinion of the court.

It was argued by *Mr. Paschal* for the plaintiff in error, and by *Mr. Hale* and *Mr. Robinson* for the defendants.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff claimed in the District Court a league of land in the county of Fayette, originally granted by the Mexican Government to William H. Jack, and which was in the possession of the defendants. His title consists of a record of a suit in one of the district courts of Texas, in favor of Bremond and Van Alstyne against a number of persons associated under the name of the German Emigration Company, founded upon notes and bills of the company, dated in the years 1846 and 1847, and upon which judgment was recovered in 1852.

An execution was issued upon this judgment, and a levy, sale, and conveyance of the property in controversy were made in 1853, according to the exigency of the writ. The plaintiff was

the purchaser at the sale. There was testimony conducing to prove that Von Roeder entered upon the land as the agent of the company. The defendants, in their answer, denied the sufficiency of this title, and pleaded that they had had adverse and peaceable possession of the land for more than five years under deeds duly registered, and had paid taxes thereon; and also that they had possessed the land peaceably for more than three years under title, or color of title, derived from the sovereign authority, thus claiming the benefit of the 15th and 16th sections of the act of limitations. Hartley's Dig., arts. 2,391, 2,392.

The title exhibited on the trial by the defendants consisted of a deed purporting to be made by the German Emigration Company, through an attorney, Gustavus Dressell, in the year 1848, in favor of the defendant, Von Roeder, in which this and other property was conveyed to him, and deeds from Von Roeder to the co-defendants dated in 1850, and that the defendants had had adverse possession under them. There was not five years from the date of the deed to Von Roeder to the commencement of the suit, and there was no testimony to show in what manner the German Emigration Company had become entitled to the property. No conveyance from William H. Jack, the original grantee, was produced either to the company or to the defendants. Thus, the pleas of the statute of limitations were not proved. The plaintiff's counsel requested the court to instruct the jury that there is no documentary evidence, title, or color of title, to support these pleas of the defendants. The court declined to advise the jury as requested, but after informing them of the nature of the title and possession that would support such pleas, directed the jury to inquire whether the defendants had adduced sufficient evidence to sustain them. The entire case, in so far as these pleas were concerned, was contained in written documents and undisputed facts. It is the duty of the court to determine the competency of evidence, and to decide all legal questions that arise in the progress of a trial, and consequently, when, assuming that all the testimony adduced by the one or the other party is true,

it does or does not support his issue, its duty is to declare this clearly and directly. Whether there there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury.

Company of Carpenters *v.* Haywood, Doug., 375.

Jewell *v.* Parr, 13 C. B. R., 909.

The court erred in refusing to instruct the jury as requested, and in submitting the decision of questions when there was no evidence to raise them. The defendants having introduced their title, the plaintiff proposed to produce testimony of a variety of circumstances to show that the possession of the property by Von Roeder was collusive and fraudulent, and that the deed was made to him with the intent to defraud and delay the creditors of the German Emigration Company, who were insolvent.

The court overruled this attempt of the plaintiff, and excluded all testimony to establish fraud or collusion. The statute of the 13th Elizabeth concerning fraudulent conveyances has been adopted in Texas. The Supreme Court of that State have decided that when a deed is a mere pretence, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with the intent to defraud creditors, that the conveyance is void.

Baldwin *v.* Peete, 22 Texas R., 708.

This decision conforms to the current doctrine relative to the just construction of this statute. The plaintiff proposed to prove that the deed to Von Roeder was fraudulent within the meaning of the act. The bills and notes upon which the judgment was founded were filed as part of the record, and and are certified with the judgment of the District Court.

These show that the plaintiffs in the suit were creditors at the date of the conveyance to Von Roeder, and within the protection of the statute of frauds.

Without considering the particular testimony offered, it is

our opinion that the District Court erred in refusing to receive evidence to impeach the deed for fraud.

The plaintiff objected to the introduction of the deed to Von Roeder as testimony, because it was not shown that there was such a corporation as the German association, and because a letter of attorney to Dressel was not exhibited. The deed was admissible, because it appeared that the defendants held their possession under it. But whether it was sufficient evidence of title in the German Emigration Company, or of transfer to the defendants, were questions which it was competent to the court to determine in its instructions to the jury. It appears from the charge that the decision of the court was favorable to the plaintiff. He, consequently, has no cause for complaint upon his exceptions to the competency of the evidence.

For the errors we have noticed the judgment of the District Court is reversed, and the cause remanded for further proceedings.

CHRISTOPHER G. PEARCE AND OTHERS, INCORPORATED AND ACTING UNDER THE NAME OF THE NILES WORKS, APPELLANTS, *v.* JESSE W. PAGE AND OTHERS, CLAIMANTS OF THE STEAMBOAT DOCTOR ROBERTSON.

In a collision which took place in the Ohio river between a steamboat ascending and a flat-boat descending, the steamboat was in fault.

When a floating boat follows the course of the current, the steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use.

Any attempt to give a direction to the floating mass on the river would be likely to embarrass the steamer, and subject it to greater hazards. A few strokes of an engine will be sufficient to avoid any float upon the river which is moved only by the current, and this is the established rule of navigation.

THIS was an appeal from the Circuit Court of the United States for the district of Kentucky, sitting in admiralty.

It was a libel filed in the District Court of Kentucky by Pearce and others against the steamboat Doctor Robertson,

for the loss of certain castings, which the libellants had shipped on board of a flat-boat, sunk by collision with the steamboat on the Ohio river.

The District Court dismissed the libel, as not being sustained by the proofs.

This decree was affirmed by the Circuit Court, and the libellants appealed to this court.

It was argued by *Mr. Lincoln* for the appellants, and by *Mr. Phillips* upon a brief filed by himself and *Mr. Nicholson* for the appellees.

The arguments would be difficult to be explained without diagrams and a full report of the testimony.

Mr. Justice McLEAN delivered the opinion of the court.

This is a libel filed by Christopher G. Pearce et al., incorporated and acting under the name of "Niles Works," and by virtue of the statute of the State of Ohio, passed May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," against the steamboat Doctor Robertson, her tackle, apparel, engine, and furniture, and all persons intervening for their interest in the same, in a cause of collision, civil and maritime.

The libellants were the owners of a large amount of iron castings, made for and intended as sugar-mill machinery, which was at the time of the said collision in a flat-boat, well manned and equipped, and which was being navigated on the Ohio river, and in the usual mode of navigating such craft, and near the Illinois shore, and along the side of the Cincinnati tow-head, about twenty-five feet therefrom, and had crossed over from the Kentucky side, and was at the time in full view of the Doctor Robertson and her pilot.

The libel states that on the eighth day of August, 1856, at about eight o'clock in the forenoon of that day, and while the said flat-boat was being navigated as aforesaid, the said steamboat, Doctor Robertson, approached her, coming up the river, and having a lighter in tow, with full speed; and although the flat-

boat was in full view of her pilot, and there was ample room for the said steamboat to pass to the left of, and between her and the Cincinnati bar, which lay between the flat-boat and the Illinois shore, yet the said steamboat endeavored to run between the said flat-boat and the said tow-head, and ran herself and the said lighter with great force directly into and upon the said flat-boat, and broke in the sides thereof, and caused the flat-boat immediately to sink in about twenty feet of water, and so injured it as to render it entirely useless.

It happens in this case, as in all other cases of collision, that the witnesses on the respective boats are somewhat contradictory in their statements. It is admitted, that in ascending the Ohio river, some fifty or sixty miles below Cincinnati, the steamboat Doctor Robertson, a stern-wheel boat, of fifty tons burden, in passing up the river, near the place called the Cincinnati tow-head, while running close to the Kentucky shore, being from one to two miles below, in full view of the defendants' flat-boat, which was freighted with sugar-mills, and other machinery, for the Western trade; and that the flat-boat, being put in the course of the current, floated down the river, her stern and front oars not in use, but laid on the boat, without any effort by the hands on the flat-boat, continued to float with the current, until it came into collision with the ascending steamboat. That this boat, to avoid a snag that projected some distance into the river, changed her course, by which means she came into collision with the flat-boat, which was immediately sunk in water near fifteen feet deep.

There seems to have been little or no effort made to avoid this collision by those who had the command of the flat-boat. There were two other flat-boats lashed together, which followed the first boat at a distance of some two or three hundred yards; and they, perceiving that a collision was likely to occur, used their oars, so as to avoid the ascending steamboat. Under this state of facts, the question of fault arises.

The defendants' flat-boat was ninety-six feet in length, and some ——— feet in breadth, with an oar or sweep in the front and rear parts of the boat, so that some direction might be given to it. But this movement cannot be relied on when

the colliding boats are near to each other. The flat-boat was heavily laden, and occupied near a hundred feet in a somewhat rapid current, and the only means of removing it out of the direction of the steamboat was, by working the end oars across the current. This could not be done successfully, unless the boats were so far apart, as by a diagonal movement to secure the aid of the current in escaping a collision.

But what is the law of the river on this subject, in regard to floating flat-boats and steam vessels? The self-moving power must take the responsible action. This cannot always be done, even with a fair wind, by a sailing vessel, as it may suddenly change, or be subject to accident. But steam is generally under the control of the will of the engineer, and he is responsible for a proper use of it.

Schyler C. Barnet says he was passenger on the Doctor Robertson, and that five or six miles below Shawneetown she came in collision with a flat-boat, loaded with sugar-mill machinery, at about nine or ten o'clock of a clear morning; the flat-boat had come over the reef, and had straightened down the river, and was about one hundred feet from the tow-head, the witness sitting half an hour on the boiler-deck of the steamer before the collision, the steamer running about fifty feet from the Kentucky shore, on the larboard side; she had a lighter in tow, and when she approached very near the flat-boat she turned out a little from the shore to avoid a snag just above her, but kept on until the lighter struck the flat-boat, when the bow of the steamer was some fifty or sixty feet below the tow-head; the lighter struck the flat-boat, and ran half-way over it, which caused the flat-boat to sink.

And the witness says, that on the part of the flat-boat nothing could have been done, as she was lying in the best possible position. Since 1824, the witness states, he has been boating on the river, and that the general custom has been, and now is, "for steamboats to give the way for flat-boats to pass."

Alexander Ford has been on the river ten or twelve years, and a pilot for three years. The flat-boat was lying nearly straight with the tow-head, about one hundred and fifty yards,

more or less, above the foot of it, and about twenty-five or thirty yards from the Kentucky shore. The Doctor Robertson aimed to go on the starboard side of the flat-boat, when the barge which the Robertson had in tow struck the flat-boat, and sunk her. He thinks the Robertson had stopped her engine, which, if it had been done in time, the boats would not have come together. He says there was plenty of room to pass outside of the flat-boat. The witness says "that he supposed the Robertson could pass on either side of the flat-boat. The flat-boat was not easily turned out of line. The boats in approaching each other were in full view a mile and a half. It is customary for a steamboat to give way to a flat-boat. The steamboat takes either side of the descending flat-boat, so as to avoid it. Ford's boat was from seventy-five to one hundred and twenty-five yards above the machinery boat when he perceived that the steamboat would run into the flat-boat."

The witnesses generally concurred in saying, that the steamboat could have run to the Kentucky shore until the flat-boat had passed, or could have run on the Illinois side of the flat-boat. In the language of John Walker, a witness, "the steamboat could have either gone to the shore or run closer to the shore, or she might have gone entirely outside of the flat-boat; and he does not think those persons on the flat-boat could have done anything to have prevented the collision." Witness thinks there was one hundred to one hundred and fifty yards of river on the Illinois side.

William P. Lameth, for the last fifteen years, has acted as steamboat captain, and he says, "it is the usual custom for steamboats to examine the position of the flat-boats, and to take the best possible course to avoid them, on either side that seems best. If danger is apprehended, it is usual to ring a slow bell, and run easy. If danger be apparent, the boat should land or stop entirely, and let the flat-boat pass."

John F. Farrell says, "it is the duty of a flat-boat to straighten itself in the river, ease its oars, and pursue the course with the current, and the steamboat must avoid her." The snag in the river, Douglass says, was one hundred feet above the bow of the steamer when the boats struck. The

two other flat-boats were, when the steamer struck the flat-boat, one hundred and fifty yards above the colliding boats, and the witness, Douglass, thinks the steamboat could have passed, if all the flat-boats had kept their places. The stern of the flat-boat was sixteen feet under water.

Several witnesses called by the steamer seem to think that the flat-boat was bound to avoid the steamer; but such a rule would be unreasonable, and would increase the risk of navigation. When a floating boat follows the course of the current, the steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use. Any attempt to give a direction to the floating mass on the river would be likely to embarrass the steamer, and subject it to greater hazards. A few strokes of an engine will be sufficient to avoid any float upon the river which is moved only by the current; and this, I understand, is the established rule of navigation.

We think the steamer was in fault in not avoiding the flat-boat, on which ground the judgment of the Circuit Court is reversed.

WILLIAM THOMPSON AND JOHN PICKELL, PLAINTIFFS IN ERROR, *v.* LEWIS ROBERTS, GIDEON R. BURBANK, AND ADDISON ROBERTS.

The general rule of law is, that the judgment of a court of law or a decree of a court of equity, directly upon the same point and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit.

Where the court left it to the jury to say whether the defence made at law was the same which was made in a prior equity suit, this error, if it be one, does not invalidate the judgment of the court below.

The parties to the suit at law having been parties to the suit in equity, the subject-matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter.

No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

In consequence of some negotiations relative to coal lands, and their eventual purchase by Pickell and Thompson, they executed to Mr. Smith the following notes:

Promissory Note No. 1.

BALTIMORE, *June* 2, 1853.

On the 31st of December, 1856, we promise to pay William H. Smith, or order, two thousand dollars, with interest from July 20, 1853. Value received.

$2,000.00. JOHN PICKELL.
WM. THOMPSON.

(Endorsed:) WM. H. SMITH.

Promissory Note No. 2.

BALTIMORE, *June* 2, 1853.

On the first day of July, in the year 1856, we promise to pay William H. Smith, or order, two thousand dollars, with interest from July 20, 1853. Value received.

$2,000.00. JOHN PICKELL.
WM. THOMPSON.

(Endorsed:) WM. H. SMITH.

The time for the payment of these notes was afterwards, by agreement, extended to 15th January, 1857.

On the 12th of July, 1853, Thompson and Pickell executed a mortgage of the property purchased to Smith, for the purpose of securing the payment of the purchase money, of which the notes were only a part.

On the 2d of October, 1856, Smith assigned the mortgage, as also the two notes in question, to Lewis Roberts, Gideon R. Burbank, and Addison Roberts.

The next step in the proceedings was the filing of a bill in the Circuit Court of the United States for the district of Maryland for the foreclosure of the mortgage. To this bill the following were the parties:

William H. Smith, of the city of Richmond, and State of Virginia, and a citizen of the said State of Virginia, and Lewis Roberts, Gideon R. Burbank, and Addison F. Roberts, of the city of New York, and State of New York, and citizens of

said State of New York, bring this their bill of complaint against William Thompson, a citizen of the State of Maryland, and residing in the city of Baltimore, in the said State, and John Pickell, a citizen of the said State of Maryland, and residing in Alleghany county, in said State, and the Pickell Mining Company, incorporated by the laws of the said State of Maryland, mining and transacting business in Alleghany county, in said State, and having an office for the dispatch of business in the city of Baltimore, in said State.

The Pickell Mining Company were made a party because, as the bill alleged, Thompson and Pickell had, since the date of the mortgage, assigned their equity of redemption to that company.

This gave rise to a protracted and warmly-contested litigation, the defendants alleging that Smith had represented the land to contain at least three hundred acres of the big vein of coal, whereas it did not contain more than one hundred and fifty.

It is not necessary to state the evidence taken on both sides.

On the 31st of October, 1857, whilst this controversy was pending in chancery, the defendants in error brought a suit on the common-law side of the court upon the two notes above mentioned, which is the present case.

In April, 1858, the court on the equity side decreed a sale of a part of the mortgaged property, but the most valuable part of it was excepted, so that the residue was not worth the debt. The suit at law therefore went on.

In November, 1858, the case came up for trial. The defendants offered a part of the chancery record for the purpose of showing that the plaintiffs were not holders of the notes for value, when the plaintiffs offered the entire record, and insisted that the decree was conclusive, and estopped the defendants from again alleging the same matter as a defence to the suit at law on the notes.

Four long prayers were made to the court on each side, which were all rejected, and the following instructions given to the jury:

If the jury shall find from the evidence that the promissory

notes offered in evidence in this case were duly executed and delivered by the said defendants to William H. Smith, and by him endorsed over to the said plaintiff for value; and that in the cause on the equity side of this court, in which the said plaintiffs, with the said Smith, were complainants, and the said Thompson and Pickell, with the Pickell Mining Company, were defendants, (the record of which has been offered in evidence,) the same defence was made and set up in said cause to prevent the passage of a decree for the sale of the said lands to pay the said notes as is now made to prevent a recovery in this case, then the decree passed in that case is conclusive upon the point of this defence, and the plaintiffs are entitled to recover in this action.

To which said rejection of the prayers offered on the part of plaintiffs the said plaintiffs prayed leave to except, and the said defendants prayed leave to except to the rejection of the prayers as offered by the defendants, and to the instruction given by the court to the jury, and the said parties, plaintiffs and defendants, prayed the court to sign and seal this their several bill of exceptions; which is accordingly done this 18th November, 1858.

WILLIAM F. GILES. [SEAL.]

It was argued by *Mr. Mayer*, upon a brief filed by himself and *Mr. Washington Yellott*, for the plaintiffs in error, and by *Mr. Alexander* for the defendants.

The arguments upon both sides necessarily included comments upon the prayers rejected by the court below, as well as upon the instructions which were given. Our notice will be confined to the latter.

Mr. Mayer made the following points:

But as to the instruction, the plaintiffs in error maintain—

I. It submits to the jury the whole question of the identity of the defences taken in this suit and in the equity case in the United States court, which question, on the contrary, is, it is contended, one of law and fact; in regard, too, to which, the

court should at least have specified the particular point of defence to which they referred.

2 Johns. R., 29, 30, 210; 16 Id., 136.

1 Esp. R., 43; 1 East., 355.

3 B. and Cr., 239; [10 E. C. L., 62.]

II. It was for the court, on that question of the defences, to compare the respective defences; and on such comparison it will appear that they do not coincide; and the court should therefore have refused to leave to the jury the inquiry as to the identity of defence. The defence in the equity suit was only that the land was represented by Smith to contain 300 acres of the "big-vein" coal, and proved to have only 150—an allegation which might imply that such was only Smith's opinion, and certainly did not necessarily import that he had made an ascertainment by survey. The defence, on the other hand, taken in the present suit, is, that Smith was guilty of actua fraud, and had asserted what, by his own examination, he knew was false.

2 Gall., 229, 230.

17 Peck., 7—14.

1 Greenl. Ev., secs. 528—534.

III. The instruction was erroneous, because, even assuming that the defence of fraud was taken in the equity suit, the decree there is not to be understood as determining or at all considering that defence. In that suit, *in rem*, it was not an appropriate defence and could not have availed, since, whether there were fraud or no fraud, the land, inferior in coal value as it might be, ought to have been charged with the purchase-money debt, under the mortgage. The personal liability on the notes is a distinct question. The sale upon the mortgage was inevitable; and for any amount reclaimable for the misrepresentation of the purchase money paid, the remedy was against the proceeds of sales under the mortgage decree.

1 Greenl. Ev., sec. 528.

2 Gall., 229, 230.

1 Peters C. C. R., 203.

3 Day's R., 138; 8 Conn., 268.

3 Simons, 447; 4 Irish Ch. R., 75.

IV. Identity of defences does not bear on the defendants in this suit and preclude the bar now set up, because they were not necessary nor proper parties to the equity suit, all their estate in the land to be affected by that proceeding having been conveyed to the party defendant there, the Pickell Mining Company, as the very bill confesses.

Calont on Part., 181, [17 Law Lib.]

V. The defence and testimony in the equity case were not between the same parties as the parties to this suit, and cannot operate against the defendants here, as *res judicata*, by virtue of the equity decree.

6 Peters, 328.

1 Wash. C. C. R., 70—75.

4 Wash. C. C. R., 186, 187, 188.

1 Paine C. C. R., 548.

2 Gall., 228; 1 Munf., 398.

Upon this branch of the case, *Mr. Alexander* made the following points:

The verdict being for the plaintiffs below, establishes the identity of the defences in the two causes; so that it is presumed the only subject for inquiry is, whether the decree of the court of equity on the matter of a defence taken in a proceeding *in rem*, to enforce payment of a debt by sale of the pledge, is conclusive on the same matter offered as a defence in an action *in personam*, for recovery of the same debt. The defendants in error maintain the affirmative on this question.

To render the decree conclusive, it is sufficient that there exists identity of matter in issue, and of parties.

The identity of the matter in issue is established by the verdict. As to parties there can be no question.

The leading cases on the subject are—

2 Smith's Leading Cases, 424, Duchess of Kingston's Case.

3 East., 346, Outram *v.* Morewood.

12 Md., 564, Beall *v.* Pearce.

In addition to which it will be sufficient to refer to 6 Wheat., 109, Hopkins *v.* Lee. Lee sued Hopkins on a covenant to

convey. Hopkins pleaded that he had not performed a condition on which the conveyance was to be made; a decree in favor of Lee in a cause instituted against him by Hopkins, to enforce performance of that condition, was adjudged to be conclusive on the point of performance.

1 How., 134, Bank of United States *v.* Beverly.

7 How., 198, Smith *v.* Kernochen.

Mr. Justice GRIER delivered the opinion of the court.

The defendants in error were plaintiffs below, and brought this suit as endorsees of two notes given by the plaintiffs in error to William H. Smith. These notes were given in part payment of some tracts of coal land sold and conveyed to Thompson and Pickell by Smith, and the defence endeavored to be established on the trial was a want of consideration, in that Smith had falsely represented the lands to contain 300 acres of "big-vein" coal, when in fact they contained but 150 acres. A mortgage had been given to secure these notes; a bill had been filed in chancery to foreclose this mortgage, in which Smith, the assignor, and Roberts and others, the equitable assignees of the mortgage, and endorsees of these notes, were complainants, and Thompson and Pickell, together with their assignees, the Pickell Mining Company, were respondents. They put in a joint and several answer admitting the execution of the notes and mortgage, and alleging as a defence the representations made by Smith, by which Thompson and Pickell were induced to purchase the lands, supposing them to contain 300 acres of the "big-vein" coal, when in fact, as they afterwards discovered, the lands contained but 150 acres of the same. For this reason, and "because they did not receive a valuable consideration for said notes or mortgage, respondents aver that plaintiffs are not entitled to demand payment of them, or any part of them, but the same are to be regarded as absolutely void."

This case was fully heard by the chancellor on the pleadings and evidence, who overruled the defence set up, and decreed a sale of the mortgaged premises. The record of that case was put in evidence on the trial of this case by the defendants

below, for the purpose, as they alleged, "of showing that the plaintiffs were not holders for value."

They offered for that purpose a part only of the record. Whereupon the plaintiffs gave in evidence the entire record, and insisted that the decree is conclusive, and estops the defendants from again alleging the same matter as a defence to the suit at law on the notes. The evidence was, however, again presented to the jury, without a waiver of plaintiffs' right to treat the decree as an estoppel.

The court rejected a number of prayers offered by each party, and gave the following instruction to the jury, which is the subject of exception:

"If the jury shall find from the evidence that the promissory notes offered in evidence in this case were duly executed and delivered by the said defendants to William H. Smith, and by him endorsed over to the said plaintiffs for value; and that in the cause on the equity side of this court, in which the said plaintiffs, with the said Smith, were complainants, and the said Thompson and Pickell, with the Pickell Mining Company, were defendants, (the record of which has been offered in evidence,) the same defence was made and set up in said cause to prevent the passage of a decree for the sale of the said lands to pay the said notes as is now made to prevent a recovery in this case, then the decree passed in that case is conclusive upon the point of this defence, and the plaintiffs are entitled to recover in this action."

The plaintiffs in error have not called in question the correctness of the general principle of law assumed by the court below, viz: "that the judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit."

But it is objected to this instruction, that it submits as a question of fact to the jury what ought to have been decided by the court as matter of law from the face of the record produced. This, if an error, was one favorable to the plaintiffs in error, as it gave them the chance of a verdict on a point which, if decided by the court, must have been decided against

them; for the record shows conclusively that the very same defence against these notes was the only point in dispute in the court of equity, to wit, whether plaintiffs in error were "*deceived* by" the alleged misrepresentations of Smith, fraudulent or otherwise, and whether the notes were therefore "without consideration," and "absolutely void."

The objection that the parties were not the same in both suits cannot be sustained.

Both parties to this litigation were parties in that suit; the subject-matter was the same; the defence now set up was the same which the pleadings and the evidence show to have been adjudicated in the court of chancery.

It is true, Smith, who endorsed the notes to the plaintiffs below, and who was interested in the question, was joined as complainant, and the Pickell Mining Company, who had purchased the mortgaged property, were made respondents, according to the practice in courts of chancery, where all parties having an interest in the question to be tried are made parties, that the decree may be final as to all the matters in litigation. No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides.

The question as between the present parties is *res judicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule having no foundation in reason; making a distinction where there is no difference.

Such was the ruling of the court in the case of Lawrence *v.* Hunt, (10 Wendell, 82,) where it was objected that in the former suit there was another plaintiff joined. Where the former suit was at law, this objection might have some weight, for it could not well be said that a contract of A and B with D and C was the same as that in another suit where A was sole plaintiff and D sole defendant. But this objection cannot apply where the first issue is in chancery, and parties collaterally interested are made parties to the litigation, that it may be

final, and not because they were legal parties to the original contract on which the litigation is founded. In such a case the pleadings may show the contract or subject-matter of the litigation to be the very same, and directly in issue; in the other, it could not be well so. As we are of opinion that there was no error in this instruction, it will not be necessary to notice the other points alluded to in the argument, this one being conclusive of the whole case.

The judgment of the Circuit Court is therefore affirmed, with costs.

WILLIAM S. MCEWEN AND HENRY H. WILEY, PLAINTIFFS IN ERROR, *v.* JOHN DEN, LESSEE OF CHARLES BULKLEY AND STUART BROWN.

By the laws of Tennessee anterior to 1856, a deed for lands lying in Tennessee could not be acknowledged or proven in another State before the clerk of a court.

In 1856, a law was passed allowing this to be done. This statute was prospective.

The circumstance that the law of 1856 was called an amendment of the prior law does not change this view of the subject.

Where a deed was acknowledged in 1839, before the clerk of a court in another State, a copy of it from the record was improperly allowed to be read in evidence to the jury.

Where the defendant claimed under the statute of limitations and showed possession of Evans's coal bank; the validity of this plea will depend upon the fact whether or not Evans's coal bank is within the lines of the plaintiff's patent.

The case remanded to the Circuit Court for the purpose of ascertaining this by a corrected survey made according to the rules laid down by this court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Tennessee.

It was an ejectment brought under the circumstances stated in the opinion of the court, and was argued by *Mr. Maynard* and *Mr. Heiskell* for the plaintiffs in error, and *Mr. Nelson* for the defendants.

The principal question in the case was, whether the possession of the defendants below was upon the tract of land claimed by the plaintiffs, so as to constitute a bar to the action through the statute of limitations. Maps were produced in court, but so many tracts of land were laid down upon them, that it was difficult to decide the point. The arguments of counsel bearing upon it could not possibly be understood by the reader.

Mr. Justice CATRON delivered the opinion of the court.

Bulkley sued McEwen and Wiley, in an action of ejectment, for 5,000 acres of land. At the trial, the plaintiff introduced a patent issued to Thomas B. Eastland, dated December 21st, 1838, No. 22,261. The plaintiff next offered to read the copy of a deed from Eastland to Bulkley for the tract granted, (with other lands;) to the reading of which objection was made, but the court admitted the copy to be read; to the admission of which the defendants excepted.

By the laws of Tennessee, the fee in land does not pass unless the conveyance is proved, or duly acknowledged and registered. This deed purports to have been acknowledged by the grantor, Eastland, before the clerk of the court of common pleas for the city and county of New York, and is certified under his seal of office. And this was accompanied by a certificate of the judge of said court, that Joseph Hoxie, before whom the deed was acknowledged, was clerk, and that the court of which he was clerk was a court of record. On this evidence of its execution, the deed was registered in the county where the land lies; but at what time it was registered does not appear. The acknowledgment was taken October 25th, 1839. At that time, a deed for lands lying in Tennessee could not be acknowledged or proven in another State before the clerk of a court.

In 1856, an act was passed, (ch. 115,) which it is insisted validates this probate. It provides, that deeds proved or acknowledged before the clerk of any court of record in any of the States of this Union, and certified by the clerk under his seal of office, and the chief magistrate of the court shall certify to the official character of the clerk, the probate or acknowledg-

ment shall be valid. And the second section declares, that all deeds proved or acknowledged, and certified in manner aforesaid, may be registered in this State, and shall be good to pass title, &c.

It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.

We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears.

It is next insisted that the act of 1856, being an amendment of the act of 1839, carries with it the provisions of this law. The act of 1856 declares, that the act of 1839 "be so amended" that all deeds, powers of attorney, &c., proved or acknowledged before a foreign clerk, may be registered, and have full effect. An additional mode of probate is provided; nor does the act go any further.

The deed offered in evidence was recorded without legal proof of its execution; and, therefore, a copy of the record could not be evidence. The court erred in admitting the copy to go to the jury.

The plaintiff below described the land sued for in his declaration, which is required to be done by the laws of Tennessee. The declaration calls for the boundaries of grant No. 22,261, made to Thomas B. Eastland, December 21st, 1838. The defendants then gave in evidence two other grants, for 5,000 acres each; one to Thomas B. Eastland, No. 22,267, being one of the tracts contained in the deed from Eastland to Bulkley; and another to Henry H. Wiley, one of the defendants, No. 26,086. The two junior patents covered the principal possession of the defendants, at a place known as Evans's coal bank. This fact was admitted; and it furthermore appeared, that the defendants had held seven years' adverse possession at the coal bank, under Wiley's grant. And it was insisted below, and is again here, that as Bulkley had shown himself to be the owner of both the tracts granted, and as the op-

eration of the act of limitations drew to Wiley's younger patent the title of Eastland's junior grant, and vested this title in the defendants, they were protected by the statute, because Bulkley had the right to sue at all times during the seven years, by virtue of grant No. 22,267. But the court instructed the jury to the reverse of this assumption, and, we think, correctly. From the facts stated, it is true that the right of action founded on the younger grant to Eastland was barred, to the extent that Wiley's grant interfered with No. 22,267; and assuming it to be true, that the defendants could avail themselves in defence, or affirmatively, of this title, still it could avail them nothing, as both No. 22,267 and No. 26,086 were inferior to grant No. 22,261.

The main question in the cause turns on the fact, whether the possession at Evans's coal bank was within the boundary of the grant No. 22,261, described in the declaration, and alone relied on at the trial by the plaintiff. It calls to begin on the south bank of Coal creek, four poles below Bowling's mill; thence running south with the foot of Walden's ridge, 894 poles, to a stake at letter H, in Henderson & Co.'s Clinch river survey; then west, crossing Walden's ridge, 894 poles to a stake; thence north 894 poles to a stake; then a direct line to the beginning.

It was proved at the trial, and is admitted here, that no line was originally run and marked but the first one; and that at H there is a marked poplar corner tree, which is a line mark of the grant. It being admitted that the first line is established, and that it is regarded as a north and south line, and that the other lines of the tract were not run or marked, it follows they must be ascertained by course and measurement. How they are to run is matter of law; and on this assumption, the Circuit Court instructed the jury as follows: "To identify the land appropriated, the jury must look to the calls, locative and directory, the foot of the mountain, the creek, the coal bank, the marked trees, courses and distance, number of acres demanded and paid for, &c.; and they will look to the survey, full or partial; that assuming the correct mode of survey to have been by horizontal measurement, and that the surveyor

based his identification of the land entered on surface measure, in accordance with his custom and the custom of the mountain range of country in which he resided, this would not of itself defeat the location of the land, and the boundaries of the grant as indicated by the survey, calls, and other evidence, to all of which they would look in adjusting the boundaries of the plaintiff's grant." To this charge, exception was taken. We think the instructions given were too vague and general to afford the jury any material aid in ascertaining the true boundaries of the land granted. The first line calls for two corners admitted to exist; this line must govern the three others. 1 Meigs's Digest, 154. It falls short of the distance called for, being only about 800 poles long. Its course being found, the next line running west must be run at right angles to the first one. In ascertaining the southwest corner of the tract at 894 poles from the poplar corner, the mode of measuring will be to level the chain, as is usual with chain-carriers when measuring up and down mountain sides, or over other steep acclivities or depressions, so as to *approximate*, to a reasonable extent, horizontal measurement, this being the general practice of surveying wild lands in Tennessee. The reasonable certainty of distance, and approximation to a horizontal line, is matter of fact for the jury to determine.

The 3d line running north, from the ascertained western termination of the second, must run parallel with the first line, and be continued to the distance of 894 poles; the chain being levelled as above stated. The 4th line will be run from the northern terminus of the 3d line to the beginning near Bowling's Mill.

The surveyor who made the survey on which grant No. 22,261 is founded, deposed at the trial, "that no actual survey was made in 1838 of said land, except the first line from A to H. That the other three lines of the grant were not run, but merely platted. That the proper mode of making surveys was by horizontal measurement, but that he had not been in the habit of making them in that way; that in making the line from A to H, in this survey, he had measured the surface; that the custom of the country was to adopt surface measure;

and that he had made the survey in accordance with such custom."

The grantee was bound to abide by the marked line from A to H; but the other lines must be governed by a legal rule, which a local custom cannot change. Should this custom be recognised as law, governing surveys, it must prevail in private surveys, in cases of sales of land, when the purchaser who bought a certain number of acres might, by surface measure across a mountain, lose a large portion of the land he had paid for. And such would be the case with this grantee, were he restricted to surface measure; whereas, by the terms of his patent, the Government granted to the extent of lines approximating to horizontal measurement. How far the act of limitations will affect the plaintiff's title, will depend on the fact whether Evans's coal bank falls within the boundary of the patent sued on, as it is not claimed that the other possession at a different place on grant No. 22,261, and for which trespass the recovery was had, was seven years old when the suit was brought.

It is ordered that the judgment below be reversed, and the cause remanded for another trial to be had therein.

THE POWHATAN STEAMBOAT COMPANY, PLAINTIFFS IN ERROR, *v.* THE APPOMATTOX RAILROAD COMPANY.

In the code of Virginia, chapter 196, are the following sections, viz:

"SEC. 15. If a free person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit $10 for each offence; every day any servant, apprentice, or slave, is so employed, constituting a distinct offence.

"SEC. 17. No forfeiture shall be incurred under the preceding section for the transportation on Sunday of the mail, or of passengers and their baggage. And the said forfeiture shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day; provided he does not compel a slave, apprentice, or servant, not of his belief,

to do secular work or business on Sunday, and does not, on that day, disturb any other person."

The acts prohibited by these sections are no doubt unlawful, but the following case does not fall within their operation.

The Powhatan Steamboat Company were the owners of a line of steamers employed in the transportation of goods from Baltimore to Richmond, stopping at City Point to deliver goods, which were to be carried thence to Petersburg by the Appomattox Railroad Company. The steamboat company gave receipts for the goods when shipped, undertaking to deliver them at Petersburg, paying the railroad company a portion of the freight.

Leaving Baltimore on Saturday, one of the steamers arrived at City Point on Sunday morning and delivered the goods intended for Petersburg, which were received and locked up in a warehouse, belonging to the railroad company, to remain until the next day. But in the after part of the day, the warehouse and goods were destroyed by fire. The steamboat company were sued by the shippers and compelled to pay the value of the goods, to recoup which they now sued the railroad company.

The instructions of the court below to the jury were erroneous, viz: that if they found that the goods were delivered on a Sunday, under a contract between the parties, express or implied, that they might be received and accepted on that day, and were destroyed by fire on the day on which they were delivered and received, their verdict should be for the defendants.

The steamboat company and railroad company each worked for themselves. The railroad company, having received the goods into their warehouse, were bound to keep them in safe custody, as carriers for hire, although they could not transport them to Petersburg until the next day. To take care of them on the Sabbath day was a work of necessity, and therefore not unlawful.

The cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening or closing of the warehouse, but it is based upon the non-performance of the duty which arose after those acts had been performed.

If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Virginia.

The nature of the case and rulings of the court below are fully explained in the opinion of the court.

It was argued by *Mr. Schley*, upon a brief submitted by himself and *Mr. Jaynes*, for the plaintiffs in error, and by *Mr. Robinson* for the defendants.

The arguments upon both sides contained examinations of the cases in this country and England with respect to the operation of Sunday laws; but the opinion of the court being that this case does not come within the scope of the Virginia code, the insertion of these arguments is not considered necessary. It will be seen that the court consider the transaction between the two companies as having been closed by the reception of the goods by the railroad company; after which period it became their duty to keep them safely, which did not amount to a violation of the Virginia code.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Virginia. All of the questions presented for decision in this case arise upon the instructions given by the court to the jury, but a brief reference to the pleadings and evidence will be necessary, in order that the precise nature of those questions may be clearly and fully understood.

It was an action on the case, and the declaration contained three counts, which are set forth at large in the transcript. Among other things, the plaintiffs alleged, in the first count, that the defendants were common carriers for hire; that they, the plaintiffs, at the special instance and request of the defendants, on the twenty-sixth day of June, 1853, at City Point, in the State of Virginia, caused certain goods and merchandise to be delivered to the defendants, as such carriers, to be by them transported from the place of delivery to Petersburg, in the same State; and that the defendants, in consideration thereof, and of certain hire and reward to be paid them therefor, undertook and promised safely and securely to carry and convey the goods and merchandise to the place of destination, and there to deliver the same; and the complaint is, that the defendants, not regarding their promise and undertaking in that behalf, so conducted themselves, as such carriers, that the goods and merchandise, through their negligence and carelessness, were wholly lost to the plaintiffs. To the whole declaration the defendants pleaded that they never undertook

and promised as the plaintiffs had thereof alleged against them, and upon that issue the parties went to trial.

From the evidence in the case, it substantially appears that the plaintiffs were the owners of a weekly line of steamers, employed in the regular and stated transportation of goods and merchandise between the city of Baltimore, in the State of Maryland, and the city of Richmond, in the State of Virginia. Their steamboats, on the trip each way, were accustomed to stop at the intermediate place called City Point, on James river, for the purpose of landing goods to be sent to Petersburg, and also for the purpose of receiving other goods arriving from the same place to be transported to either terminus of the steamboat route. Defendants were a railroad company, and were also engaged in the transportation of goods and merchandise over their railroad, extending from City Point to Petersburg, in the same State. For many years there had been an arrangement and contract between the parties, whereby goods and merchandise destined for transportation to the latter place were to be received by the plaintiffs in Baltimore, carried in their steamers to City Point, and there delivered to the defendants, to be by them transported over their railroad to the place of destination. Receipts for the goods were given by the plaintiffs in Baltimore, promising to deliver the same to the consignees at Petersburg, where the plaintiffs had an agent, who collected the entire freight money, and paid over one-fourth part of the amount to the defendants. When the steamers arrived at City Point, the goods were landed, and deposited in the warehouse of the defendants, which was situated on the wharf adjacent to the railroad.

According to the regular course of the transportation, one of the steamboats of the plaintiffs left Baltimore every Saturday afternoon, arrived at City Point about noon on Sunday, and there such of her cargo as was destined for Petersburg was landed and deposited in the warehouse of the defendants, and the steamer on the same day proceeded on her voyage to the place of her destination. Goods so landed and deposited remained in the warehouse until the following day, because the defendants run no merchandise train on Sundays. Usually

the warehouse was opened on the occasion, and afterwards closed by the agent of the defendants; but the whole labor of landing and depositing the goods, except the opening and closing of the warehouse, was performed by the plaintiffs.

Pursuant to the regular course of the transportation, one of the steamers of the plaintiffs arrived at City Point on Sunday, the twenty-sixth day of June, 1853, about noon, with the goods in controversy on board. On the arrival of the steamer at the wharf, the goods, being destined for Petersburg, were landed and deposited in the warehouse, and the evidence shows that the whole labor of landing and depositing them was performed by the plaintiffs, except that the agent of the defendants unlocked and opened the warehouse for that purpose, and afterwards closed it, as he had been accustomed to do on former occasions. After the goods had been so deposited, the steamer proceeded on her voyage up the river, and on the same day the warehouse and all the goods were destroyed by fire. Suit was brought against these plaintiffs by the shipper of the goods, and payment was recovered against them for a sum exceeding twelve thousand dollars, which they had to pay. Evidence was then introduced by the defendants, tending to show that the goods were deposited in their warehouse for the convenience and accommodation of the plaintiffs, upon the agreement and understanding that the goods should remain there until the following morning, and be at the risk of the plaintiffs. Under the instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instruction. It is to the concluding portion only of the instruction that the plaintiffs now object, and for that reason the preceding part of it is omitted. Having assumed that state of the case in the introductory part of the instruction—which the evidence adduced by the plaintiffs tended to prove, and which, if found to be true, and the goods had been deposited on an ordinary working day, would have entitled the plaintiffs to recover—the jury were substantially told by the presiding justice, in the concluding portion of the instruction, that notwithstanding the facts so assumed, still, if they found from the evidence that the goods were delivered

on a Sunday, under a contract between the parties, express or implied, that they might be received and accepted on that day, and were destroyed by fire on the day on which they were delivered and received, to wit, on Sunday, the twenty-sixth day of June, 1853, then their verdict should be for the defendants. Had the goods arrived and been deposited in the warehouse on an ordinary working day, the preceding part of the instruction assumed that the evidence in the case would authorize a finding in favor of the plaintiffs, and the principal question is, whether the rights of the parties were varied by the fact that the goods were landed and deposited on a Sunday. It is insisted by the defendants that it does vary their rights, especially as the goods were destroyed accidentally on the day they were delivered and received. To support that theory, they refer, in the first place, to the sixteenth and seventeenth sections of the code of Virginia. By the sixteenth section it is provided, among other things, that "if a free person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit ten dollars for each offence;" and by the seventeenth section it is provided, that no forfeiture shall be incurred under the preceding section for the transporting on Sunday of the mail, or of passengers and their baggage. Most of the States have laws forbidding any worldly labor or business within their jurisdiction on the Lord's day, commonly called Sunday, except works of necessity or charity. Those laws were borrowed substantially from similar regulations in the parent country, and in some of the States were adopted at a very early period in the history of the Colonial Governments. Statutes of the description mentioned usually contain an express prohibition against such labor; but we are inclined to adopt the early rule upon the subject, that where the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act. Adopting that rule of construction, it must be assumed that all labor "at any

trade or calling on a Sabbath day, except in household or other work of necessity or charity," is prohibited in the State of Virginia by the sixteenth section of the code already cited. But the defendants do not attempt to maintain that the contract between the plaintiffs and the shipper of the goods, for the transportation of the same from Baltimore to Petersburg, falls within that implied prohibition, or that the voyage of the steamer from Baltimore to Richmond was illegal. As the evidence shows, the steamer left Baltimore on Saturday, the day previous to the fire which consumed the warehouse and the goods, and it is very properly conceded by the defendants that she might lawfully, under the circumstances, proceed on her voyage to her place of destination, notwithstanding the fact that, in so doing, she had to sail on "a Sabbath day;" and if so, it clearly follows that she might stop at any intermediate place on the route. Transportation of the goods, therefore, so far as they were carried in the steamer, was a lawful act, and, in effect, it is conceded to have been so by the defendants. Merchandise trains were not run by the defendants on Sundays; and, of course, neither the contract of the shipper nor the arrangement between these parties contemplated that the goods would be carried over the railroad on that day. Shippers made their contracts with the plaintiffs for the transportation of the goods over the whole route, from the place of departure to the place of destination, wholly irrespective of the circumstances which might afterwards attend the transfer of the goods from the steamer to the defendants, and without any knowledge, so far as appears, whether it would be accomplished on a Sunday, or on an ordinary working day.

When the shipper had delivered the goods to the plaintiffs, the contract between him and them was completed, and it is self-evident that it was one to which the Sunday laws of Virginia have no application whatever. All such contracts were made by the plaintiffs, but they were made for the separate benefit of the defendants, as well as themselves, and the arrangement between these parties had respect to the apportionment of the service to be performed in carrying out the contract made with the shipper, and the division of the freight

money to be received for the entire service. Each party worked for himself, and not for the other, and the compensation for that service was to be derived from the shipper of the goods. Neither party promised to pay the other anything, but each was to receive a proportion of the freight money equal to the proportion of the service the arrangement between the parties required him to perform. Plaintiffs made the contract with the shippers in their own name, received the goods at Baltimore, transported them to City Point, and on the arrival of the steamer there, landed the goods and deposited them in the warehouse of the defendants. On the other hand, the defendants furnished the warehouse, opened and closed it on the occasion, took the custody of the goods until the following morning, and then transported them over the railroad to the place of destination, and delivered them to the consignees. After the goods were delivered to the consignees, the agent of the plaintiffs collected the entire freight money, and paid over to the defendants such portion of it as belonged to them under the arrangement. Merchants sending goods knew only the plaintiffs in the entire transportation; but, as between these parties, each performed a separate service for himself, and had no other claim for compensation than his proportion of freight money. Had the goods been lost at sea through the negligence of the plaintiffs, it is clear that the defendants would not have been answerable either to the shippers or to the plaintiffs, because the defendants had no interest in the steamer, and the arrangement between the parties did not contemplate that they should be responsible for her navigation. Shippers, however, had a right to proceed against the plaintiffs, although the loss had occurred while the goods were in the custody of the defendants, because their contract with the plaintiffs covered the whole route; and as between them and the defendants, the latter were but the agents of the plaintiffs. Accordingly, the shippers recovered judgment against the plaintiffs, and clearly the defendants are answerable over, unless it is shown that the case is one where courts of justice will not interfere to enforce the contract. It is insisted by the plaintiffs that the labor of landing and depositing

the goods was a work of necessity, within the meaning of the exception contained in the statute; but in the view we have taken of the case, it will not be necessary to decide that question at the present time.

Suppose it be admitted that the plaintiffs violated the Sunday law in landing the goods and depositing them, and that defendants also violated the same law in opening and closing the warehouse on the occasion; still the admission will not benefit the defendants, for the reason that the cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening and closing of the warehouse, but it is based upon the non-performance of the duty which arose after those acts had been performed. If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for a refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply. Granting, however, for the sake of the argument, that those acts of labor fall within the prohibition of the statute, still their performance did not have the effect to transfer the general property in the goods to the defendants, nor to release or discharge them from the subsequent obligations which devolved upon them as common carriers for hire. Safe custody is as much the duty of the carrier as due transport and right delivery; and although the defendants were forbidden to transport the goods over the railroad, or to deliver the same on "a Sabbath day," yet they might safely and securely keep such as were in their custody, and it was their duty so to do. Irrespective of the Sunday law, the plaintiffs could maintain no action against the defendants for the service they had performed in landing and depositing the goods, for the best of all reasons, that in performing it they had worked for themselves, and not for the defendants. Nothing, therefore, can be more certain than the fact that the claim in this case is not founded upon any executory promise necessarily connected with those supposed illegal acts. On the contrary, the real claim is grounded on the obligations which the law imposed

on the defendants safely and securely to keep, convey, and deliver the goods, and upon their subsequent negligence and carelessness, whereby the goods were lost. To take care of the goods on "a Sabbath day," and safely and securely keep them, after the goods were received, was a work of necessity, and therefore was not unlawful, even on the theory assumed by the defendants, and the defendants were not expected to convey or deliver the goods until the following day. On the theory assumed, the defendants might have refused to open the warehouse, or to allow the goods to be deposited; and if they had done so, no action could have been maintained against them for the refusal. But they elected to do otherwise, and suffered the plaintiffs to deposit the goods; and when the warehouse was closed, all the supposed illegal acts were fully performed.

Whatever contract or arrangement existed between the parties upon that subject had then been fully executed, and those who had been employed in landing and depositing the goods, as well as the agent of the defendants, who had opened and closed the warehouse, if the acts were illegal, had respectively become liable to the penalty which the law inflicts for such a violation of its mandate. That penalty is a fine of ten dollars; but there is no authority in any court to declare the goods forfeited, nor do we perceive any just ground for holding that the general property in the goods was thereby changed. Unless the goods be considered as forfeited, or it be held that the property became vested in the defendants, it is difficult to see any reason why the plaintiffs ought not to recover in this suit, even admitting that the acts of landing and depositing the goods, and of opening and closing the warehouse, were within the prohibition of the statute.

Subsequent custody of the goods was certainly not within that prohibition; and if not, then the law imposed the obligation upon the defendants to keep the goods safely and securely until the following morning, and afterwards to transport them over the railroad to the place of destination, and deliver them to the consignees. To assume the contrary, would be to admit that a carrier, accepting goods to be trans-

ported on an ordinary working day, may set off the fact that the labor of depositing the goods in his warehouse was performed on "a Sabbath day," against all the subsequent obligations which the law would otherwise impose upon him with respect to the goods. Such a rule of law, if acknowledged by courts of justice, and carried into effect, would amount to a forfeiture of the goods, so far as the shipper is concerned, as its practical operation would be to allow the carrier, if he saw fit, voluntarily to destroy the goods, or to appropriate them to his own use.

Upon a careful examination of the numerous authorities bearing upon the question, the better opinion, we think, is, that inasmuch as the subsequent custody of the goods was not unlawful, that the obligations of the defendants, under the circumstances of this case, were not varied by the fact that the goods were deposited in their warehouse by their consent on "a Sabbath day." Great injustice would result from any different rule, and although the precise question has seldom or never been presented for decision, yet we think the analogies of the law fully sustain the rule here laid down. For these reasons we are of the opinion that the instruction given to the jury was erroneous. The judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to issue a new venire.

ROBERT GUE, APPELLANT, *v.* THE TIDE WATER CANAL COMPANY.

A corporate franchise to take tolls on a canal cannot be seized and sold under a *fieri facias*, unless authorized by a statute of the State which granted the act of incorporation.

Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise.

THIS was an appeal from the Circuit Court of the United States, sitting in equity, for the district of Maryland.

The case is stated in the opinion of the court.

It was argued by *Mr. Campbell* and *Mr. McLaughlin* for the appellant, and *Mr. Dobbin* for the appellee.

The canal company had made a deed of trust, which was attacked as fraudulent, and defended by *Mr. Dobbin*, but the arguments upon that point will be passed over.

Upon the question of selling the franchise under a *fieri facias*, the counsel for the appellant said:

The question then is, whether land held in fee by a company for a canal and its appurtenances can be seized and sold, not by piecemeal, but so that the purchaser will take the land with the entire improvement as it stands.

In 4 Massachusetts, 596, Tippetts *v.* Walker, Parsons, Chief Justice, said it might require consideration whether this franchise could be taken in execution, but he does not decide it. That was a case of a turnpike road, and it is apprehended that no estate in the land passed to the Turnpike Company.

In 13 Sergeant and Rawle, 212, an execution was levied on ten miles of a turnpike, with a toll-house and appurtenances. It was there decided that the execution could not be sustained, and among the grounds relied on were the facts that the company had no estate in the land, and that it could not be cut up into parts. In both these particulars the case at bar is distinguishable.

In 5 Watts and Sergeant, 265, Leedon *v.* Plymouth Railroad Company, the plaintiff, who was an execution creditor, had not executed the land, but claimed that his judgment was a lien upon the tolls, and gave him a priority in payment out of the tolls collected by a sequestration. What might have been the decision if the land had been levied on does not appear, and the decision goes merely on the ground that the tolls were not bound by the judgment.

In 9 Watts and Sergeant, 27, Susquehanna Canal Co. *v.* Bonham, the execution was levied on a toll-house, and not on the whole work, and the court followed the decision in 13 Sergeant and Rawle, and an act of Assembly of Pennsylvania, of 1836, which had been passed subsequently to that decision.

In 9 Georgia, 394, Macon Railroad Co. *v.* Parker, it was made

the subject of a query, whether a railroad could be sold under an execution at law. In that case it had been sold under a decree in chancery.

In 10 Ohio, 476, Seymour *v.* Milford and Chilicothe Turnpike Co., the question was, whether the tolls of the road could be levied on under the Ohio act of 8th February, 1826, without notice first given to a receiver, and the decision was merely on the construction of a local statute.

In 5 Ben. Monroe, 1, it was decided that in Kentucky a turnpike road could not be sold under a decree in chancery, the only decree allowable in such a case at a creditor's suit being the application of the tolls.

In Coe *v.* Hart, before Mr. Justice McLean, (6 Am. Law Reg., 42,*) it was said, on the contrary, in regard to a railroad company, that while the proper mode of enforcing payment was by a proceeding in chancery to distribute the earnings equitably among the creditors, yet in a case where such a course would not satisfy their demands, the road might be sold, and the proceeds distributed; and the same doctrine was laid down by the superior court of Cincinnati, in the case of Ludlow and Heard, reported in the same volume of the Law Register, at page 503.

In State *v.* Rives, 5 Iredell's Law Rep., 297, it is said that the corporation having an estate in the lands, and not a mere easement, it seems to follow that such an estate is liable to execution.

In Arthur *v.* Comm. and Railroad Bank, 9 Smedes and Marshal, 394, 434, the court says, whether the road is the subject of assignment or execution depends on the nature of the estate which the corporation has in it.

The differing views in these cases make it difficult to say that there is any settled rule at common law, and throw us back on principle; and so considered, it seems hard to escape the conclusion that as, after all, a corporation is merely placed on a level with individuals, it cannot hold its property exempt from the payment of its debts. But of course a purchaser

* This is the case in 23 Howard, 117.

would take, not the corporate franchise, but the estate of the corporation in the land, and would take that estate, of course, as the corporation held it. Holding it in this case on the condition of allowing the public to use the canal on payment of certain fixed tolls, the same user on the terms would continue to exist after the sale as before. (1825, c. 180, sec. 12.)

Perhaps, however, the true view in which to regard this case is to look at it as controlled by the law of Maryland, and the analogies of that law. The element which elsewhere seems to settle that a public improvement cannot be sold on execution, is its inalienability. If the Legislature will allow a voluntary assignment, the presumption of a prohibition against involuntarily alienation falls to the ground.

The act of Maryland of 1835, ch. 356, sec. 5, authorized the company to raise money by a loan, and the Court of Appeals of that State, in 3 Maryland, 311, Susquehanna Bridge and Banking Co. *v.* General Insurance Co., decided it to be the law of Maryland, that the power in a corporation to borrow, (and the corporation then before the court was a bridge as well as a banking corporation,) carried with it the power to mortgage. The deed in this case of December, 1841, was drawn upon the assumption that the power to mortgage existed, for it authorizes a mortgage. (Rec., 10.) But a power to mortgage necessarily involves a sale as a possible result; and if, therefore, in the present instance, the General Assembly of Maryland have authorized the company to part with its land and canal, it cannot be said that any public policy forbids a sale on execution.

See, also, 7 How., 278.

21 How., 138, 125.

Mr. Dobbin for the appellee:

3. The property levied upon is not properly the subject of a levy and sale under a *fieri facias*.

The levy was made on the locks of the canal, its toll-house or collector's office, and the land surrounding the outlet locks, all admitted to be essential for the uses and working of the canal. The agreement which states these facts is ambiguous

in admitting the construction that the property levied on comprises the entire property of the Tide Water Canal Company, and that a sale of that by the sheriff would transfer to the purchaser a complete thing, which would enable him to discharge the duty to the public of maintaining it as a highway. This construction, it is obvious from the context, is not the true one. In the paragraph preceding, it is said that the company "owns the line canal and its appurtenances, which extends from Havre de Grace, in Maryland, to the Pennsylvania line," which is of course inconsistent with the construction that the locks and toll-house, &c., which do not comprise the thousandth part of the line, constitute the whole property. Besides, the property levied upon is stated to be necessary to the uses and working of the canal; it must therefore be something other than the canal itself, and is obviously intended to apply to that part of the thing levied upon which is not visibly a part of the canal, that is, land which the marshal, in his levy, calls wharf property and building lots, &c., all of which are admitted to be necessary for the uses and working of the Tide Water canal.

The appellee contends that it possesses only an easement, acquired for the purposes of its incorporation, connected with the franchise of taking toll from the public for the use of that easement, and that the said easement and franchise are not subject to levy and sale under a *fieri facias*.

Ammant *v.* New Alexandria and Pittsburg Turnpike Road Co., 13 Serg. and Rawle, 210.

Leedon *v.* Plymouth R. R. Co., 5 Watts and Serg., 265.

Susquehanna Canal Co. *v.* Bonham, 9 Watts and Serg., 27.

Seymour *v.* Milford and Chilicothe R. R. Co., 10 Ohio, 476.

Winchester and Lexington Turn. Co. *v.* Vimont, 5 B. Monroe, 1.

Coe *v.* Hart, 6 Am. Law Reg., 41—2.

Ludlow *v.* Heard, Ib., 502.

Tippetts *v.* Martin, 4 Mass., 596.

Macon R. R. Co. *v.* Parker, 9 Geo., 3'

That even if a portion of the property levied upon is liable to sale, the levy having blended it with that which is not liable, is void for the whole.

Ammant *v.* New Alexandria and Pittsburg Turnpike Road Co., 13 Serg. and Rawle, 210.

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

It appears from the record in this case that a judgment was obtained by Robert Gue, the appellant, against the Tide Water Canal Company, in the Circuit Court of the United States for the district of Maryland, upon which he issued a *fieri facias*, and the marshal seized and advertised for sale a house and lot, sundry canal locks, a wharf, and sundry other lots; all of which property, it is admitted, belonged to the Canal Company in fee.

The Canal Company thereupon filed their bill in the Circuit Court, praying an injunction to prohibit the sale of this property under the *fieri facias*. The injunction was granted, and afterwards, on final hearing, made perpetual. And from this decree the present appeal was taken.

The Tide Water canal is a public improvement situated in the State of Maryland, and constructed and owned by a joint stock company chartered by the State of Maryland for that purpose. The canal extends from Havre de Grace, in Maryland, to the Pennsylvania line; and it is admitted that the property levied on is necessary for the uses and working of the canal.

Upon the matters alleged in the bill and answer several questions of much interest and importance have been raised by the respective parties, and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, because, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this *fi. fa.*, and consequently the Circuit Court was right in granting the injunction.

The Tide Water canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susquehanna river usually passes, in order to reach tide-water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of Assembly which created the corporation. The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it connected in the hands of the company, and if sold under this *fieri facias* without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the States, it must be under a statutory provision of the State; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them.

The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise property which was essential to its useful existence.

In this view of the subject, the court do not deem it proper to express any opinion as to the right of this creditor, in some other form of judicial proceeding, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. Nor do we mean to express any opinion as to the validity or operation of the deeds of trust and acts of Assembly of the State of Maryland, referred to in the proceedings. If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; and the Circuit Court was right in granting the injunction, and its decree is therefore affirmed.

THOMAS M. LEAGUE, PLAINTIFF IN ERROR, *v.* CYRUS W. EGERY, JOSEPH F. SMITH, AND SARAH A. SMITH, ADMINISTRATRIX.

By the colonization laws of Mexico passed in 1824 and 1828, the consent of the federal Executive of Mexico was essential to the validity of a grant of lands within ten leagues of the coast.

The Supreme Court of Texas has repeatedly so decided, and this court adopts their decision.

THIS case was brought up by writ of error from the District Court of the United States for the eastern district of Texas.

The case is stated in the opinion of the court.

It was argued by *Mr. Hughes* for the plaintiff in error, and *Mr. Phillips* for the defendants.

Mr. Hughes tried to avoid the effect of the case of Smith *v.* Power, 14 Texas, 147, which decided that the grant was within

the littoral leagues, and therefore void, by referring to a statute of Texas, (Hartley's Digest, article 3, p. 221,) by virtue of which the record of that case could not have been maintained if it had been pleaded in bar in the present case.

The arguments upon the merits of the case are omitted.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff sued in the District Court for a parcel of land containing two and one-half leagues in the county of Refugio, in the State of Texas. The answer and amended answer of the defendants contain some twenty pleas, and a number of questions are presented by the record; but as the decision of the cause will be complete by the opinion the court have formed of the original grant from the State of Coahuila and Texas, from which the claim of the plaintiff is derived, and on which it depends, a statement of that grant will be sufficient. In the year 1826, Power and Hewetson proposed to the Government of Mexico to establish a colony on the seacoast of Texas, within what is termed in their law of colonization the littoral leagues. This proposal was accepted, and the partners entered upon the fulfillment of that enterprise. In December, 1829, they respectively applied to the Governor of the State of Coahuila and Texas for the purchase of eleven leagues of land each, within the limits of the colony. This offer was accepted; the petitioners were authorized to locate their grant upon any lands in the colony that were vacant, or elsewhere, if there was not a sufficiency of vacant land for that purpose; and the general commissioner of the colony was directed to deliver possession of the land selected, and to perfect the corresponding titles. In November, 1834, Power represented to this general commissioner that the partners had selected only seventeen and one-quarter leagues, and requested him to issue grants for two tracts, one containing two and a half leagues, and the other, two and one-quarter leagues, to complete this contract, at a place designated. This request of the petitioner was complied with, and one of these grants is that which was introduced to support the plaintiff's title, and with which he connected himself by mesne conveyances.

The location is within the littoral or coast leagues described in the fourth sections of the colonization laws of Mexico, of 1824 and 1828.

The litigation between the grantees and their assigns and the defendants for this land has been protracted in the courts of Texas, and the opinion of the Supreme Court of that State has been very definitely expressed upon the validity of their titles on two several occasions.

Smith *v.* Power, 14 Tex. R., 146.

Smith *v.* Power, 23 Tex. R., 29.

In the latter case the Supreme Court said: "No question is more authoritatively settled by the repeated decisions of this court, than that the consent of the federal Executive of Mexico was essential to the validity of a grant of lands of the character of the present within the border and coast leagues. Edwards *v.* Davis, 3 Tex. R., 321; 10 Id., 316; Republic *v.* Thorn, 3 Id., 499; 5 Id., 410; 9 Id., 410, 556. In the case of Smith *v.* Power, (14 Texas R.,) the parties to this appeal, it was held, that the grant here in question, under which the defendant claims, could not be distinguished from those which had been passed upon in former cases; and upon the authority of those cases, it was decided, that the grant wanting such consent was void. That question, therefore, cannot be considered as now an open one. A series of decisions continued almost from the organization of this court down to the present time, thus settling the construction of the old local law, upon which the titles to real property in the oldest and most densely peopled portions of the State so largely depend, must be regarded as emphatically the law of the State." In accordance with well-established principles in this court, we accept this uniform and stable body of judicial decision from the court of last resort of the State in which the property is situated, and in which the transactions that form the subject of this litigation took place, as conclusive testimony of the rule of action prescribed by the authorities of the State, as applicable to their interpretation and adjustment. We do not inquire whether a more suitable rule might not have been adopted, nor whether the arguments which led to its adoption were forcible or just. We receive

the decisions having the character that are mentioned in the extract we have made from the opinion of the Supreme Court of Texas as having a binding force almost equivalent to positive law. Such being our conclusion in respect to this grant, we must sanction the judgment of the District Court that denies to it validity.

Judgment affirmed.

HENRY S. FOOTE, PLAINTIFF IN ERROR, *v.* CYRUS W. EGERY AND JOSEPH F. SMITH.

The decision in the preceding case of League *v.* Egery and others concludes this also.

THIS case was brought up by writ of error from the District Court of the United States for the eastern district of Texas.

It was similar to the preceding case with respect to the principal question involved, and was argued by the same counsel.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff claimed in the District Court two leagues and one-half of land in the county of Refugio, in the State of Texas, which were in the possession of the defendants. The defendant answered the claim by asserting title under grants from the State of Texas, and by the operation of the statutes of limitation.

The plaintiff maintained his claim by producing a grant to James Power and James Hewetson, issued under the authority of the State of Coahuila and Texas, in the year 1834, upon a contract of sale of a certain quantity of lands in the colony of Power and Hewetson, situate within the littoral or coast leagues. In deriving his title under these grantees, the plaintiff produced a deed, or an agreement for a conveyance, from Hewetson to Power and Walker; this paper was rejected as testimony by the court. Walker, this vendee, died in 1836,

being a citizen of, and resident in, the United States. His brother, also a citizen of the United States, succeeded to his estate, and in the year 1837 conveyed his interest to a person under whom the plaintiff claims.

Three questions were made upon the trial in reference to the validity of the plaintiff's title: 1st. Whether the State of Coahuila and Texas, in the year 1829, or in the year 1834, could sell and convey land to a colonist within the littoral or coast leagues, without the consent or approbation of the Central Government of Mexico. 2d. Whether the paper executed by Hewetson to Power and Walker was a conveyance of the land, or merely an agreement to convey. 3d. Whether in 1836, Walker, a citizen of the United States, could inherit land in Texas, from one who was also a citizen of, and a resident in, the United States. The decision of either of these questions in favor of the defendants is fatal to the plaintiff's right to recover.

The first of these questions has been determined by this court in the case of League *v.* Egery and others in the negative. This decision is in accordance with the decision of the District Court, whose judgment is consequently affirmed.

JOHN GREER AND OTHERS, PLAINTIFFS IN ERROR, *v.* S. M. MEZES, MARIA DE LA SOLIDAD ORTEGA DE ARGUELLO, AND JOSE RAMON ARGUELLO.

Where the plaintiffs in ejectment showed a legal title to land in California under a patent from the United States and a survey under their authority, it was proper in the court below to refuse to admit testimony offered by the defendants to show that the survey was incorrect, the defendants claiming under a merely equitable title.

Where the defendants pleaded severally the general issue, it was proper for the court below to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels.

The mode of proceeding by petition does not alter the law of ejectment under the old system of pleading.

THIS case was brought up by writ of error from the Circuit

Court of the United States for the northern district of California.

It was an action of ejectment brought, by way of petition, by the defendants in error against Greer and twenty-nine other persons. The plaintiffs below represented the interests of Arguello, whose title was confirmed by this court in 18 Howard, 539, to that portion of the land described in the petition, bounded as follows, viz: on the south by the Arrogo or creek of San Francisquito, on the north by the creek San Mateo, on the east by the estuary or waters of the bay of San Francisco, and on the west by the eastern borders of the valley known as Cañada de Raymundo, said land being of the extent of four leagues in length and one in breadth, be the same more or less.

A survey of this land was made by John C. Hays, United States surveyor general for California, who returned the field notes with a map to the Commissioner of the General Land Office on the 19th of December, 1856. This survey and map included 35,240 acres.

A patent was issued on the 2d of October, 1857, which followed the field notes, and granted the land as follows:

To Maria de la Solidad Ortega de Arguello, one equal undivided half.

To Jose Ramon Arguello, one equal undivided fourth part.

To Luis Antonio Arguello, one equal undivided tenth part.

To S. M. Mezes, three equal undivided twentieth parts thereof; but with the stipulation that in virtue of the fifteenth section of 3d March, 1851, the confirmation of this said claim and this patent shall not affect the rights of third persons.

At July term, 1858, of the Circuit Court of the United States for the districts of California, in and for the northern district, this ejectment was brought, at first in the name of Mezes alone, the bill having been filed on March 16, 1858. Pleas were put in to the jurisdiction upon the ground that Mezes was not an alien nor a subject of the Queen of Spain, as he had alleged. Afterwards, in October, 1858, an amended bill was filed, making parties of those persons who are named as defendants in

error in the caption of this report, Luis Antonio Arguello having conveyed his interest to Mezes.

In November, 1858, the cause came on for trial. The principal points in that court and in this arose upon the rulings of the court upon the admission of evidence, under the following circumstances:

John Greer, the principal defendant, had married Maria Louisa, the widow of John Coppinger, and in behalf of his wife and of Manuela Coppinger, an infant child of John, had petitioned for the confirmation of a grant alleged to have been made to John Coppinger by Alvarado on 3d of August, 1840, containing twenty-seven square miles of territory.

On 23d November, 1853, the board of commissioners decided that the claim was valid, and decreed that it should be confirmed.

On the 8th of January, 1855, *Mr. Cushing*, Attorney General, filed a notice that the United States would appeal to the District Court of the United States for the northern district of California.

On the 14th January, 1856, the district judge, Ogden Hoffman, decreed that said decision be and the same is hereby affirmed. And it is further ordered, adjudged, and decreed, that the claim of the appellees be confirmed to the tract of land known as "Cañada de Raymundo," being the same now occupied by the said appellees, and bounded and described as follows, viz: bordering to the west on the Sierra Morena, to the east on the rancho de las Pulgas, to the south on the rancho of Maximo Martinez, and to the north on the Great Laguna. Reference for further description to be had to a map, which is made a part of document marked C, and filed in this case.

In November, 1856, in consequence of a notice by the Attorney General that no appeal to the Supreme Court of the United States would be taken, Judge Hoffman decreed that the claimants have leave to proceed under the decree of that court heretofore rendered in their favor as on final decree.

What other steps were taken by Greer, the record did not show. As his title stood at the time of the trial, it appeared to be an equitable title only, the decision of the board of com-

missioners not passing the legal title, and there having been no subsequent survey and patent.

Upon the trial below, the plaintiffs made out their title by the patent and map, and proved that some of the defendants were residing upon the land.

The defendants then offered to prove that the grant to Coppinger, and the confirmation thereof, embraced all the land in controversy in this suit, and that all the defendants at the time of the institution of this suit were in possession of such portions of the premises as were occupied by them under the grant to Coppinger, and deriving title therefrom.

The defendants further offered to prove that the survey and patent given in evidence by the plaintiffs were erroneous in respect to the location of the western line of the Las Pulgas ranch, and that if said line was properly located, according to the grant to Luis Arguello's heirs, or according to the decree of the Supreme Court of the United States confirming said claim, it would not embrace any of the land occupied by the defendants, or either of them.

The defendants further offered to prove that the western line of the Las Pulgas ranch, as established by the patent and survey given in evidence by the plaintiffs, does not stop at the eastern borders of the Cañada de Raymundo, but embraces a large portion of the level valley land of the said cañada, occupied and held by the defendants, or some of them, under the grant to Coppinger.

All of which proof, both oral and documentary, was objected to by the plaintiffs, and ruled out by the court as incompetent, to which ruling the defendants duly excepted at the time.

The statement of this case has occupied so much room that but little space is left for the arguments of counsel in this court.

It was argued by *Mr. Blair*, upon a brief filed by himself and *Mr. Crockett*, for the plaintiffs in error, and by *Mr. Janin* for the defendants. The points given below were amply illustrated, but there is not room to insert any more.

The counsel for the plaintiffs in error made, amongst others, the following points:

1. The Coppinger grant is by metes and bounds, and not by quantity, and is without the usual provision as to the surplus. No survey was necessary to locate and segregate the land. A grant or confirmation of a specific parcel of land conveys the title *proprio vigore*, without a survey.

Guitard *v.* Stoddard, 16 How., 494.

Bissell *v.* Penrose, 8 How., 317.

Stanford *v.* Taylor, 18 How., 409.

United States *v.* Sutherland, 19 How., 363.

2. The grant to Coppinger conveyed the legal and not a mere equitable title. It purports to convey the property in fee, and was issued by the Governor, who had the lawful authority to grant lands. On its face it is designated as a "patent," and purports to be final and definitive. The fact that it is made subject to the approval of the Departmental Assembly does not impair its effect as a valid legal title. This created only a defeasance, by which the title might be defeated, if the Departmental Assembly *refused* to ratify the grant; but until such refusal, the legal title was in the grantee. Even this refusal did not impair the title, unless the supreme Government ratified the action of the Assembly.

Ferris *v.* Coover, 10 California R., 589.

3. If the title was before only equitable, the final confirmation by metes and bounds has converted it into a complete legal title, conclusive as against the United States; and after such confirmation there was no title, either legal or equitable, in the United States, which it could convey by patent to a third person. The United States was estopped by the confirmation to deny that the title was in the claimant, and being thus estopped by the record, it could convey no title to another.

Lafayette's Heirs *v.* Kenton, 18 How., 197.

Guitard *v.* Stoddard, 16 How., 494.

Stanford *v.* Taylor, 18 How., 409.

Ledoux *v.* Black, 18 How., 473.

Roche *v.* Jones, 9 How., 155.

Grignon *v.* Astor, 2 How., 319.

Chouteau *v.* Eckhart, 2 How., 344.
Strother *v.* Lucas, 12 Pet., 410.
Same, 3 Dallas, 456.
Harrold *v.* Bailey, 9 Missouri R., 323.

Mr. Janin, after stating the case, said:

Under these circumstances, it is clear that the defendants in error have the legal title to the land in dispute, whereas the plaintiffs in error have only an equitable claim, such as cannot be offered in opposition to a legal title in an action of ejectment.

I. By the uniform legislation of Congress, the title passed out of the Government only by the patent. In respect to California land claims, this is specially provided for by the 8th section of the act of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California." (9 Stat. at Large, 632.)

In Hooper *v.* Scheimer, 23 How., 249, the court say: "This court held, in the case of Bagnell *v.* Broderick, 13 Pet., 450, that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law. Such is the settled doctrine of this court." Until the issuance of the patent the fee is in the Government, which passes by the patent to the grantee, and he is entitled to recover the possession in ejectment. 13 Pet., 450.

II. The title of the plaintiffs in error is an equitable and not a legal title. It was a grant by the Governor, subject to the approbation of the Departmental Assembly, which it never received. It was unaccompanied by judicial possession, and never surveyed, so far as the record enables us to judge.

Mr. Justice GRIER delivered the opinion of the court.

The defendants in error are the owners of the tract of land called Las Pulgas, the title to which was confirmed to the heirs of Arguello by this court, (18 How., 539.) This action of ejectment was brought by them against Greer and a number of others, now plaintiffs in error. The defendants pleaded

severally the general issue, but no one of them took defence specially for any definite part of the land claimed in the writ, or made a disclaimer as to any portion of it. The plaintiffs gave in evidence the survey and patent of the Las Pulgas tract, and proved the defendants to be in possession within its boundaries. Their Mexican title was dated in 1835, and had the approbation of the Departmental Assembly, preceded and followed by possession.

Their grant, as confirmed by this court, is bounded on the north by the arroyo of San Francisquito, on the south by that of St. Mateo, on the east by the estuary, and on the west by the cañada or valley of Raymundo, "being four leagues in length and *one in breadth.*" The plaintiffs having shown a complete legal title to the land in dispute, were entitled to a verdict, unless the defendants could show a better.

They claimed under a grant to Juan Coppinger, dated in 1840, for the valley of Raymundo, specifying nothing as to quantity, but describing it as bounded on the east by the rancho of Las Pulgas, and on the west by the Sierra Morena, south by rancho of Martinez, and north by the lagune. The espediente provides, that "the judge who shall deliver possession of the land shall have it measured according to the ordinance, specifying the amount of sitios it contains."

This grant had never received the sanction of the Departmental Assembly, nor had possession ever been delivered, or any precise boundaries ascertained by survey; and although confirmed as a valid, equitable claim by the District Court of California, it has never been surveyed, nor had a patent been issued for it under the decree of confirmation. The claim of defendants to the land is therefore not yet completed into a legal title. Its boundaries and quantity still remain uncertain and undefined. The Sierra Morena may be sufficiently definite as the boundary of a State or kingdom, or of a valley, but is certainly a very vague and uncertain line for a survey of land. The eastern boundary called also for the rancho of Las Pulgas; this was also uncertain till the western line of Las Pulgas was correctly surveyed. Coppinger's grant, calling for land outside of the Pulgas grant, and to be bounded by

it, could have no possible interference or claim to land within it. Hence, the defendants could resort to no other defence than to offer proof that the survey and patent of Las Pulgas were erroneous as regarded the location of the western line, because it embraces a portion of the level land in the cañada or valley Raymundo, which is the call of its western boundary.

It is the refusal of the court to admit testimony for that purpose which is now alleged as error.

The testimony offered might well have been rejected as irrelevant, for it does not follow, that if the western line of Las Pulgas, as run by the surveyor general, included level land in the valley, that it was at all incorrect. The western boundary line of Las Pulgas, as adjudged by the decree of this court, had two several points of description to fix its location; one uncertain and vague, the other admitting of mathematical certainty. The call of the Cañada Raymundo on the west is as vague as that for the Sierra Morena, a chain of mountains. But the breadth of one league from the estuary or bay was a certain and definite boundary on the east, and showed conclusively the precise location of the line. Las Pulgas could claim to extend but a league west, whether that reached to the hills on the east of the valley or not, and was entitled to have the league in breadth, whether it carried the western line over the hills or not. Coppinger's grant can claim only what is left after satisfying Las Pulgas, which calls for a certain quantity and a certain boundary. There was no offer to prove that the survey of Las Pulgas was extended beyond such limit.

The court below refused to admit the testimony, not for its irrelevancy, but its incompetency; because the defendants, claiming under a merely equitable title, having neither survey nor patent, were not in a condition to dispute in a court of law the correctness of the survey made by the public officer or resist the plaintiff's perfect legal title.

The fact and the conclusion of the court from it are undoubtedly correct. It is well settled that both plaintiff and defendant must produce a strictly legal title, whether it be in fee or as lessee for years.

The plaintiff had shown a complete legal title; the defendant had not, for the reasons already stated.

The act of 3d March, 1851, c. 41, section 13, makes it the duty of the surveyor general to cause all private claims which shall be confirmed to be surveyed, and "to decide between the parties with regard to all such confirmed claims as may conflict or in any manner interfere." It is true this may not preclude a legal investigation of the subject by the proper judicial tribunal. In this case there can be no conflict of title as between Las Pulgas and the later grant to Coppinger, which calls for it as a boundary. The survey is conclusive evidence as to the precise location of the western line of Pulgas, as between these parties in this suit. If Coppinger and those claiming under him charge that this line has not been properly established, either by mistake or fraud, they might have had a remedy under the thirteenth section of the act, and may possibly yet have it by filing a bill in chancery. But in this action of ejectment, the defendants cannot call upon a jury at their discretion to alter a boundary line which has been legally established by the public officer specially intrusted with this duty.

The only other exception is, to the following instruction of the court as to the form of the verdict: "That they should find a separate verdict against such of the defendants as were proved to have been in possession, at the commencement of the suit, of separate distinct parcels of the said land held in severalty, and that the jury might find a general verdict against all the other defendants who were proved or admitted to have been, at the commencement of the suit, in possession of some portion or portions of the premises in controversy, the limits or boundaries of whose possessions were not defined by the proof; and this, whether such possessions and occupation were joint or several."

We can perceive no error in this instruction. Although the Circuit Court may have adopted the mode of instituting the action of ejectment by petition and summons, instead of the old fiction of lease, entry, and ouster, it is still governed by the principles of pleading and practice which have been estab-

lished by courts of common law. The hybrid mixture of civil and common-law pleadings and practice introduced by State codes cannot be transplanted into the courts of the United States.

In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him they are all trespassers, and he cannot know how they claim, whether jointly or severally; or if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defence specially for such portion of the land as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration; and if on the trial he succeeds in establishing his title to so much of it as he has taken defence for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation.

If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defence for the whole. How can he call on the plaintiffs to prove how much he claims, or the jury to find a separate verdict as to his separate holding, when he will neither by his pleading nor evidence signify how much he claims? This was a fact known only to himself, and one with which the plaintiff had no concern and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain.

In the case of McGarvey *v.* Little et al., (not yet reported,) when the same objection was made to the charge of the court, the Supreme Court of California overruled it, and held "that

the defendants being in possession, and there being no proof of the particular portions which they severally occupied or claimed, there was no error in refusing to direct the jury to bring in a separate verdict as to each."

The judgment of the Circuit Court is therefore affirmed, with costs.

THE LESSEE OF ISAIAH FROST AND OTHERS, PLAINTIFFS IN ERROR, *v.* THE FROSTBURG COAL COMPANY.

An act of the Legislature of Maryland examined whereby certain named persons, and such others as might be associated with them, were incorporated by the name of the Frostburg Coal Company.

The defendants in this suit were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate from the beginning.

Even if it were otherwise, and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted or its non-performance shown, a party dealing with the company is not permitted to set up the irregularity.

The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the Government that created it.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Davis* and *Mr. Shackelford* for the plaintiffs in error, and by *Mr. Price* and *Mr. Pearre* for the defendants.

The question being on the construction of a local charter, the arguments are not likely to be of general interest, and are therefore omitted.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Maryland.

The action in the court below was an ejectment brought by the heirs of Isaiah Frost, to recover the possession of a tract of land situate in the county of Allegany, Maryland. The defence set up was a conveyance of the land by their ancestor to the defendants. The only question in the case is, whether or not the Frostburg Coal Company was capable of taking and holding real estate at the date of the deed, the 13th March, 1845.

The court charged the jury, if they found that Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, the parties named in the act of incorporation of 1845, accepted the charter, and proceeded to act as a corporate body under it, by the name of the Frostburg Coal Company, opened their coal mines, transported the coal to market, borrowed money on the credit of the company, and made large and costly improvements on the lands in controversy, during all which time Isaiah Frost, the ancestor, acted as one of the directors; and further found, that the said Frost executed and delivered to the company the deed of the 13th March, 1845, given in evidence, they must find a verdict for the defendants.

The act of incorporation, which was passed February 24, 1845, provided that Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, and such other persons as may be associated with them in the manner afterwards provided, *shall be and they are hereby incorporated and made a body politic and corporate, by the name of the Frostburg Coal Company*, and by that name shall have succession, &c., conferring the usual corporate powers for the manufacture of iron, and mining of coal, and for transporting the same to market; and among others, the power to purchase and hold all such property, real, personal, and mixed, as the company may require for the purposes aforesaid.

The second section provided, that the capital stock of the company should consist of five thousand shares of one hundred dollars each, of which the lands and mines of Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, on one part, and those who may associate with them

and constitute the aforesaid subscription for stock, payable in money, on the other part.

The third section provided, that the subscriptions to the capital stock should be made at such places, and in such manner, as should be designated by the four persons above named, and that the shareholders of one or more shares of stock should be members of the corporation, and entitled to one vote for each share so held; and making the shares assignable and transferable, as may be provided in the by-laws of the company.

The fourth section provided, that the affairs of the company should be managed by a president and four directors, to be chosen by the stockholders, to serve one year, and till others shall be elected; and *until the first election of directors shall be held, the said Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, shall have full power and authority to exercise all the corporate powers of the said company, &c.*

The fifth section provided, that a general meeting of the stockholders should be held as soon as the company is organized, and annually thereafter, on the first Monday of June in each year, for the election of directors, and to consult upon the business of the company.

On the 12th March, 1845, the associates met in pursuance of the authority given in the third section of the act, at which meeting the whole number of shares, constituting the capital stock, were subscribed, and the company proceeded to the election of the president and four directors, the number required by the charter for the ensuing year; and at the same time, directed that the secretary should procure deeds to the company for the lands, which should constitute part of the capital stock. And on the 21st of the month, the board met, and provided for the issuing of certificates of the capital stock to each stockholder.

It was in pursuance of the resolution of the 12th March, that the deed of Isaiah Frost, the ancestor of the lessors of the plaintiff, was executed. This deed contained some four hundred and sixty-four acres of land, which, together with several parcels conveyed by Mechack Frost, another of the stockhold-

ers, dated on the same day, and adjoining the former tract, embraced the coal mines of the company, for the working of which it was incorporated.

The company immediately commenced preparations for opening the mines, and for transporting the coal to market, by constructing rail and tram roads leading into the mines, erecting buildings for the accommodation of the workmen, together with other necessary improvements, at an expense of some fifteen thousand dollars; also, a large amount of coal had been taken out of the mines, and sent to the market; all of which was done during the lifetime of Isaiah Frost, and while he was one of the most active and efficient directors, and all or nearly all of said fixtures and improvements had been made upon the parcel of land in question, and for which he had received stock. He was the largest stockholder but one in the company, and had dealt in the stock, by pledging it for money borrowed.

As we have already said, the main ground relied upon, on behalf of the heirs, to avoid the deed to the defendants, is the failure to organize under the charter, so as to constitute them a corporation capable of taking and holding real estate. It is supposed that there are some conditions precedent to the existence of the corporation which have not been performed, and that the act, of its own force, did not constitute them a corporate body. But a slight reference to the charter will show that the position is a mistaken one. The first section declares, that the four persons, and such others as may be associated with them, shall be and are hereby incorporated and made a body politic and corporate, by the name of the Frostburg Coal Company; and then confers upon it the usual powers belonging to a corporation, and among others, to purchase and hold real estate for the purposes of the company; and in the fourth section declares, that until the first election of directors shall be held, the four persons named shall have full power and authority to exercise all the corporate powers of the company. The charter took effect immediately on its acceptance by the persons named, and the subsequent steps, such as the subscription of the stock, procurement of the coal

lands, election of the directors, of the president and secretary, passing by-laws, &c., were steps taken in perfecting the organization, and enabling it to use the powers and privileges conferred for the purposes for which they were granted.

It was supposed in the argument, that the words, "and such other persons as may be associated," &c., in connection with the four persons named in the first section, imported that other persons must be associated with the four, before the charter could take effect; but, if any doubt could be raised upon the language of the first section, the fourth removes it, as there the power and authority to exercise all the corporate powers of the company is expressly conferred upon the four persons, until the first election of directors. These corporate powers are not only conferred upon the four persons named, but are continued until their successors are appointed to take their places. The true meaning of the words referred to in the first section probably is, that a privilege was intended to be given to the company of uniting other associates with the four in the enterprise, if they so elected,

The same observation is also applicable to the second section, which declares that the capital stock shall consist of 5,000 shares of one hundred dollars each, of which the lands of the four persons named in the first section may be one part, and those who may associate with them, and constitute the corporation by subscription for stock, payable in money, the other. The charter does not provide that any given amount or portion of the stock shall be in land, or in money, and the true construction probably is, that the whole of it may have been payable in money.

The language of the section would seem to confer upon the four persons the privilege of paying their shares of stock by the conveyance of land, rather than imposing it upon them as an obligation. This is the construction of the charter under which the company has acted, as the subscription for the shares is a moneyed subscription. The land was purchased from two of the principal subscribers, by the company, at a valuation which was applicable to their subscriptions. They

would be liable to the company for the balance of their stock, as would the other subscribers for the whole amount of theirs.

The subscription of the stock was in form for a given number of shares; but as each share was fixed by the charter at one hundred dollars, the amount each was liable for to the company was readily ascertained, and it is well settled that a subscription in this form is as obligatory as if it had been in money. (14 Wend. R., 20.)

The ninth section of the charter provides, that the corporation shall be subject to all the restrictions imposed by the general act of 1838, regulating incorporations for manufacturing and mining companies. The 15th section of this act provides, that when over four-fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase or otherwise, in the hands of less than five persons, &c., all the corporate powers and privileges granted shall cease and determine. And it is insisted, that the stock of this company, at the time of its organization, was held in violation of this section of the general act. Although the ninth section of the charter subjected the company to the general act, yet the provision is to be construed as subject only, when not inconsistent with the express provisions of the charter; and in this view, the better opinion, we think, is, that this four-fifths provision does not apply. But whether it does or not, it is unimportant to determine; for conceding that it does, a private party cannot take advantage of the forfeiture. That is a question for the sovereign power, which may waive it, or enforce it, at its pleasure. (9 Wend., 382; 4 Denio, 397.)

Without pursuing the case further, the main ground upon which we intend to place the judgment of the court is, that the defendants were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate; and second, even if it were otherwise, and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted, or its non-performance shown, a party dealing with

the company is not permitted to set up the irregularity. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it. Angel and Ames, sec. 774, and cases referred to.

Judgment affirmed.

THE CLEVELAND INSURANCE COMPANY, APPELLANTS, *v.* GEORGE REED, JULIET S. REED, JAMES H. ROGERS, AND THE MILWAUKIE AND MISSISSIPPI RAILROAD COMPANY.

Where a mortgagor's interest in land was sold under the bankrupt act of the United States, the statute of limitations began to run from the time when the petitioner was declared a bankrupt, and not from the time when the purchaser took a deed from the assignee in bankruptcy.

By the revised statutes of Wisconsin in 1839, it is provided in the 37th section, that where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred. And in the 40th section it is provided, that bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after that time.

Therefore, where a bill was filed for a foreclosure or sale of mortgaged property, and the defendant had been in possession for more than ten years prior to the filing of the bill, there was no corresponding remedy at law, and the case fell within the 40th section of the act.

The decree of the Circuit Court dismissing the bill must therefore be affirmed.

THIS was an appeal from the District Court of the United States for the district of Wisconsin.

The bill and answers opened a wide field of discussion relating to events which had transpired many years before, and the arguments could not be made intelligible without a minute statement of those events. But as the opinion of the court does not require that this should be done, the reporter omits a particular narrative of these circumstances.

The case was argued in this court by *Mr. Doolittle* for the appellants, and by *Mr. Lynde*, upon a brief submitted by himself and *Mr. Brown*, for the appellees.

Mr. Justice CATRON delivered the opinion of the court.

The bill seeks to enforce a lien secured by mortgage on twenty acres of land, in what is denominated Finch's addition to Milwaukie. The mortgage debt became due in February, 1839. It is difficult to say, that were the bill standing on demurrer, that a sufficient description of the land claimed as bound for the debt could be established to justify an affirmative decree. But the view we take of the case renders this question immaterial.

In 1837, George Reed executed the mortgage to the Cleveland Insurance Company for $22,000, including the greater portion of a quarter section of land, part of which was covered by previous mortgages to others. These were acquired and foreclosed, and the title vested in James H. Rogers, the purchaser, and only material respondent to this suit. He took possession of the quarter section in 1838, claiming it as his own under previous mortgages of which he was assignee, and which he foreclosed, and became the purchaser of the equity of redemption, and he also claimed title under five tax sales and deeds founded on them.

In his answer, Rogers relies on the act of limitations of Wisconsin, passed in 1839, which provides that "bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in *all other cases* not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and *not after* that time."

To establish the fact of adverse possession, and to negative the conclusion that Rogers did not recognise the trust, the parties agreed "that for the purpose of bringing the above-entitled suit to a hearing at the present term, it shall and may be taken as true and proved for all the purposes of this case, that the defendant, Rogers, has been in actual and continual possession and occupancy of the southeast quarter section 37, township 7, range 22 east, described in the bill of complaint in this suit, since some time in the year 1838, and up to this time; and during all that time has openly controlled the same, and improved some portion of the premises."

To onerate Rogers with the obligation of a mortgagor and

trustee, the complainant introduced a record from the bankrupt court held in Wisconsin, showing the proceedings against George Reed as a voluntary bankrupt under the act of Congress of 1841. The proceeding was admitted on the hearing to be in all respects regular. On the 23d of July, 1842, Reed was declared to be a bankrupt, and his property and rights of property were vested in an assignee appointed by the court. He advertised Reed's interest in the property in controversy to be sold, and on the 3d day of May, 1843, it was sold, and purchased by Rogers, he being the best bidder, for the sum of six dollars, who took a regular deed for the same on the 6th day of July, 1846, in conformity to the 15th section of the bankrupt law.

The object of introducing this evidence by the complainant was, to avoid the operation of the act of limitations, by showing that, by his purchase, Rogers stood on the same footing of mortgagor that George Reed had stood before his bankruptcy, and that the assignee's *deed* to Rogers was not ten years old when this suit was brought.

The assignee came in as trustee by force of the decree declaring Reed a bankrupt; he held the land as Reed had done, and by the deed Rogers assumed the same position, because, by the proviso to the 2d section of the bankrupt law, the lien secured by the mortgage was excepted. The main question as regards the effect of this deed is, to what time does the title acquired by Rogers relate. It vested in him by its terms such title as the bankrupt had at the time of his bankruptcy, which was the date of the decree declaring him a bankrupt. To this effect is the 15th section of the act.

This suit was brought in 1856, and the order declaring Reed a bankrupt was made in 1842, so that Rogers held the relation of mortgagor to the complainant more than ten years before this suit was brought.

But we deem this proceeding in bankruptcy altogether immaterial. Rogers claimed to own the quarter section in fee, and held it in actual adverse possession in 1839, when the ten years' act of limitations was passed. The act then began to run, and ran on so as to complete the bar in 1849.

We do not doubt that the act applies to this suit. The bill prays that the equity of redemption be foreclosed, or that the undivided interest, to the extent of twenty acres in the quarter section alleged to be covered by the mortgage, be sold, and the proceed appropriated towards paying the debts secured. As neither of these modes of relief are cognizable at law, and the only remedy is in equity, it is manifestly barred by the terms of the act.

By a previous provision of the act of 1839, (section 37,) where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred; and what we mean to say is, that the remedies demanded to be enforced by the bill have no corresponding remedy at law, and therefore fall within the 40th section of the act.

As respects the other defendants to the bill, no relief can be had against them. By his purchase of the bankrupt's title, Rogers took the equity of redemption, and cut off all claims to the land the defendants had, assuming the statements in the bill to be true.

We forbear to express any opinion on the defence relied on by Rogers in his answer, namely, that he had purchased and had deeds for the said quarter section from several tax collectors, which he alleges are valid: and if not valid, that they are confirmed by adverse possession and the operation of the three years' act of limitations.

It is ordered that the decree of the Circuit Court dismissing the bill be affirmed.

GEORGE B. BISSELL, DAVID T. ROBINSON, AND CALVIN DAY, PLAINTIFFS IN ERROR, *v.* THE CITY OF JEFFERSONVILLE.

The common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city.

The statutes of the State examined by which such authority was conferred.

Under one of these acts, the common council determined that three-fourths had

so petitioned; and under a subsequent act, authorizing them to revise the subject, they again came to the same conclusion, and issued the bonds.

Jurisdiction of the subject-matter on the part of the common council was made to depend upon the fact whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws the tribunal to decide that question.

When sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city.

Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The railroad company and their assigns had a right, therefore, to conclude that they imported absolute verity.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

The facts of the case are fully stated in the opinion of the court.

It was argued by *Mr. Taft* upon a brief filed by *Taft* and *Perry*, and also one filed by *Mr. McDonald*, for the plaintiffs in error, and by *Mr. Reverdy Johnson* upon a brief filed by *Mr. Crawford* for the defendants.

The reporter despairs of giving an account of these arguments within a reasonable space, and therefore omits them altogether.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Indiana. It was an action of assumpsit, and was instituted by the present plaintiffs against the corporation defendants, to recover two instalments of interest which had accrued upon certain bonds, purporting to have been duly issued in the name of the defendants, for stock subscribed in their behalf by the common council of the city to the Fort Wayne and Southern Railroad Company. Assuming to act in behalf of the city, the common council subscribed two hundred thousand dollars

to the stock of the railroad company, and on the twenty-fourth day of April, 1855, issued two hundred bonds, of one thousand dollars each, in the name of the city, and subsequently delivered the same to the railroad company, in payment for the stock previously subscribed. Interest on the whole amount of the loan was to be paid semi-annually in the city of New York, at the rate of six per cent., and coupons or warrants for the same, payable to bearer, were annexed to each separate bond. Plaintiffs became the holders, for value, and in the usual course of their business, of thirty-seven of these bonds; and the suit in this case was founded on thirty-seven of the coupons for the first instalment of interest, and thirty-six coupons for the second instalment. As amended, the declaration contained a count for money had and received, and a special count upon each of the seventy-three coupons. Defendants pleaded the general issue, and also filed a special plea, in bar of the cause of action set forth in the several special counts. More particular reference to the special plea is unnecessary, as it was subsequently held bad on general demurrer, and at the same time the parties went to trial on the general issue.

To maintain the issue, on their part, the plaintiffs, in the first place, introduced one of the original bonds, which is set forth at large in the record. Among other things, it recites, in effect, that it was issued by authority of the common council of the city, and that three-fourths of the legal voters thereof "petitioned for the same, as required by the charter." They also gave in evidence, without objection, the several coupons described in the declaration. All of the coupons, as well as the bonds given in evidence, were signed by the mayor of the city, and were countersigned by the city clerk, and the defendants admitted their execution.

Presentment and protest of the coupons for non-payment were also duly proved by the plaintiffs; and to show that the bonds were duly and legally issued, they introduced the records of the common council of the city, and the minutes of their proceedings upon that subject. From that record it appeared that on the twenty-third day of August, 1853, a

petition of certain legal voters of the city was presented to the common council, representing that the construction of the before-mentioned railroad would be of great benefit to the public generally, and especially to the commercial interests of the city, and praying that the board to which it was addressed would subscribe stock in the railroad to the amount of two hundred thousand dollars, and contract a loan for an equal amount, through the issue of city bonds, for the payment of the subscription. That petition purports on its face to have been signed by four hundred and sixty-seven persons, and it recites that they constituted at that time three-fourths of the legal voters of the city. On the day of its presentation it was referred by vote of the common council to three members of the board, who reported in effect that they found, upon examination of the petition, and of the poll-book of the last charter election, that the names of more than three-fourths of the legal voters of the city were appended to the petition, and they also reported a preamble and resolution to carry into effect the prayer of the petitioners. Evidently the report of the committee was entirely satisfactory, as the record shows that the resolution was immediately adopted, without alteration or amendment, by the unanimous vote of the board.

Without reproducing the document, it will be sufficient to say, that the common council thereby resolved, in case the road came into the city, to subscribe two hundred thousand dollars to the stock of the railroad company, and the preamble, which was adopted as a part of the resolution, expressly affirmed the fact reported by the committee, that more than three-fourths of the legal voters of the city had petitioned for that object. Pursuant to that determination, the parties having met, and arranged the terms and conditions of the proposed agreement, a contract was made with the railroad company, that the common council should make the subscription thus authorized, and execute and deliver the bonds of the city to the company for an equal amount in payment for the stock. Throughout the period when these proceedings took place, the parties to them, it seems, had acted upon the supposition that the fifty-sixth section of the general law of the State for the

incorporation of cities fully authorized the defendants, through their common council, to make the subscription and issue the bonds. Before the bonds were issued, however, the Supreme Court of the State decided, in an analogous case, that no such authority was conferred upon cities by that section. 1 Rev. Stat., 215; the City of Lafayette *v.* Cox, 5 Ind. R., 38.

Some delay ensued in issuing the bonds, apparently in consequence of that decision; but on the twenty-first day of February, 1855, the Legislature of the State passed an additional act to enable cities which had subscribed for stock in companies incorporated to construct works of public utility to ratify such subscriptions. By the first section of that act, the common council of any city which had contracted such obligations or liabilities upon the supposition that they were authorized so to do under the provisions of the former act might, "at any time after the passage of this act, ratify and affirm such subscription;" and upon such ratification it was expressly enacted, that "such subscription, and the obligation and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city, shall be valid." Sess. Acts 1855, p. 132. To prove such ratification, the plaintiffs introduced the record of the subsequent proceedings of the common council of the city, showing that at their meeting held on the sixth day of April, 1855, it was resolved by the board, then in session, that the former contract between the city and the before-mentioned railroad company, "for two hundred thousand dollars, be and the same is hereby confirmed and ratified."

In this connection, the plaintiffs also proved by the same record, that the common council, on the thirteenth day of April of the same year, authorized and directed the mayor of the city and the city clerk to procure and sign two hundred bonds, of a thousand dollars each, in the name of the city, and deliver the same to the railroad company, reciting in the resolution upon the subject that the proceeding was in accordance with the statute of the State, and the contract and arrangement previously made with the railroad company. Prior to the trial, the court, by the consent of parties, appointed a commissioner to take such evidence as either party might direct

to have taken, and to report both the evidence and his finding of the facts proved by it, subject to all exception as to the competency of the testimony, and the correctness of his finding. He reported that three-fourths of the legal voters of the city had not signed the petition to the common council, which constituted the foundation of their action in making the subscription to the stock and issuing the bonds. This report was accompanied by the several depositions on which it was founded, and the transcript shows that certain portions of the testimony of the deponents tended to prove the fact reported by the commissioner. Defendants offered the report, with the several depositions, in evidence, to prove, among other things, that the petition in question was not signed by three-fourths of the legal voters of the city. They also offered oral evidence to prove the same fact. To all such testimony the plaintiffs objected, and also moved the court to suppress all such portions of the depositions taken by the commissioner as tended to prove that a less number than three-fourths of the legal voters had petitioned for the subscription to the stock and for the issuing of the bonds. But all of these objections of the plaintiffs were overruled by the court, and the report of the commissioner, with the depositions as taken by him, and the parol testimony, were admitted to the jury, and the plaintiffs excepted to the several rulings in that behalf. Further testimony was then given by the plaintiffs, showing that the bonds in question were negotiated to them for value by the agent of the railroad company; and that the agent, at the time they were received, exhibited to them the certificate of the city clerk, under the seal of the city, giving a condensed statement of the proceedings of the common council from the presentation of the petition to the delivery of the bonds, and affirming, in effect, that all those proceedings appeared of record in the office of the city clerk; and they further proved, that he also exhibited to them at the same time another certificate, signed by the mayor of the city and city clerk, showing that the bonds had been exchanged with the railroad company for an equal amount of their capital stock, and affirming that the exchange was authorized by the contract between the parties and the

resolutions of the common council of the city. After the testimony was closed, the court instructed the jury to the effect that, if they found from the evidence that three-fourths of the legal voters of the city had petitioned for the subscription to the stock, and for the issuing of the bonds, their verdict should be for the plaintiffs; but if they found that three-fourths of the legal voters had not so petitioned, then their verdict should be for the defendants. Under the rulings and instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instructions.

1. On that state of the case the main question presented for decision is, whether it was competent for the defendants to introduce parol testimony to prove that three-fourths of the legal voters of the city did not petition for the subscription to the stock and the issuing of the bonds. That question is raised, as well by the exceptions to the rulings of the court in admitting such testimony as by those taken to the instructions given to the jury.

Some further reference, however, to the law under which the common council acted, in making the subscription and in issuing the bonds, becomes necessary before we proceed to the examination of that question. It is conceded on both sides that the defendants had adopted the general law of the State, entitled an act for the incorporation of cities, before any of these proceedings were commenced. Prior to the adoption of that law by the corporation, the charter of the city authorized the common council to subscribe, in the name of the city, for any amount of stock in railroad or turnpike companies formed, or to be formed, for the purpose of constructing any railroad or turnpike from the city to any other point, provided the stock so held by the city did not, at any time, exceed one hundred thousand dollars; and with that view, they were authorized to borrow money or issue bonds to pay for such stock. But it is admitted by the plaintiffs that the corporation, at the date of the proceedings in question, was duly organized under the subsequent general law for the incorporation of cities, which provides, in effect, that the acceptance of that act by any incorporated city shall be deemed a surren-

der by such city of its prior charter. By the fifty-sixth section of the last-named act it is also provided, that no incorporated city, under this act, shall have power to borrow money, or incur any debt or liability, unless three-fourths of the legal voters shall petition the common council to contract such debt or loan. All of the proceedings in question which led *to the contract* for the subscription to the stock took place under that provision of the charter; and we have already adverted to the fact that the Supreme Court of the State decided, before the bonds were issued, that, by its true construction, it did not authorize a subscription to the stock of a railroad company. At the argument, the construction adopted by the State court was controverted by the counsel of the plaintiffs. But suppose it to be correct; still the limitation or restriction was one created by the Legislature which granted the charter, and certainly it was competent for the same authority to repeal it altogether, or to substitute some other in its place.

Municipal corporations are created by the authority of the Legislature, and Chancellor Kent says they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the Legislature of the State. 2 Kent's Com., p. 275.

Whatever may be the true construction of that section of the charter, it is nevertheless certain that it was under that provision that the petition for the subscription was presented to the common council, and it is equally certain that it was under the same provision that they heard and determined the question whether the petition actually contained the signatures of three-fourths of the legal voters of the city. Bad faith is not imputed to the board, nor is it denied that they acted "upon the supposition" that they were authorized by that provision, on "the written petition of three-fourths of the legal voters of the city," to subscribe for the stock and contract to issue the bonds. Having ascertained and determined that three-fourths of the legal voters had petitioned, they adopted the resolution reported by the committee, and entered into the contract with the railroad company. Clearly, therefore, the

common council had contracted the obligation to take the stock; and in case of refusal, would have been liable in damages for a breach of the contract. Other cities in the State had contracted like obligations under similar circumstances; and to remedy the anticipated difficulty, and to remove the doubt first suggested by the decision of the Supreme Court of the State, the Legislature passed the explanatory act of the twenty-first of February, 1855, to which reference has been made.

Sufficient has already been remarked to show that the circumstances of the case exhibited in the record bring it within the very terms of the act; and if so, then the common council might lawfully ratify and affirm the subscription; and upon such ratification it is expressly declared that the bonds issued or to be issued shall be valid.

Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the State Legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority. Unlike what is sometimes exhibited in laws of this description, the Legislature did not attempt to ratify the subscription, but left the matter entirely optional with the common council, as the representatives of the city, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription; and by so doing, gave the same effect to the contract to subscribe for the stock, and to all the proceedings that led to it, as if the authority to make it had been coeval with the presentation of the petition on which those proceedings were founded. No injustice will result from this conclusion, as it is obvious that the contract had been made in good faith, under the full belief that they were duly authorized to subscribe for the stock, and issue the bonds in the name of the city, so that the only operation of the confirmatory resolution was to give the very effect to the proceedings which they had intended, but which, from the defect in their authority, had not been accomplished.

Watson *v.* Mercer, 8 Pet., p. 111; Wilkinson *v.* Leland et al., 2 Pet., p. 661.

Authority on the part of the common council to subscribe for the stock, and to issue the bonds on the petition of three-fourths of the legal voters of the city, is therefore shown to have existed, and must be assumed in the further consideration of the case. With this explanation as to the authority of the common council, we will proceed to the examination of the main question discussed at the bar.

2. It is insisted by the plaintiffs that the defendants had no right to disprove the verity of their own records, certificates, and representations, concerning the facts necessary to give validity to the bonds. On the other hand, the defendants controvert that proposition, and insist that it was competent for them under the circumstances to prove, by parol testimony, that the records given in evidence did not speak the truth, and that, in point of fact, three-fourths of the legal voters had not petitioned, as required by the charter. Unless three-fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three-fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. That fact, however, had been previously ascertained and determined by the board to which the petition was originally addressed.

After the explanatory act was passed, the common council were fully authorized to revise the finding of the former board; and if it did not appear, upon inquiry and proper investigation, that it was correct, it was their duty, as the representatives of the city, to have refused to ratify and affirm the contract for the subscription. Such an inquiry might have been made through the medium of a committee, as it had been when the petition was presented, or in any other mode, satisfactory to the board, which would enable them to ascertain the true state

of the case. By the terms of the explanatory act they were authorized to ratify and affirm the subscription, if the obligation or liability incurred had been contracted on the petition of three-fourths of the legal voters of the city; and, of course, the necessary implication is, that they must be satisfied that the requisite number had petitioned. In making that investigation, however, it was not required that there should be a new petition, and the law is entirely silent as to the manner in which it was to be conducted. If the common council was composed of the same persons who had already passed upon the question, further investigation was unnecessary, provided they were satisfied with their former determination. Such of the members as knew the record of the fact to be correct might safely act upon their own personal knowledge, without further inquiry; and if there were any who had not been members of the board when the prior determination was made, they might ascertain the fact in any mode which was satisfactory to themselves and their associates. Nothing appears in the record to show whether further information upon the subject was necessary or desirable, or, if so, what means were adopted to obtain it; but it does appear that the board unanimously resolved to ratify and confirm the contract with the railroad company, and subsequently issued the bonds, reciting in each that it was issued by authority of the common council of the city, "three-fourths of the legal voters of the city having petitioned for the same as required by the charter." Taken together, we think the record of the resolution ratifying and confirming the contract, and the recital in the bonds, furnish conclusive evidence in this case that the common council did readjudicate the question, whether the requisite number of the legal voters of the city had signed the petition. Fraud is not imputed in this case, and it does not appear that it was even suggested at the trial in the court below that the board neglected that duty at the time the contract was confirmed; but the defence was, that the finding was erroneous, because the petition, as matter of fact, did not contain three-fourths of the legal voters of the city.

3. It only remains to consider the effect of that determina-

tion as between the defendants and the holders for value of the bonds, without notice of the supposed defect in the proceedings under which they were issued, and put into the market. Two hundred bonds, with twelve hundred interest warrants, or coupons, were issued in the name of the city, and the coupons, as well as the bonds, were payable to bearer. Interest was payable semi-annually, but the redemption of the principal was postponed for a period exceeding twenty-five years. Capitalists could not be expected to accept such paper, and advance money for it, unless the authority to issue it was put beyond dispute. They certainly would not pay value for such securities, with knowledge that the question under consideration would be open to litigation whenever payment, either of principal or interest, was demanded. Purchasers of such paper look at the form of the paper, the law which authorized it to be issued, and the recorded proceedings on which it is based. When the law was passed authorizing the common council to ratify and affirm the contract with the railroad company, it must have been understood by the Legislature that the bonds were to be received by the company in payment for the stock, and used as a means for borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the act, it contemplated that the bonds should be issued before it was conclusively determined that the requisite number of the legal voters of the city had petitioned the common council. But a much stronger reason why that construction cannot be adopted is, that it would involve an absurdity, as it would render the law altogether inoperative, or else it would admit that the bonds might be issued without authority.

Whether three-fourths of the legal voters had petitioned or not, was a question of fact; and if not ascertained and conclusively settled before the bonds were issued, it would remain open to future inquiry, and might be determined in the negative; and clearly the common council could not lawfully ratify and affirm the subscription, unless that proportion of the legal voters had petitioned; and without such ratification, the bonds

would be invalid. Beyond question, therefore, that construction must be rejected.

Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three-fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of the Commissioners of Knox county *v.* Aspinwall et al., 21 How., 544, we are of the opinion that "this board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it." Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint.

When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.

Duly certified copies of the record of the proceedings were exhibited to the plaintiffs at the time they received the bonds, showing to a demonstration that further examination upon the subject would have been useless; for, whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority; and

we hold that the company and their assigns, under the circumstances of this case, had a right to assume that they imported verity.

Citation of authorities to this point is unnecessary, as the whole subject has recently been examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. Zabriskie *v.* the Cleveland, &c., Railroad Co., 23 How., 400.

For these reasons, we are of the opinion that the parol testimony was improperly admitted, and that the instructions given to the jury were erroneous. The judgment of the Circuit Court is therefore reversed, with costs, and the cause remanded, with directions to issue a new venire.

THE RECTOR, CHURCH WARDENS, AND VESTRYMEN, OF CHRIST CHURCH, IN THE CITY OF PHILADELPHIA, IN TRUST FOR CHRIST CHURCH HOSPITAL, PLAINTIFFS IN ERROR, *v.* THE COUNTY OF PHILADELPHIA.

In 1833, the Legislature of Pennsylvania enacted that "the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

In 1851, they enacted that all property, real or personal, belonging to any association or incorporated company, which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed.

This last law was not in violation of the Constitution of the United States. It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

THIS case was brought up from the Supreme Court of the State of Pennsylvania by a writ of error issued under the 25th section of the Judiciary act.

The facts of the case are stated in the opinion of the court, and also the decision of the Supreme Court of Pennsylvania, which was alleged to be in conflict with the Constitution of the United States.

It was argued by *Mr. McCall* and *Mr. Reverdy Johnson* for the plaintiffs in error, and submitted on a printed argument by *Mr. King* for the defendants.

The first point of the counsel for the plaintiffs in error, viz: that a Legislature had power to exempt property permanently from taxation, was not contested by the other side; but the argument was, whether the reason given for exempting the property was a legal consideration of a contract or only a motive alleged for passing the laws. Upon this question many authorities were cited on both sides.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court upon a writ of error to the Supreme Court of Pennsylvania, under the 25th section of the act of Congress of the 24th September, 1789. In the year 1833 the Legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited," they enacted, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

In the year 1851 the same authority enacted "that all property, real and personal, belonging to any association or incor-

porated company which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." It was decided in the Supreme Court of Pennsylvania, that the exemption conferred upon these plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the Constitution of the United States, as tending to impair a legislative contract they alleged to be contained in the act of Assembly of 1833 aforesaid.

The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the Legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia.* It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence.

Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the State, and must be exerted according to the varying conditions of the Commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the Legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says, "that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a perpetuity defeasi-

ble by an alteration of the circumstances and reasons on which the law is founded." The inducements that moved the Legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes.

It may be supposed that in eighteen years the buildings would be renovated, and that the corporation would be able afterwards to sustain some share of the taxation of the State. The act of 1851 embodies the sense of the Legislature to this effect.

It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

Such was the conclusion of the courts in Commonwealth *v.* Bird, 12 Mass., 442; Dale *v.* Governor, 3 Stew., 387; Alexander *v.* Willington, 2 Russ. and M., 35; 12 Harris, 232; Lindley's Jurisp., sec. 42.

It is the opinion of the court that there is no error in the judgment of the Supreme Court, within the scope of the writ to that court, and its judgment is affirmed.

WILLIAM WIGGINS, JAMES M. JONES, AND JOHN B. WELLER, COMPLAINANTS, *v.* JOHN B. GRAY AND KNOWLES TAYLOR.

The Circuit Court certified that they had divided in opinion upon a question whether a party had a right to proceed summarily on motion to vacate a decree in that court.

The question certified is merely one of practice, to be governed by the rules prescribed by this court, and the established principles and usages of a chancery court. And even if a summary proceeding on motion might have been a legitimate mode of proceeding, yet the court, in its discretion, had a right to refuse, and to order a plenary proceeding by bill and answer. The exercise of such a discretionary power by the court below cannot be revised in this court upon appeal or certificate of division, and this court therefore decline expressing any opinion on the question certified.

THIS case came up on a certificate of a division of opinion

between the judges of the Circuit Court of the United States for the northern district of California.

The question certified is stated in the opinion of the court.

The case was argued by *Mr. Bayard*, upon a brief filed by himself and *Mr. Collier*, for the complainants, and by *Mr. Walker* and *Mr. Cushing* for the defendants.

The question being merely one of practice, which is authoritatively settled by the judgment of this court, it is not thought necessary to give the authorities referred to.

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

This case comes before the court upon a certificate of division of opinion between the judges of the Circuit Court for the district of California, sitting as a court of equity.

In stating the facts upon which the question certified arose, the court gives a history of the case, and it appears that a bill was filed in a State court of California, and was afterwards removed to the District Court of the United States, by order of the court, pursuant to an agreement made by the counsel for the respective parties; that before it was transferred from the State court, one of the complainants and one of the defendants died; and the representatives of neither of them were afterwards made parties, either in the State court before the removal, or the District Court of the United States, after the case was transferred to that court. And in this condition of the case, and without these parties, a final decree was rendered in the last-mentioned court. These proceedings were transferred to the Circuit Court of the United States, under the act of Congress of April 30, 1856; and a bill was afterwards filed in that court to set aside and vacate the final decree which had been rendered as above mentioned; but in that proceeding the Circuit Court held that it had not jurisdiction, because the parties made defendants resided in New York, where the process of the court could not lawfully be served upon them. The dates of these several proceedings in the different courts, and the motions and agreements of counsel, are particularly

set forth in the statement; but they are not material to the decision of this court, and need not, therefore, be repeated here.

The Circuit Court further certify, that after all of these proceedings were had, and the bill filed against the citizens of New York dismissed, a motion was made "to vacate the final decree rendered, and to remand the case to the State court, in which it originated; and that the motion was predicated on the ground that the whole proceedings, from the time the case was transferred thence, including the decree, were null and void, and not merely voidable, and therefore might be set aside on motion."

Upon this motion the judges divided in opinion, as they certify, upon the following question: "whether, under the circumstances detailed, this court (the Circuit Court) has authority to vacate summarily, on motion, the decree of the District Court of the United States for the northern district of California, and remand the case to the third judicial district of the State."

It will be observed, that the grounds upon which the decree of the District Court is alleged to be void, or voidable, are not stated, nor the questions which arose in the State court, or the courts of the United States; nor does it appear what errors are supposed to have been committed, which it is proposed to bring for revision before the Circuit Court, and to correct by a summary proceeding on this motion.

The only question certified by the Circuit Court is, whether, under the circumstances of the case as detailed in the statement, it could proceed summarily on motion to vacate and declare void the decree. The inquiry obviously relates altogether to the practice of the court as a court of equity. And this question often depends upon the sound judicial discretion of the court, regulated by the rules prescribed by this court, and the general principles and established usages which govern proceedings in a court of chancery; and whether it will proceed in a summary manner on motion, or require plenary proceedings by bill and answer, must depend upon the partic-

ular circumstances of the case before it, and the object sought to be attained.

The act of 1802, chap. 32, which authorizes the certificate of division, evidently did not intend to give this court jurisdiction, in that mode of proceeding, upon any question of common law or equity, that would not be open to revision here upon writ of error or appeal. It was so decided in Davis *v.* Braden, 10 Pet., 288, and in Parker *v.* Nixon, 10 Pet., 410. And it has repeatedly been held that the decision of the inferior court, upon a question depending upon the exercise of a sound judicial discretion in a matter of practice as to the mere form of proceeding, is not open to revision in this court.

If the judges had united in refusing the summary proceedings on motion, it is very clear that the decision could not have been revised in this court upon appeal, although this tribunal might be of opinion that the relief sought might have been legitimately granted in that mode of proceeding; for this discretion in a matter of practice resting exclusively with the inferior court, it has the right to determine for itself whether it will proceed in a summary way, or refuse to do so whenever it thinks the purposes of justice will be better accomplished in a plenary proceeding by bill and answer; and consequently no appeal will lie from its decision, made in the exercise of this discretionary power. In the case before us, by the division of opinion between the judges, the motion was as legally and effectually refused as if both had concurred in the refusal. And as the decision in the latter case could not have been reviewed here upon appeal, for want of appellate jurisdiction over such questions, we should hardly be justified in assuming jurisdiction, and exercising appellate powers over the same questions when they come before us on a certificate of division.

Besides, the act of 1802 obviously contemplates a suit in court, in which plaintiff and defendant have both appeared, for it directs the point to be certified at the request of either party. But here there is no party but the one in whose behalf the motion is made. No defendant is named, and no process prayed for. And if, in this stage of the case, the legality of

this proceeding can be certified to this court for its opinion, the same thing may be done at the commencement of any other equity proceeding, and this court called on to decide in advance, before any process is issued or any party brought into court, whether a motion, or an original bill, or any other of the many description of bills known in equity practice, was the proper and appropriate remedy in the case which a party was about to bring before the Circuit Court. No one will suppose that such a practice was intended to be established by the act of 1802.

The court order and adjudge that this opinion be certified to the Circuit Court, and that the cause be remanded.

THE UNION STEAMSHIP COMPANY OF PHILADELPHIA, CLAIMANTS AND OWNERS OF THE STEAMSHIP PENNSYLVANIA, HER TACKLE, &C., APPELLANTS, *v.* THE NEW YORK AND VIRGINIA STEAMSHIP COMPANY.

In a collision which took place in Elizabeth river, in 1855, between the steamship Pennsylvania and the steamship Jamestown, the Pennsylvania was in fault, and the collision cannot be imputed to inevitable accident.

Inevitable accident must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident.

If the night was very dark, it was negligence in the master of the Pennsylvania to remain in the saloon until just before the collision occurred; and if the night was not unusually dark, there was gross negligence in those who had the management of the deck.

The helm of the Pennsylvania was put to starboard when it ought not to have been, and the supposition that she was backing is shown not to have been correct by the force with which she struck the other vessel, which had taken every precaution to avoid the danger.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Virginia, sitting in admiralty.

It was a case of collision which occurred between the steamship Jamestown and the steamship Pennsylvania, the libel

being filed by the owners of the former. The collision took place some few miles below the port of Norfolk, in Virginia, under circumstances which are freely stated in the opinion of the court.

The District Court decreed in favor of the libellants, and assessed the damages at $1,893.08, with interest from 1st of February, 1855, till paid, and the Circuit Court affirmed the decree.

Upon an appeal to this court it was submitted on printed argument by *Mr. Kane* for the appellants, and argued by *Mr. Watson* for the appellees.

Mr. Kane contended that the evidence justified the conclusion that the collision was the result of inevitable accident, arising from the intense fog which had settled upon the Elizabeth river, which position was denied by *Mr. Watson.* The arguments could not be explained without a reference to the testimony, which was quite voluminous.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Virginia, sitting in admiralty. The libel was filed in the District Court, by the appellees, on the thirteenth day of June, 1855. It was a proceeding *in rem* against the steamship Pennsylvania, and was instituted to recover compensation for certain damage done to the steamship Jamestown, by means of a collision which occurred between those steamers in Elizabeth river, on the night of the seventh of January, 1855, some five or six miles below the port of Norfolk, in the State of Virginia. At the time of the collision, the Jamestown was on her regular weekly trip from the port of Norfolk to Richmond, in the same State, and the Pennsylvania was proceeding up the river to Norfolk, in the prosecution of her regular semi-monthly trip from Philadelphia to her place of destination. Libellants allege that the Jamestown was pursuing her usual and proper course down the river, and that the collision occurred in consequence of

the improper and unskillful management of those in charge of the other steamer. Process was duly served, and the respondents appeared and answered to the suit. They admitted the collision, but alleged, in effect, that it occurred in consequence of the intense darkness of the night, occasioned by a dense fog, without any such negligence or fault as is alleged in the libel, and in spite of every possible precaution on the part of those in charge of their steamer to prevent it. A decree was entered for the libellants in the District Court, which was affirmed, on appeal, in the Circuit Court, and thereupon the respondents appealed to this court. It is now conceded by the respondents that the collision was not occasioned by any fault on the part of those in charge of the injured vessel, but it is insisted in their behalf that the colliding steamer was also without fault, and that the collision was the result of inevitable accident. To establish that defence, they rely entirely upon the character of the night, as shown by the evidence, and the circumstances attending the disaster. From the evidence, it appears that the Jamestown left the wharf at Norfolk on the seventh of January, 1855, about eleven or half past eleven o'clock at night, as alleged in the libel. When she started there was a thick fog in the harbor, but she met with no difficulty in passing out, and it so far cleared away in about half an hour that those in charge of her deck, as she proceeded down the river, could see the lights and even the hulls of vessels ahead, and the land on the eastern shore. Several witnesses also testify that the moon had risen, and that stars were occasionally visible, though they admit that it was still quite foggy, and that there was a heavy mist on the water. Two competent look-outs were accordingly stationed at the usual place in the forecastle, and the signal-lights of the steamer were properly displayed. Those precautions had been taken at the time the steamer left the wharf, but about the time she passed the naval hospital, the master, as he had been accustomed to do on similar occasions, left the quarter-deck, and took a position in the rigging of the steamer, some ten feet above the hurricane-deck. Leaving the look-outs properly stationed in the forecastle to perform their usual duties, he

doubtless chose that more elevated situation to get a less obstructed view of distant objects, and he testifies that he could then see a mile and a half ahead, and the evidence furnishes no good reason to doubt the truth of his statement.

Intending to take the eastern side of the channel, another precaution also became necessary, so as not to incur the hazard of running the steamer aground; and to guard against any such danger, he directed the mate to heave the lead at short intervals, and to report to him the soundings; and the order was faithfully obeyed. Having taken these precautions, he continued to prosecute the voyage at a moderate rate of speed, sometimes stopping the engine when the fog shut in, and occasionally ringing the bell and sounding the whistle; and the steamer, pursuing her regular course, rounded Lambert's point in perfect safety, passing so near to the buoy located there that it was seen by the master from his position in the rigging, and particularly noticed. On arriving there, it was necessary to change the course of the steamer; and inasmuch as he had noticed the buoy, he was enabled to perform that duty without danger of mistake. Orders were accordingly given to the wheelsman to set the course north one-fourth east, and to run by the compass. During all this time the master remained in the rigging, and he testifies that after the steamer rounded the point, he could see from the buoy to Craney Island light-ship, which, according to his estimate, is a mile and a half. Presently, however, as the steamer advanced, he saw another light, on the larboard bow of the steamer, and finding upon inquiry that the wheelsman had not seen it, he called his attention to the fact that there were two lights, expressing the opinion, at the same time, that the one last discovered was the light of the Pennsylvania coming up the river. His own steamer at that time was heading north, half east, and he directed the wheelsman to port the helm, so as to keep both lights well on the larboard bow, which had the effect gradually to sheer the steamer still closer to the eastern side of the channel. She had previously been running in about four fathoms of water, but the mate soon reported that the soundings showed only three, and as she

advanced, he informed the master that there was but two and a half fathoms, and cautioned him that there was danger of running aground. At this time the master saw the signal-lights and hull of the Pennsylvania, as she passed the light-ship, on the western side of the channel. Immediate orders were then given to ring the bell and sound the whistle, and the master testifies that the signals were answered from the approaching steamer. Shortly afterwards, the mate reported that the soundings showed but ten feet of water, and immediately upon receiving that information he gave the necessary orders to stop the machinery, and reverse the engine. Both orders were promptly obeyed, and it was then the master first discovered that the approaching steamer had altered her course, and was heading diagonally across the channel towards the Jamestown. They were then less than a quarter of a mile apart, and seeing that a collision was almost inevitable, he instantly directed the alarm-bell to be rung, and the whistle of the steamer to be sounded; and as there was nothing more that he could do to avoid the danger, he gave warning to the men in the forecastle, and left the rigging, and returned to the quarter-deck. Further reference to the circumstances preceding the collision, so far as respects the injured steamer, is unnecessary at this stage of the investigation. According to the evidence, it seems that the Pennsylvania arrived off Cape Henry at an early hour in the evening of the day of the collision, but in consequence of the fog and the difficulties of the navigation she did not enter the river till after eleven o'clock at night. She proceeded up the river at the rate of about six miles an hour, and the mate, who was the acting pilot after she entered the river, and had charge of her deck, admits that she ran very close to the before-mentioned light-ship, and that her course at that time was south, half east, and it is not possible to doubt that if she had continued on that course a short time longer, all danger would have been avoided. Such, however, was not the fact, as is clearly shown by the pilot himself, and we refer to his testimony in preference to that of the master, because the latter remained in the

saloon until just before the collision occurred. Among other things, the pilot admits, that shortly after his steamer passed the light-ship, he gave the order to starboard the helm; and what seems even more remarkable, in cases of this description, he acknowledges that he gave the order after he knew that another steamer was approaching, though he denies that he had seen her lights. His theory is, and he accordingly testifies, that he first gave the order to stop and back; and inasmuch as that order had been executed, and the steamer had actually commenced to back, that putting the helm a-starboard had the same effect as porting the helm would have produced if the steamer had been going ahead. But it is a sufficient answer to that theory, as applied to this case, to say that the evidence shows beyond the reach of doubt, that the steamer was still advancing at the rate, at least, of three or four miles an hour, so that, upon his own theory, he committed an error, and according to his own testimony he committed it with a knowledge of the approaching danger. Three or four witnesses, including the master of the colliding steamer, testify that she was advancing three or four miles an hour when the collision occurred, and the damage done to the injured steamer proves to a demonstration that her headway must have been very considerable. On the contrary, the injured steamer had nearly stopped, and being already as close to the eastern side of the channel as the means of navigation would allow, she was almost as powerless to prevent the collision as if she had been lashed to the wharf from which she started. It was under these circumstances that the two steamers came together, and the evidence shows that the colliding steamer struck the other on the port-bow near the forward gangway, some thirty or forty feet abaft the stem. As described by the witnesses, it was a full blow at right angles, and had the effect to force the stem of the colliding steamer some six feet into the hull of the other, tearing up the deck of the forecastle a third part of the way across the vessel, and breaking into two pieces six or eight of the largest timbers. Looking at the whole circumstances of the collision, it is vain for the respondents to suppose that

this court can hold that it was the result of inevitable accident. Where the collision occurs exclusively from natural causes, and without any negligence or fault either on the part of the owners of the respective vessels, or of those intrusted with their control and management, the rule of law is, that the loss must rest where it fell, on the principle that no one is responsible for such an accident, if it was produced by causes over which human agency could exercise no control. Stainback et al. *v.* Rae et al., 14 How., 533; 1 Pars. M. L., 187. But that rule can have no application whatever to a case where negligence or fault is shown to have been committed on either side; for if the fault was one committed by the libellant alone, proof of that fact is of itself a sufficient defence; or if the respondent alone committed the fault, then the libellant is entitled to recover; and clearly, if both were in fault, then the damages must be equally apportioned between them. Plainly, therefore, it is only when the disaster happens from natural causes, and without negligence or fault on either side, that the defence set up in this case can be admitted. Inevitable accident, as applied to cases of this description, must be understood to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. The Locklibo, 3 W. Rob., 318. The John Frazer, 21 How., 184. It is not inevitable accident, as was well remarked by the learned judge in the case of the Juliet Erskine, 6 Notes of Cases, 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done." He must show that he acted seasonably, and that he "did everything which an experienced mariner could do, adopting ordinary caution," and that the collision ensued in spite of such exertions. The Rose, 7 Jur., 381. Unless the rule were so, it would follow that the master might neglect the special precautions which are often necessary in a dark night, and when a collision had occurred in consequence of such neglect, he might successfully defend himself upon

the ground that the disaster had happened from the character of the night, and not from any want of exertion on his part to prevent it. The Batavier, 40 Eng. L. and Eq., p. 25. The Europa, 2 Eng. L. and Eq., 564. The Mellona, 5 Notes of Cases, 558. Applying these principles to the present case, it is obvious that the defence set up by the respondents cannot be sustained. They not only fail to show that the steamer was without fault, but the testimony of those in charge of her incontestably proves that they were guilty of negligence in more than one particular. Both steamers were in the prosecution of their regular and stated trips, and of course those in charge of them knew, or ought to have known, that they were liable to meet each other on the route; and if it was so dark that the lights of an approaching steamer could not be seen, it was negligence in the master, while his steamer was proceeding at the rate of six miles an hour, to remain in the saloon, wholly inattentive to the peculiar dangers incident to the character of the night; and if it was not unusually dark, then it is clear that there was gross negligence on the part of those in charge of the deck. It is shown by the evidence, that the colliding steamer had two look-outs; but it is not shown what, if any, duty they performed in the emergency, or that any inquiries were made of them, either when the course of the steamer was changed near the light-ship, or when the pilot heard the noise made by the wheels of the approaching steamer. But the great fault committed on the occasion was that of putting the helm to starboard, instead of keeping the course or porting it when it became known that the other steamer was approaching; and the excuse given for it by the pilot, that he supposed his own steamer was backing, only adds to the magnitude of the error, as it shows that the order was given without knowing what its effect would be, which could only have happened from indifference or inattention to duty.

For these reasons, we are of the opinion that the decision of the Circuit Court was correct, and the decree is accordingly affirmed, with costs.

JOHN T. MARTIN, ANDREW PROUDFIT, AND JOHN KEEFE, PLAINTIFFS IN ERROR, *v.* WILLIAM H. THOMAS AND ROBERT A. BAKER, ADMINISTRATORS OF MAJOR J. THOMAS, DECEASED, USE OF GEORGE T. ROGERS.

Where there was an action of replevin in Wisconsin, by virtue of which the property was seized by the marshal, and a bond was given by the defendant in replevin, together with sureties, the object of which was to obtain the return of the property to the defendant; which bond was afterwards altered, by the principal defendant's erasing his name from the bond, with the knowledge and consent of the marshal but without the knowledge or consent of the sureties, the bond was thereby rendered invalid against the sureties.

THIS case was brought up by writ of error from the District Court of the United States for the district of Wisconsin.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Doolittle* and *Mr. Ewing* for the plaintiffs in error, and by *Mr. Reverdy Johnson*, upon a brief filed by himself and *Mr. Hopkins*, for the defendants.

The counsel for the plaintiffs in error made the following points:

I. The bond upon which judgment was recovered was invalid as against the defendants, because after the same was executed by them as sureties, Remington, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond.

Hunt's Adm. *v.* Adams, 6 Mass., 521.

Speake et al. *v.* U. S., 9 Cranch, 35.

Miller *v.* Stewart, 9 Wheaton, 702, 703.

II. After the execution of the bond by the defendants to be delivered to the marshal, it was refused and disagreed to by him, and it thereby became void. Any subsequent alteration would create a new deed requiring a new execution, or positive assent to the same, to give it validity against the defendants.

O'Neale *v.* Long, 4 Cranch, 60, 62.

See Sheppard's Touchstone, 70, 394, as to the effect of disagreement.

III. There was no breach of the condition of the bond.

The obligors undertook to deliver the property in question to the marshal, if such delivery were adjudged, and to pay him such sum as might for any cause be recovered against the defendants, Henry W. Remington and John T. Martin, jun.

The return of the property was not adjudged, and there was no recovery of any sum of money against the defendants. The recovery was against one only.

See Miller *v.* Stewart, 9 Wheaton, 702, 703, and the cases cited.

The counsel for the defendants in error maintained that the alterations of the bond were immaterial, and cited:

15 John., 293; 1 Wend., 659; 10 Conn., 192.

18 Pick., 172; 5 Mass., 538; 2 Barb. Ch'y R., 119.

16 N. Y. Rep., 439; 3 Comsk. R., 188.

1 Greenleaf, (Maine Rep.,) Hale *v.* Russ.

1 Coke's Rep., 60.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the district court of the United States for the district of Wisconsin.

The action was replevin; the pleadings being filed, a jury was called, who rendered a verdict in damages for nine thousand seven hundred and eighty dollars and ninety-six cents, with costs.

In the course of the trial a bill of exceptions was filed, on which the questions of law were raised. Be it remembered, that at the trial of the above-entitled action, the plaintiff produced an instrument in writing in the words and figures, and with interlineations and erasures following, to wit:

Know all men by these presents, that we and John T. Martin, and John Keefe, and Andrew Proudfit, are held and firmly bound unto Major J. Thomas, marshal of the United States for the Wisconsin district, in the sum of twenty thousand dollars, to be paid, &c.

Whereas the defendants have required the return of property replevied by the marshal, at the suit of George T. Rogers against Henry M. Remington and John T. Martin, jun.; now,

the condition of this obligation is such, that if the said defendants in said suit shall deliver to the marshal said property, if such delivery be adjudged, and shall pay to him such sum as may for any cause be recovered against the defendants, then this obligation to be void.

The bond upon which judgment was recovered was void, as against the defendants, because, after the same was executed by them as sureties, Remington, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond.

In Miller *v.* Stuart, 9 Wheat., 702, Mr. Justice Story said, nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal.

Hunt's Adm. *v.* Adams, 6 Mass., 521.

2. After the execution of the bond by the defendants, to be delivered to the marshal, it was refused and disagreed to by him, and it thereby became void. Any subsequent alteration would require a new deed or positive assent to the same, to make it valid against the defendants.

Sheppard's Touchstone, 70, 394.

The judgment is reversed.

CHARLES F. MAYER, SURVIVING PERMANENT TRUSTEE OF JOHN GOODING, APPELLANT, *v.* WILLIAM PINKNEY WHITE, ADMINISTRATOR DE BONIS NON OF JOHN GOODING AND ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED.

Another branch of the cases arising under the Mexican Company of Baltimore, formed in 1816.

This court decided, in 17th Howard, 274, that the interest in one of these shares did not pass to a trustee in insolvency in 1819, the contract with Mina having been declared by the Court of Appeals of Maryland to be utterly null and void, so that no interest could pass to the trustee of an insolvent.

But in 1824, Mexico assumed the debt as one of national obligation, and the United States made it the subject of negotiation until it was finally paid.

A second insolvency having taken place in 1829, there was a right of property in the insolvent which was capable of passing to his trustee.

The claim of the latter is therefore better than that of the administrator of the insolvent.

THIS was an appeal from the Circuit Court of the United States for the district of Maryland.

It was a branch of the cases relating to the shares of the Mexican Company of Baltimore, so often reported in the preceding volumes of Howard, and which are referred to in the opinion of the court. The opinion contains, also, a statement of the facts in the present case.

The bill was originally filed in the Circuit Court for Baltimore county (State court) by Charles F. Mayer and John Barney, trustees of John Gooding, under his insolvency in 1829, against John Gooding, jun., Charles Oliver, and Robert M. Gibbes. It was removed into the Circuit Court of the United States, upon the application of John Gooding, junior, who alleged that he was a citizen of Virginia. An answer was filed by Gooding, who afterwards died, and White became administrator de bonis non of the first John Gooding. A bill of revision was filed, and other proceedings took place, amongst which was a suggestion of the death of John Barney, so that Mayer became the surviving trustee. Gibbes and Oliver answered, and in May, 1858, Judge Giles, then holding a Circuit Court, dismissed the bill; from which order Mayer appealed to this court.

It was argued by *Mr. Mayer* and *Mr. Reverdy Johnson* for the appellant, and submitted on printed argument by *Mr. Dulany* and *Mr. Campbell* for the appellees.

It is proper to mention that when the mandate of this court,

in the case of Gooding, 17th Howard, 274, went down, the executors of Oliver paid into court the money and stocks sued for; and afterwards, in pursuance of an order of the court, passed on the 28th June, 1858, (after the dismissal of the bill, as above mentioned,) the same stocks and money were paid out of court to White. It was agreed by the counsel that the claim of Mayer was exclusively against White as administrator.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland.

The bill was filed in the court below by Charles F. Mayer, the surviving trustee of John Gooding, appointed under certain proceedings instituted by Gooding before the commissioners of insolvent debtors for the city and county of Baltimore, for the benefit of the insolvent laws of Maryland, in October, 1829. Gooding was an original owner of a share in what is known as the Baltimore Mexican Company, which, in 1816, furnished General Mina with the means to fit out a warlike expedition against Mexico, then a province of Spain. The expedition failed, and Mina perished with it soon after he landed. Mexico having subsequently achieved her independence, the company made application to the new Government to assume the debt, which it did, by a decree of the 28th June, 1824; but payment was delayed, from time to time, until this, with other claims against the Government, were adjusted and discharged, under the convention between this Government and Mexico, of April, 1839. The share of Gooding, which was one-ninth of the interest in the contract of Mina, amounted, at the time of its allowance by the commissioners under this convention, to the sum of $39,381.82. The complainant claims this amount, with interest, under the insolvent assignment made by Gooding for the benefit of all his creditors, as already stated, under the insolvent laws of Maryland, in 1829.

The defendant, White, the administrator de bonis non of Gooding, sets up a title to the fund as the personal representative of the estate, and claims it as part of the assets which belong to the heirs and distributees.

The history of the litigation among the several claimants to the money, awarded to the Baltimore Company by the commissioners, under the convention with Mexico, (amounting to the sum of $354,436.42,) of which the fund in controversy is a part, will be found in the 11th How., 529; 12 Ib., 111; 14 Ib., 610; 17 Ib., 234; and 20 Ib., 535.

In the case of John Gooding, administrator de bonis non of John Gooding, deceased, *v.* Charles Oliver and others, executors of Robert Oliver, (17 How., 274,) the present fund was in controversy between the administrator of the estate, claiming it as assets, and the representatives of Robert Oliver, claiming it by virtue of a purchase from an insolvent trustee, under proceedings instituted by Gooding for the benefit of the insolvent act of Maryland in 1819. As between these parties the court held, that the administrator was entitled to the fund as assets of the estate. The reasons for this decree will be found in the report of the case referred to.

Gooding, as has been already stated, again took the benefit of the insolvent act in 1829, and the question now is between the trustee appointed under these insolvent proceedings, as assignee of his estate for the benefit of creditors, and the present administrator de bonis non, the personal representative.

The executors of Oliver, who claimed under the trustee in the first insolvent proceedings in 1819, failed to hold the fund against the personal representative in the case referred to, upon the ground the courts of Maryland had decided that the contract of the Baltimore Company with General Mina, which had been made in violation of our neutrality laws, was so fraught with illegality and turpitude, and so utterly null and void, that no claim to, or interest in it, passed under their insolvent laws to the trustee; and such being the construction of a statute of Maryland by her own courts, this court, according to the established course of decision, felt bound by it, and consequently the insolvent trustee took no interest in the Mina contract, nor Robert Oliver, or his personal representatives, who claimed under him.

The case now comes before us between the trustee in the

insolvent proceedings of 1829, under the assignment for the benefit of creditors, and the present personal representative of the estate of Gooding, the former in the mean time having died; and the principal question is, whether or not this trustee took the interest of the insolvent in the Baltimore Company in 1829, by virtue of these proceedings. If the interest is to be regarded in the same condition as it stood, according to the judgment of the Maryland courts, at the time of the former insolvent proceedings, our conclusion must be the same as in the case of Gooding, administrator, *v.* the Executors of Oliver. The personal representative would be entitled to the fund.

It is insisted, however, by the learned counsel, on behalf of the trustee, that the state and condition of this interest had in the mean time changed, and had become an admitted legitimate demand or debt against the Mexican Government, wholly exempt from any taint of illegality or turpitude, and hence to be regarded as property of the insolvent, to be devoted to the benefit of his creditors.

This interest or demand, as it stood in 1819, at the time of the first insolvent assignment, as we have seen, arose out of a contract between the Baltimore Company and General Mina, which, as admitted, was illegal, being in violation of our neutrality laws. Whether that constituted a valid objection to the assignment under the insolvent laws of Maryland, for the benefit of creditors, is not a question now before us. The affirmative was held by a court having jurisdiction to decide it. If an original question, we should not have had much difficulty in disposing of it. This contract, then, stood simply upon the personal obligation of Mina, and as between the parties it was void and of no effect, if Mina or his legal representatives chose to avail themselves of its illegality. But Mexico, after she had gained her independence in 1824, assumed the debt due to the Baltimore Company as one of national obligation, which had been contracted for the service and benefit of the nation by a general declared *bene meritos de la patria.* The assumption was the free act of a sovereign power, and wholly independent of the question as to the legal qualities or charac-

ter of the debt, as viewed under the statute or common law of the country in which it originated. It was assumed by the Congress of Mexico, upon public political considerations, in favor of persons who had contributed their means in support of the struggle which resulted in the achievement of her independence, and the obligation rests not upon the contract of General Mina, or municipal regulations, but upon the decree of the sovereign power and public law of the nation.

We may add, that after the recognition and adoption of this claim by the Mexican authorities, the Government of the United States, through its minister to that country, made it the subject of negotiation on behalf of the parties in interest, who were citizens, for the purpose of procuring indemnity for the same, and which resulted, as has been already stated, in its satisfaction, under the convention of 1839.

We have no difficulty, therefore, in holding that the demand in 1829 constituted a right of property or interest in Gooding, the insolvent, that passed to the plaintiff as trustee, by virtue of the assignment under the insolvent proceedings of 1829. The case of Comegys et al. *v.* Vase, (1 Peters, 193, 216, 218, 220,) is a full authority upon this point.

As to the objection that the plaintiff is concluded by the decision of this court in the case of the former, Administrator of Gooding *v.* the Executors of Oliver, reported in the 17th How., 274, one of the questions decided in that case furnishes a conclusive answer to it. We need not repeat the reasons or authority which led this court to its conclusion, which are there stated at large.

The decree of the court below reversed and remanded, with directions to enter a decree for the plaintiff against the administrators of Gooding, deceased, in pursuance of above opinion and stipulations of parties.

JOHN M. FACKLER, APPELLANT, *v.* JOHN R. FORD AND OTHERS.

The fourth and fifth sections of the act of Congress passed on the 31st of March, 1830, (4 Stat. at L., 392,) entitled "An act for the relief of purchasers of pub

lic lands, and for the suppression of fraudulent practices at the public sales of the United States," cited and explained.

One who covenants to sell lands which he expects to purchase at such sales, cannot afterwards plead his own fraud in obtaining his title from the Government in bar of a decree for specific performance of his agreement.

THIS was an appeal from the Supreme Court of the Territory of Kansas.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Carlisle*, upon a brief filed by *Mr. Badger* and himself, for the appellant, and by *Mr. Ewing* and *Mr. Coombs* for the appellees.

The counsel for the appellant insisted that the agreement of November 23, 1856, was in violation of the fourth and fifth sections of the act of 31st March, 1830.

4 Stat. at L., 392.

We insist that the contract on which this bill is filed is in conflict with the provisions of both these sections, and tends immediately to defeat or obstruct the purpose of Congress. That purpose, in both sections, is to secure free and open contests at the sales of the public lands by auction. The fourth section prohibits any contract or agreement to induce or prevent any one from bidding at such sales. Here, the plain result and effect of this contract was to prevent the appellees from bidding for land which the contract shows that they desired to possess; and this was directly within the scope of the agreement and purpose of the parties. For how could it be consistent with the agreement, that the appellant should buy for himself and the other parties; that the other parties should bid against him—that is, against themselves? That they would not, was certain, because those other parties were by the agreement to pay to the appellant one moiety of the price at which the land should be bid off by him; and the agreement shows upon its face that it was well understood that the appellant would, as a settler on the land, buy it for the *minimum* price at which it was to be put up for sale; or, in other words, it was the expectation that there would in effect be no

auction and no bid but that of the appellant, if the appellees did not enter the contest. And the agreement to pay the appellant ten thousand dollars beyond the price to be paid to the United States, shows that the land to be bought was known to be worth many times that price. It was therefore a plain, direct purpose of the contract to prevent the land from bringing a fair value, by stifling a contest, and excluding the only party besides the appellant desiring the land from bidding. And further, this understanding was so much a part of the contract, that the appellees could not have bid without violating the agreement on their part, and discharging the appellant from his part thereof. For to bid would have been to enhance the price, one-half of which the appellant was to pay, contrary to the obvious intent and purpose of the contract.

Now, all this is in plain contravention of the fourth section of the statute, which makes it an offence to bargain, contract, or agree with any person, that such person will not bid at any such sale, or even to attempt to make a bargain, contract, or agreement, for such purpose. Now, here was not only a contract, but an effectual one, by which the appellees were prevented from making a bid.

But further, the same section makes it an offence, by any "combination or unfair management," to hinder, or prevent, or attempt to hinder or prevent, any person from bidding; and though this primarily refers to the hindering of persons from bidding who are not parties to the combination or management, yet in this case, upon this contract, the combination or management with each other to procure the land at a less price, by preventing one of the parties, is seen to be within the mischief which the statute was intended to prevent; and whether the parties would or would not be indictable, yet the contract is in plain and evident conflict with the policy of the law, and therefore prohibited thereby.

But the contract is also manifestly a violation of the last cited section—the fifth of the statute.

That section prohibits any and every contract or secret understanding made by one or more persons with another who

proposes to purchase any such lands, to pay or give to such purchaser for such land a sum of money or article of property over and "above the price at which the land may or shall be bid off," and declares every such contract, &c., and "every bond, obligation, or writing, of any kind whatsoever, founded upon or growing out of the same," to be utterly null and void, and authorizes any party to such contract, &c., who may pay any such sum of money, &c., to sue for and recover back the same. Now, the contract in this case, we submit, falls, both literally and in spirit and intent, within the prohibition of this section. First, as to its letter. The parties came to an understanding for what the statute prohibited, and then entered into a written contract, which is void. Secondly, the whole scope and intent of the contract is in violation of the spirit of the law, which is, to secure a fair competition at the public sales. And both sections seek to accomplish that purpose—the former, by punishing any attempt to prevent bidding; the latter, by avoiding contracts between the parties, by which one should buy and sell to another at an enhanced price. The object is one—to insure fair competition. This is sought by both sections; and the contract in our case embraces both the modes of evading the enactment and accomplishing the mischief against which the statute was directed. There is, first, the attempt, by a bargain well devised and successfully carried out, to prevent competition, and procure the land at less than its value, by making it the interest of one party not to bid; then, there is, to accomplish the same purpose, the stipulation by that party to pay a price additional to that offered to and received by the United States at the auction-sale, and the actual payment thereof to the other party.

Now, it seems sufficiently obvious, that if such a contract will be enforced in a court of justice, for either party against the other, the object of the statute will be defeated. True, one or both the parties might have been, perhaps, indicted under the first section before the time of limitation had expired, and true, also, that one of the parties might, and may now, recover against the other the sum paid in violation of the law; but that is not the full measure of aid which courts

of justice give in support of the law. The indictment may be barred by time; the recovery back of the money may be prevented by the statute of limitations; but courts act upon the principle of giving no relief to parties to an unlawful contract—one expressly forbidden by law, or growing out of or connected with one so forbidden, or which plainly violates the policy of the law—the end and object of the law—however such contracts may be framed or executed.

This case, we submit, falls within this principle, and the appellees are consequently not entitled to relief.

The counsel for the defendant contended, on the other hand, that the agreement was not in violation of either of these sections.

The fourth section was intended to protect the United States against combinations to prevent competition at the sales.

Now, this case does not come within the provisions of this fourth section; there is no such agreement as it contemplates, either alleged or proved. If that section stood alone, this would be simply a case where two or three men give two or three other men a sum of money, the latter of whom are to bid off two designated tracts of land for the common benefit, and divide the land equally between them.

2. But the contract does, we think, come within the fifth section of the same act, which was intended, not for the protection of the United States, but for the protection of the person who is made to pay a premium to another for bidding off land for him. It is to prevent the levying of black mail, by combinations of men, trespassers on the public lands, who assemble at the sales, and with rifle and revolver overawe honest bidders. It was intended for such cases. It is in these words:

"That if any person or persons shall, before or at the time of the public sale of any of the lands of the United States, enter into any contract, bargain, agreement, or secret understanding with any other person or persons, proposing to purchase such land, or pay or give such purchasers for such land a sum of money, or other article of property, over and above

the price at which the land may or shall be bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void. And any person or persons being a party to such contract, bargain, agreement, or secret understanding, who shall or may pay to such purchasers any sum of money or other article of property, as aforesaid, over and above the purchase money of such land, may sue for and recover such excess from such purchasers in any court having jurisdiction of the same. And if the party aggrieved have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess aforesaid, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same: Provided, every such suit, either in law or equity, shall be commenced within six years next after the sale of said land by the United States."

The person of whom illegal exaction is made is not an offending, but, in the language of the act, the "aggrieved" party. Courts of equity are opened to him; he may compel a disclosure by the offending party, and he may have a decree for "such excess" as he has been compelled to pay. He may not, as seems to be supposed on the other side, recover back the actual purchase money, but only the excess, having his remedy in equity, as a matter of course, for the title to his land also. The fact that he has been swindled in the purchase, does not at all deprive him of his right to the land purchased. If the complainants had paid but $560, the actual price at which the land was bid off, they would have been entitled to their half of the land, beyond all doubt or question. But they were illegally required to pay an "excess," or not get the land. They paid it; the act of Congress says they are "aggrieved," and have a right to recover it back in equity. The act which gives them equitable remedy, which they had not, cannot be construed to take away that which they already

had. It is not intended to aggrieve the person imposed on, but to redress his grievance.

Mr. Justice GRIER delivered the opinion of the court.

Ford and others are complainants in a bill for specific performance of a contract made by them with Fackler & Mills.

The bill charges that on and before the 22d of November, 1856, Fackler claimed, as actual settler thereon, a fractional section of land containing sixty acres, and Mills the east half of a quarter section, containing eighty acres, in Leavenworth county, Kansas Territory, being parts of the land purchased by the Government of the United States of the Delaware Indians.

These lands had been appraised at eight dollars an acre, and advertised for sale pursuant to law. That prior to that date, Fackler & Mills surveyed and laid off said tracts of land so claimed and held by them, into blocks, lots, public grounds, streets, alleys, &c., for a town to be known as "Fackler's addition" to Leavenworth city; that they made a plat of it and divided the whole into eighty shares of six lots each, executing certificates, on the back of each of which they indorsed the lots assigned; that they also represented themselves to be owners of a ferry right from the south part of Fackler's addition to and including a landing on the opposite side of the Missouri river, and a lease of a fractional section in Platte county, in Missouri, containing thirty-four acres; that Fackler & Mills were anxious to sell and dispose of the undivided half of the ferry, together with an equal and divided half in lots of the 140 acres, being 40 shares, containing in the aggregate 240 lots; that on the 22d of November, 1856, they entered into covenant, under seal, to sell to complainant 40 shares, being one-half of 140 acres in Fackler's addition to Leavenworth city, which shares were divided and agreed to be the following lots, viz: 23, &c., &c., &c.; that the complainants have paid the sum of $10,000 as a consideration, and agreed to furnish one-half the purchase money to be paid at the Delaware sales; that Fackler & Mills agreed to make a quit-claim deed to the vendees when they have obtained a title for the lands, and as

part consideration of said payment, a deed for the undivided half of the ferry right and lease of grounds on the Missouri side should also be executed.

At the bottom of this agreement, of the same date, is a receipt by Fackler for $560, "being one-half of the appraised value of the lands described in the within contract, which we are to use in paying for the said lands at Delaware sales, held at Leavenworth this day."

The bill further charges that Fackler & Mills did obtain a title for said land, and now refuse to convey to complainant either the land or the moiety of the ferry right, and prays for a decree for specific performance.

The respondents demurred to this bill, and afterwards withdrew their demurrer and filed an answer. The answer admits the contract and receipt of the money, and purchase of the lands, but charges that the Government of the United States was trustee of the Delaware Indians of these lands, and that the act of the officers of the Government in fixing the value of the land, and in restricting the purchase thereof to settlers thereon, to such valuation, was a "fraud on the Indians," and that the plaintiffs were cognizant of such fraud; that the lands were appraised far below their true value; that respondents have not put the plat of their town on record; that therefore the description of the land is so vague and uncertain that a court cannot decree a specific performance; that a statute of Kansas requires all town plats to be recorded; that besides the money paid to the respondents, there was a parol representation made by complainants; that by their capital and influence they had built up other towns in the West, and would do the same with this if they could get a large interest at low rates; and that not having performed this part of their contract, respondent refused to make them a title; and lastly, the answer concludes with the following defence and apology:

"And this defendant says, that inasmuch as the plaintiffs have endeavored to avail themselves of a supposed technical legal advantage to aid them in a non-compliance with their contract, and have failed to comply with the same, defendant in turn claims that he is justified in charging, and does charge

and insist, that said contract was made before the relinquishment of the title of the Delaware Indians to said land, and in violation of the said treaty with said Indians; and that said agreement, settlement, survey, and *platte* of said land were each in violation thereof, and in violation of the laws of the United States, and in violation of the statutes of the Territory of Kansas, and in violation of the public policy of the United States, and void."

Afterwards, on motion of complainants, the court ordered to be expunged from the answer each one of the charges, a summary of which we have just given. This left in the answer nothing but an admission of the charges in complainants' bill.

A bill of exceptions (according to the practice of that court) was taken to this order of the court, and the case was then heard on the bill, answer, and exhibits, and a decree was entered for complainants, which was confirmed on appeal to the Supreme Court of the Territory.

The allegation that the United States defrauded the Indians, and that the lands were sold below their value, and consequently that Fackler, having got his title by a fraud, was bound to commit the further fraud of keeping the complainants' money and the land too, might well have been expunged from the answer as "*impertinent*" in every sense of the term. The plea of vagueness of description in the contract, and that defendant had not put his town plat on record before he got a title from the United States, partake largely of the same quality.

The plea that plaintiffs had not used their influence to bring emigrants and make improvements in the intended addition to the city, and thus add value to the land which the respondent would *not* convey to them, was surely *irrelevant*, if not impertinent; and finally, the sweeping charge in the conclusion of the answer, that the whole transaction was in violation of the treaty with the Indians, and in violation of the laws of the United States, and of the statutes of Kansas, does not indicate whether respondent intends to charge the complainants with fraud, or rely upon his own. It alleges no facts, and is fol-

lowed by no proof. It is in fact a return to the demurrer to the bill, and as such has been argued in this court.

The question to be decided is, whether there is anything on the face of this contract which shows it to be void by any law of the United States. How the treaty or the laws of Kansas can affect it has not been shown, and need not be further noticed. It was time enough to record the plat of the intended city when the respondents had obtained a title, and so far as it concerned the complainants, they could not be in default till they got a title, and were offering their lots for sale. The enumeration of the lots in the contract was a mode of specifying how the land should be divided, and the plat of the intended town could be referred to for description and certainty just as any other private survey or draft.

The laws of the United States which it is alleged invalidate this contract, are the fourth and fifth sections of the act of Congress of 31st of March, 1830, entitled "An act for the *relief of purchasers of public lands*, and for the suppression of fraudulent practices at the public sales of the lands of the United States." These sections are in these words:

"Sec. 4. That if any person or persons shall, before or at the time of the public sale of any lands of the United States, bargain, contract, or agree, or attempt to bargain, contract, or agree, with any other person or persons, that the last-named person or persons shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or shall by intimidation, combination, or unfair management, hinder or prevent, or attempt to hinder or prevent, any person or persons from bidding upon or purchasing any tract or tracts of land so offered for sale, every such offender, his, her, or their aiders and abettors, being thereof duly convicted, shall, for every such offence, be fined not exceeding one thousand dollars, or imprisoned not exceeding two years, or both, in the discretion of the court.

"Sec. 5. That if any person or persons shall, before or at the time of the public sale of any of the lands of the United States, enter into any contract, bargain, agreement, or secret understanding with any other person or persons, proposing to purchase such land, or pay or give such purchasers for such

land a sum of money, or other article of property, over and above the price at which the land may or shall be bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void. And any person or persons being a party to such contract, bargain, agreement, or secret understanding, who shall or may pay to such purchasers any sum of money or other article of property, as aforesaid, over and above the purchase money of such land, may sue for and recover *such excess* from such purchasers in any court having jurisdiction of the same. And if the *party aggrieved* have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess aforesaid, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same: Provided, every such suit, either in law or equity, shall be commenced within six years next after the sale of said land by the United States."

The fourth section is intended to protect the Government and punish all persons who enter into combinations or conspiracies to prevent others from bidding at the sales, either by agreement not to do so, or by intimidation, threats, or violence.

There is nothing to be found on the face of this contract which can be construed as an agreement not to bid, or to hinder, intimidate, or prevent others from doing so.

The fifth section is evidently intended for the protection of those who propose to purchase lands at the public sales from the extortions of those who have formed the combinations made penal by the fourth section. The complainants stand in the character of the "*party aggrieved*" by the fraud, if there be any in the case. If Fackler had made his conveyance according to his contract, and the complainants were *now* seeking to recover back the ten thousand dollars paid to him, this section of the statute might have been invoked by them, on proof of such a combination, and that Fackler was a party to it, as he

now acknowledges. But it is no part of the policy of this section to encourage frauds by releasing the fraudulent party from the obligation of his contract. The allegation of the answer that the contract was in violation of the treaty with the Indians, and of the acts of Congress, may be a confession of the respondent's own fraud, but it can give no right to commit another.

The answer filed in this case is by Fackler alone; the record shows the agreement of counsel that the bill be dismissed as to Mills.

The court below were therefore right in decreeing a specific performance of the contract, but erred in that part of the decree which orders a conveyance of the *undivided moiety of the* 140 acres. The contract is for a specified and divided moiety of the land, and an undivided moiety of the ferry privilege, and that portion of the decree which orders a conveyance according to the contract is affirmed with costs, and record remitted, with instructions to the court below to reform their decree in accordance with this opinion.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM-PACKET COMPANY, PLAINTIFFS IN ERROR, *v.* FREDERIC E. SICKLES AND TRUEMAN COOK. THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM-PACKET COMPANY, PLAINTIFFS IN ERROR, *v.* FREDERIC E. SICKLES AND TRUEMAN COOK.

Docket entries in the courts of the District of Columbia, as in Maryland, stand in the place of, and perhaps are, the record, and receive all the consideration that is yielded to the formal record in other States.

The record of a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count; for the verdict may have been rendered on the common counts.

This rule is not varied by the circumstance that after the verdict was rendered the court directed judgment to be entered for the plaintiffs on the first count in the declaration, being the special count.

The authorities upon the doctrine of estoppel examined.

THESE two cases were brought up by writ of error from the Circuit Court of the United States for the District of Columbia.

They related to the same subject-matter, and were argued together. The first case was an action brought by Sickles and Cook for their share of the earnings of the steam-packet company by the use of their cut-off from March 13, 1846, to October 19, 1846; the second for the same earnings from October 13, 1846, up to December 26, 1855.

The case was before this court at a preceding term, viz: December term, 1850, and is reported in 10 Howard, 419. The suit there was for earnings from 20th August, 1844, to March, 1846.

When the mandate went down a new trial was had, (the judgment of the court below having been reversed by this court,) which took place at October term, 1855. The plaintiffs below, Sickles and Cook, had in the mean time amended their pleadings according to the evidence as given on the first trial, by making the declaration consist of a special count and the common money counts. The record entries were as follows, relative to this trial in 1855:

Narr. Non assumpsit and issue.

November 22. Jury sworn; verdict for plaintiffs; damages $1,695.79, with interest from March 16, 1846; verdict rendered 7th December.

December 14. Judgment for plaintiffs on the first count in the declaration.

December 14, 1855. Appeal bond, writ of error, citation, &c.

The writ of error thus sued out was not prosecuted, and the case was docketed and dismissed, under the rule, with costs, on December 19, 1856. Of course this was done at the instance of the counsel for Sickles and Cook.

On the 26th of December, 1855, the suits now in question were brought by Sickles and Cook. The declaration consisted of two special counts and the common money counts, which were afterward abandoned, and the case went to trial on the two special counts. It resulted in a verdict for the plaintiffs for $16,388.25.

On the trial of each of the two last-mentioned cases in the court below, the plaintiffs contended that by the verdict and judgment rendered in the case tried in 1855, between said plaintiffs and defendant, the existence of the contract as set forth in the two first counts of their declarations in said causes, (which was identical with that set forth in the declaration in said first-mentioned cause,) and the rate of saving ascertained by said experiments, were judicially settled between said plaintiffs and defendant; and that in all subsequent suits between the same parties on said contract, the said defendant was estopped to deny the same, or the rate of saving fixed by the experiment provided for by said contract, and the court below so ruled. The defendant excepted to the ruling of the court, and presented objections in various forms by different exceptions.

The reader will perceive that the principal question brought before this court by the bills of exception was that relating to the doctrine of estoppel, when taken in connection with the order of the Circuit Court passed on the 14th December, 1855, ordering judgment to be entered on the first count of the declaration.

The case was argued by *Mr. Badger* and *Mr. Carlisle* for the plaintiffs in error, and by *Mr. Bradley* and *Mr. Stone* for the defendants.

The whole doctrine of estoppel was reviewed, and also that of docket entries as being records. In order to give some account of the views of the counsel upon the first subject, the following may be referred to as a small branch of the argument.

The counsel for the plaintiff in error said:

Now, the rule we take to be this. If, in the former proceeding, the title of the party has been *directly* alleged, and *an issue taken upon it which involves no other matter*, or if any fact being part of that title has been thus *separated from all other matters* and made the point of an issue, the finding upon it may in such subsequent suit be relied on in pleading as a technical

estoppel, and not otherwise. And that where in the former suit there has not been such separation of the title from all other matters, but the same has been involved in a general issue with other matters, whether this arise from the mode of pleading adopted by the parties, or required by the nature of the action, no finding thereon can either establish or disaffirm the title so as to estop either of the parties in a subsequent suit; and that if it cannot operate as an estoppel by pleading, neither can it have the effect of an estoppel when given in evidence to the jury.

This is the undoubted law in England; which is proved by the case of Outram *v.* Morewood, already cited, where Lord Ellenborough shows the true nature and office of an estoppel as distinguished from a bar; by the case of Evelyn *v.* Hayes, cited with approbation in Outram *v.* Morewood, and tried before Lord Mansfield, which is precisely in point; by Hooper *v.* Hooper, McCl. and Young, 509, where, in an action for obstructing a way, the record of a verdict and judgment for the plaintiff in a former action, had on the plea of not guilty, was given in evidence, and it was held not to be conclusive of the plaintiff's right so as to prevent the defendant from going into his case; by Miles *v.* Rose, 5 Taunt. 704; and by the case of Carter *v.* James, 13 M. and W., 137; and there is no English case to the contrary.

It is true that different views prevail in the several States of the Union—some holding the English doctrine, and some admitting, in aid of the record, parol evidence to show on what points the case turned, of the most dangerous and latitudinarian scope and tendency, upon the notion that certainty was to be obtained by evidence in its nature the most uncertain, and that there was no danger in allowing one trial upon a general issue to conclude a question of title.

Mr. Justice GRIER, when delivering the opinion of this court, in the case of Richardson *v.* Boston, (19 How.,) takes notice of this contrariety of opinion in the several States; and we submit that the present is a fit occasion for this high tribunal to lay down a rule which may tend to introduce order and consistency into the decisions in the States, and at all events

to establish the true rule in this District. Here the court is trammeled by no State decisions establishing a local law, to which respect must be paid, whether right or wrong.

And we submit that the English decisions are in every respect entitled to the highest authority. They show the rule of the English law from the earliest times—from the Year Books down—of that common law which was brought over by our ancestors and established here, which is still maintained in many of the States in its original simplicity and directness, and which ought not to be subject to capricious variations by judges speculating how, in this age of progress, they can amend what they have no rightful authority to alter—what they are appointed to expound, and apply, and preserve, until the legislative power shall interpose to change it.

If this court should adopt the exposition of the law established in England, the rule is clear beyond controversy, that in a second action for a second injury to the same right or title, a verdict and judgment for a plaintiff on the plea of not guilty in a former suit cannot be used as an estoppel in pleading, and cannot be conclusive of the right when given in evidence to the jury.

And does not this rule apply to and settle our case? Ours is an action of assumpsit. There is no English case in assumpsit to which the rule has been applied, because no case has happened in which it could have been applied. Before Slade's case, as Lord Loughborough has shown, this action was never brought to recover a debt under the name of damages, but only to recover special damages for a breach of promise, as, for example, to recover on account of a breach of a promise to deliver corn, by which the plaintiff was obliged to buy corn at a higher price.

See Rudder *v.* Price, 1 Hen. Bl., pages 550 and 551, n. (a.)

Since the 29 Car. II no such case could well arise, since all contracts not to be performed within a year were avoided by that statute, unless reduced to writing, and signed by the party to be charged therewith. Hence, cases resting upon mere verbal evidence could not present such a question, and if

the contract was in writing, there would be no occasion to call in the aid of the former proceedings. But no case on an assumpsit where this question could have arisen has been found, so far as we know, in any English reports. Nothing is said against the application of the rule to it, nor intimated, and the case now before the court is precisely within the principle on which the cases establishing the rule are founded.

Upon the particular point decided by this court the counsel for the defendants in error said:

III. Are the plaintiffs to be deprived of the benefit of the estoppel for the reason that, when the verdict was rendered, the declaration, in addition to the special count in the contract, contained also common counts?

The jury by their verdict necessarily found the statements of fact in all the counts of the declaration to be true. The theory of several counts is that they represent distinct and independent transactions, otherwise the declaration would be subject to the charge of duplicity. When the verdict was rendered the plaintiffs might have had it entered on the first count, and the judgment following the verdict, there could have been no question as to the estoppel in this case, (if there can be an estoppel in any case,) for that count sets forth the contract and experiment, with the result of it.

This will hardly be doubted. Yet why is it, if not because the verdict found the truth of the allegation in each count?

Although the plaintiffs did not, when the verdict was rendered, have it entered on the first count alone, yet they subsequently had the verdict amended and applied to that count by the court, who were satisfied that the evidence given applied to it, and not to the other counts. That the court had power to do this is well settled, and an amendment may be made even after writ of error brought and argued in the upper court.

See Matheson, administrator, *v.* Grant, administrator, 2 Howard, 281, 282.

See Stockton et al. *v.* Bishop, 4 How., 167.

Bank of the United States *v.* Moss, 6 How., 39, shows that

at a subsequent term, after judgment has been arrested, the verdict may be amended and applied to the good count.

See, also, Parker *v.* Turner et al., 12 How., 45, as to amendments of verdicts at common law, and also the effect of the 32d section of the Judiciary act of 1789. If courts have power to amend verdicts for one purpose, there can be no good reason why they should not for another, when the amendment is made to apply the verdict to the count on which the testimony was given, particularly when the one purpose is as meritorious as the other. It may be that the amendment of the verdict in the case tried in 1855 is not regularly noted, but it is sufficiently shown by the entry of the judgment, by order of court, as the judgment must follow the verdict. This could not have been urged in a direct proceeding on that judgment, but would have been cured by the 32d section of the Judiciary act of 1789.

See 12 How., 45, and 4 How., 167.

It can hardly be an objection in a collateral proceeding.

This doctrine of estoppel is not a mere technical rule, tending to exclude truth, but it is based on sound principles of public policy. Society has an interest in putting an end to litigation, and preventing the unnecessary repetition of it. Courts are established for the benefit of the community, not to encourage the litigious spirit of individuals. This case is a striking illustration of the necessity of such a rule. The trial of the questions now disputed occupied the time of the court and jury below for fourteen business days. It does not appear that there was a motion for a new trial; if made, it was overruled before judgment was entered.

No writ of error was prosecuted.

Under such circumstances, public policy forbids a retrial of facts thus established.

The defendants had a fair trial as to the contract—had nine years to prepare for the trial, and should now abide by its result.

See Greenleaf on Evidence, vol. 1, sec. 531, R. 2.

Broom's Legal Maxims, p. 131.

"Interest republicæ ut sit finis litium."

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants in error, as plaintiffs, sued the plaintiffs in error, in assumpsit in the Circuit Court, upon a special parol contract, purporting to have been made in 1844, to the effect that they having a patent for Sickles's cut-off, for saving fuel in the working of steam-engines, and the defendants being the owners of a certain steamboat, it was agreed between them that the said patentees should attach to the engine of the defendants one of their machines; and that the defendants should pay for the use thereof three-fourths of the saving of fuel produced thereby, the payments to be made from time to time, when demanded. That, to ascertain the saving of fuel, an experiment should be made in the manner described in the declaration, and that the result should be taken as the rate of saving during the continuance of the contract, which was to be as long as the patent and the steamboat should last. The plaintiffs aver, that the experiment had been made, and the rate of saving had been duly ascertained; and that the machine had been used in connection with the engine on the said boat, until the commencement of the suit.

In the first count of the declaration, the plaintiffs further stated, that they brought, in March, 1846, a suit on this contract in the Circuit Court for the sum then due, and had obtained a verdict and judgment therefor in the Circuit Court in 1856, and had thus established conclusively the contract between the parties. These last allegations are not contained in the second count. The defendants pleaded the general issue.

The plaintiffs produced upon the trial, as the only testimony of the contract, the proceedings of the suit mentioned in the declaration, and insisted that these proceedings operated as an estoppel upon the defendants. These proceedings consisted of a writ, a declaration, containing two counts upon the contract, and the common counts, and the plea of the general issue; also a docket entry of a general verdict, in favor of the plaintiffs, on the entire declaration, and a docket entry of judgment, subsequently rendered on the first count—a count similar to the counts in the declaration in the present suit. The defendants objected to these docket entries as evidence

of a verdict and judgment; but insisted they were simply memoranda or minutes, from which a record of a verdict and judgment were to be made. It appears that in the courts of this district, as in Maryland, the docket stands in the place of, or, perhaps, is the record, and receives here all the consideration that is yielded to the formal record in other States. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit. Bateler *v.* State, 8 G. and J., 381; Ruggles *v.* Alexander, 2 Rawle, 232. Besides this testimony of the contract, the plaintiffs proved the quantity of the fuel that had been used in the running of the boat, and relied upon the rate as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract; or to disprove any one of the averments in the first count of the declaration in the former suit; or to show that no saving of the wood had been effected; or to show that the so-called experiment was not made pursuant to the contract, or was fraudulently made, and was not a true and genuine exponent of the capacity of the said cut-off; or to prove that the said verdict was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered, as by the docket entry it purports to have been, upon the issues generally, and not upon the first count specially.

The Circuit Court adopted these conclusions of the plaintiffs, and excluded the testimony offered by the defendants, to prove those facts.

The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists. Whether a judgment is to have authority as such in another proceeding, depends, *an idem corpus sit; quantitas eadem, idem jus; et an eadem causa petendi et eadem conditio personarum; quæ nisi omnia concurrent alia res est;* or, as stated by another jurist, *exceptionem rei judicatæ, obstare quotiens eadem qæstio inter easdem personas revocatur.* The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of

the cause of the demand, and of the parties in the character in which they are litigants. This court described the rule in Apsden *v.* Nixon, (4 How. S. C. R., 467,) in such cases to be, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties for the same purpose. The thing demanded in the present suit is a sum of money, being a part of the consideration or price for the use of a valuable machine for which the plaintiffs had a patent, and is the complement of a whole, of which the sum demanded in the first count of the declaration in the former suit is the other part. The special counts in the declaration of each suit are similar, being framed upon this contract; and a decision in the one suit on those counts in favor of the plaintiffs necessarily included and virtually determined its sufficiency to sustain the title of the plaintiffs on it. It was, therefore, admissible as testimony. This conclusion is supported by adjudged cases, and the authority of writers on the law of evidence. Gardener *v.* Buckbe, 3 Cow., 120; Dutton *v.* Woodman, 9 Cushing R., 256; Bonnier des Preuves, sec. 766; 8 Dalloz, Jur. Generale, 256, 257, 258. Buller, in his work on Nisi Prius, says: "If a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial were not had for the same lands, for the verdict in such a case is very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the jury. * * * It is not necessary that the verdict should be in relation to the same land; for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question." B. N. P., 232. The plaintiffs in error contend that, conceding the record to be admissible as evidence, to render the verdict and judgment in the first suit an estoppel, it must be shown by the *record*, that the very point which it is sought to estop the party from contesting was distinctly presented by an issue, and expressly found by the jury, and that no estoppel by verdict and judgment can arise in an action on the case, or an

action of assumpsit, tried upon the general issue, because in no such action can any precise point be made and presented for trial by a jury, and the cases of Outram *v.* Morewood, 3 East., 346, Vooght *v.* Winch, 2 B. and Ald., 662, are cited in support of this proposition. And the conclusion would seem to be proper for the attainment of the end, for which authority was allowed to the *res judicata* as testimony. Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the faculties for litigation. For this purpose, the presumption has been adopted, that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth.

This presumption is a guarantee of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judgment shall be preserved by the court, which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury, in common-law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over-technical rules, prolixity, and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiffs impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res judicata*. It was consequently decided that it was not neces-

sary as between parties and privies that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defence, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.

In Young *v.* Black, 7 Cr., 565, this court admitted in evidence a record of a former suit between the parties, in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits was the same. The court say: "The controversy had passed in *rem judicatam;* and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question." The current of American authority runs in the same direction. Wood *v.* Jackson, 8 Wend., 9; Eastman *v.* Cooper, 15 Pick., 276; Marsh *v.* Pico, 4 Rawle, 288; Green. Ev., section 531.

In the case before the court, the verdict was rendered upon two special counts, and the general counts in assumpsit, but the verdict in the subsequent stage of the proceedings was applied by the court only to the first count. The record produced by the plaintiffs showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the

facts properly pleaded by the plaintiffs. But when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it. Merriam *v.* Whittemore, 5 Gray, 316; Hughes *v.* Alexander, 5 Duer R., 488. The defendants in error contend the jury, by their verdict, necessarily found the statements of fact in all the counts of the declaration to be true; and the effect of a verdict and judgment on the whole declaration and a verdict and judgment on the first count is precisely the same, in producing an estoppel, as respects the matters contained in that special count. But this is not true. If the verdict had been rendered on the special count in exclusion of the others, the record itself would have shown that the existence and validity of the contract were in question. There would have been no ground for the inquiry whether any other issue was presented to the jury. But where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues. Henderson *v.* Kenner, 1 Rich. R., 474; Sawyer *v.* Woodbury, 7 Gray, 499. Nor do we think that the subsequent application of the verdict to a single count by the court precludes this inquiry. The authority of the courts to make the application, and the circumstances under which it is allowable, was considered by this court in Matheson *v.* Grant, 2 How., 263. It is done for the purpose of preventing the consequences of a misjoinder of counts in a declaration, or of the union of insufficient counts with others, so as to allow a valid judgment on the verdict. It had no reference to the use that might be made of the proceedings as testimony in another proceeding. In Maryland, the power to amend the record in this form was conferred by the act of 1809. 3 Maxey, Laws, 484. The case is not embraced in the earlier act of 1785 upon this subject. 3 H. and J., 9; Ibid, 91. It is the opinion of the court, that the Circuit Court erred in holding that the plaintiffs in error were estopped by the proceedings in the former suit, for any inquiry in respect to the matters in issue, and actually tried in that cause; and

its judgment is reversed, and the cause is remanded for further proceedings, in conformity with this opinion.

THE UNITED STATES, APPELLANTS, *v.* JOSE CASTRO AND OTHERS.

As a general rule, in order to support a title to land in California under a Mexican grant, the written evidence of the grant in the forms required by the Mexican law must be found in the public archives and records, where they were required by law and regulations to be deposited and recorded.

In order to support a title by secondary evidence, the claimant must show that these title papers had been deposited and recorded in the proper office; that the records and papers of that office, or some of them, had been lost or destroyed; and also, that he entered into the possession of the premises and exercised authority as owner within a reasonable time after the date of the grant. The possession is an essential part of the secondary evidence of title.

Parol proof of a grant produced from a private receptacle, without proof that it had been deposited and recorded in the proper office and the loss and destruction of papers in that office, is not sufficient to support a title, even if possession be proved by the oral testimony of witnesses.

THIS was an appeal from the District Court of the United States for the northern district of California.

The title of Castro is set forth in the opinion of the court.

It was argued by *Mr. Stanton* (Attorney General) for the United States, and *Mr. Edward Swann* for the appellees.

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

The appellees claim title to eleven leagues of land in California under a Mexican grant.

In March, 1853, they filed a petition before the board of land commissioners, stating that the land in question was, on the 4th of April, 1846, granted by Pio Pico, then Governor of California, to Jose Castro, one of the appellees, under whom the others claim as purchasers. The petition states that the land was occupied and improved by the grantee soon after the date of the grant.

It appears that the paper purporting to be the original grant was deposited in the Government archives of the United States, on the 8th of June, 1849, more than three years after its date, and two years after the cession of the territory. It was deposited not by Castro, but by Bernard McKenzie, whose representatives claim a portion of the land under a conveyance from Castro; and the deed to him bears date on the same day—that is, June 8, 1849. The following is the translation of the grant as it appears in the record:

Pio Pico, Constitutional Governor of the Department of the Californias.

[SEAL.]

Whereas the lieutenant colonel of cavalry, Don Jose Castro, Mexican citizen, has petitioned, for the benefit of himself and his family, for a tract of land, for pasturing cattle, on the bank of the river San Joaquin, consisting of eleven leagues, whose measurement is to be commenced from the edge of the Snowy mountains, following down stream—having previously made the necessary investigations, I have, by a decree of this day, granted to the said Señor the eleven sitios he prays for, declaring to him the ownership thereof by these present letters, in conformity with the law of August 18, 1824, and the regulations of 21st November, 1828, in conformity with the powers with which I find myself invested by the Supreme Government, in the name of the Mexican nation, under reservation of the approval of the Departmental Assembly, and under the following conditions:

1st. He may fence it, without injury to the cross-roads, highways, and rights of way. He may enjoy it freely and exclusively, directing it to the best cultivation or use which may be to his convenience.

2d. He shall request the judge of that district to give him the juridical possession, by virtue of these patents, who shall mark out the boundaries with the respective landmarks, placing, in addition to them, some fruit trees, or others of known utility.

3d. The land, of which donation is made, consists expressly

of eleven (sitios) ranges of large cattle, upon the banks of the San Joaquin. Measurement shall commence from the edge of the Sierra Nevada. The judge who may give the possession shall have it measured with entire observance of the ordinances, and in view of the sketch or topographical plan which the grantee shall present.

In consequence whereof, I order that the present title, being held as firm and valid, be recorded in the corresponding book, and delivered to the party in interest for his protection, and other purposes.

Given in the Governor's house, at the city of Los Angeles, upon common paper, there being none stamped, on the fourth day of the month of April, one thousand eight hundred and forty-six. PIO PICO.

JOSE MATIAS MORENO,

Sec'y pro tem.

Record has been taken of this superior patent in the respective book. MORENO.

The handwriting of Pio Pico and Jose Matias Moreno were proved by a single witness. But no testimony was offered to show when or where this paper was executed, nor any testimony to show who had the custody of it, until it was deposited in the public archives, as above mentioned; nor is any reason given for keeping it out of the public office for so long a time, nor how McKenzie obtained possession of it, except by the deed from Castro, which he produced at the same time. And nothing was then produced to support the grant but this paper; no petition from Castro; no informe, or decree, as required by the laws of Mexico. And, notwithstanding Moreno's certificate that a record had been taken of it in the respective book, no trace of anything in relation to it is to be found in the archives of the Mexican authorities; nor was any attempt made to take possession until 1849; for although the appellees state in their petition that Castro took possession soon after the grant was made—that is, in 1846—and some of his witnesses swear to the same fact, and some even carry back his possession to 1844, under a promise of Micheltoreno

to make him a grant in that place; yet all of this testimony is contradicted by Vinsenhaler, who appears to have been an active agent in this matter, and directed the surveyor who made the survey in 1853, where he should begin, and where he should run the lines. He says that he was at the place in October, 1849; that Castro took possession in August or September of that year, and built a corral, and had cattle there in the early part of 1850; and that it would have been unsafe, in consequence of the hostility of wild Indians, to have attempted to occupy it earlier. A paper thus wanting in all the written proceedings which the Mexican law required before a grant could be issued, which had never been seen by any one of the witnesses until produced by McKenzie, with no evidence of the time or place of its execution, with no trace of it in the Mexican archives, and the witnesses produced to prove the possession contradicting each other, can hardly be entitled to confirmation as a valid grant. And even if the witness who proves the handwriting of Pio Pico and of Moreno is entitled to belief, yet the conclusion would seem to be irresistible that the paper was fraudulently ante-dated

But apart from these circumstances the grant is invalid, and not supported by legal proof, even if all the testimony adduced by the claimants was credible, and the witnesses above suspicion.

The grants of portions of the public domain in Mexico, the mode of obtaining them, and the officers by whom they were to be issued, and the conditions to be annexed to them, were with great precision regulated by law. This law has so often been referred to and commented on in former opinions of this court, that it is unnecessary to report here its particular provisions. It is sufficient to say that it was required to be in writing, the officers and tribunals before which it was to pass designated, and every step in the process, from the petition of the party to the final consummation of the title, was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the Republic.

Whenever, therefore, a party claims title to lands in Califor-

nia under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence.

But as the loss or destruction of public documents may in some instances have occurred, it would be unjust that a party should be deprived of his property by reason of an accident which he had not the power to prevent; and upon proof of that fact, secondary evidence to a certain extent will be received.

But in order to maintain a title by secondary evidence, the claimant must show to the satisfaction of the court: 1st, that the grant was obtained and made in the manner the law required, at some former time, and recorded in the proper public office; 2d, that the papers in that office, or some of them, have been lost or destroyed; and, 3dly, he must support this proof by showing, that within a reasonable time after the grant was made, there was a judicial survey of the land, and actual possession by him, by acts of ownership exercised over it.

The survey and possession are open and public acts, and would support the parol evidence of its former existence and destruction or loss. It would show the knowledge of the officers of the Government of the title claimed, and their acquiescence in the justice and legality of the claim.

But without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, resting only in the knowledge of individual witnesses; for if what purports to be a grant is produced by the party from some private receptacle, and the handwriting of the official signatures proved by witnesses, and even proved to have been executed when it bears date, it is but parol testimony, open to doubt, since its authenticity depends upon the truth or falsehood of the witnesses, instead of resting upon the certainty of the public records of the nation.

We find nothing in the history of Mexican jurisprudence or Mexican grants which would justify this court in supporting a Mexican title made out by such testimony only, or by secondary evidence of any kind short of that above stated.

It will be found, upon referring to the various cases which

have come before us from California, that none have been confirmed, unless the grant was established according to the rules of evidence above stated. And they are recognised in the cases of the United States *v.* Fuertes, 22 How., 445; U. S. *v.* Batton, 23 How., 341; U. S. *v.* Luco, 23 How., 615; and U. S. *v.* Palmer, Cook, & Co., decided at the present term. We repeat again these rules of evidence, because it would seem from the case before us that the board of land commissioners and the Circuit Court regard written documentary evidence, produced by a claimant from a private receptacle, and proved by oral testimony, as of equal authenticity and entitled to equal respect with the public and recorded documents found in the public archives. But such a rule of evidence is altogether inadmissible. It would make the title to lands depend upon oral testimony, and consequently render them insecure and unstable, and expose the public to constant imposition and fraud. Independently, therefore, of the strong presumptions against the authenticity of the paper produced as a grant, it cannot upon principles of law be maintained, even if the testimony produced by the claimant was worthy of belief.

The case of Fremont *v.* the United States is referred to, both in the opinion of the board of land commissioners and the Circuit Court, and relied on to support their respective opinions. But that case has no analogy to this. There the title-papers, from the petition down to the grant, were found in regular form in the Mexican archives. Their authenticity was therefore attested by the record; and the reasons for the delay in making the survey and taking possession were made known at the time to the Governor, and approved and allowed by him. All of this appeared in the regular official documents; and the difficulty that arose in his case arose upon the conditions annexed by law to an undoubted and admitted grant. Here the difficulty is, whether there is legal evidence to prove that this alleged grant was ever made by the Mexican authorities. And the fact that it was so made must be established by competent evidence, before any of the questions which arose and were decided in Fremont's case can arise in this.

The authenticity of the grant must first be established before any question can arise upon the conditions annexed by law to such grants, or concerning the certainty or uncertainty of the boundaries specified in it. And in the case before us, the grant itself not being maintained by competent testimony, we need not inquire whether the conditions were complied with, or the description of place and boundaries sufficiently certain.

And for the reasons above stated the judgment of the Circuit Court must be reversed, and the case remanded to the District Court, with directions to dismiss the petition.

GEORGE W. DAY, BOWEN MATLOCK, ISAAC H. FROTHINGHAM, AND GEORGE W. WARNER, PLAINTIFFS IN ERROR, *v.* WILLIAM A. WASHBURN AND JOHN A. KEITH.

Where creditors, who were so upon simple contract debts, filed a bill in chancery to set aside a deed made by the debtor as being fraudulent against creditors, and other creditors came in as parties complainants, the court below was right in ordering a pro rata distribution amongst all the creditors, none of them having a judgment or other lien at law.

The complainants who first filed the bill have no preference thereby over the other creditors.

THIS was an appeal from the Circuit Court of the United States for the district of Indiana, sitting in equity.

Washburn made an assignment of his property to Keith, for the benefit of his creditors.

Day and Matlock, and Frothingham and Warner, citizens of Ohio and New York, filed a bill in the Circuit Court of the United States to set aside this deed as fraudulent. They alleged, as a reason for not sueing him at law, that he had no property upon which a judgment would be a lien, nor any that an execution would reach.

Other creditors of Washburn, upon simple contract debts, came in by a supplemental bill, and applied to be admitted to a distributive share of the assets.

The court ordered them to be distributed equally amongst the parties to the record, from which decree Day, &c., appealed to this court.

The case was submitted on printed arguments by *Mr. Henderson* for the appellants, and by *Mr. Macdonald* and *Mr. Porter* for the appellees. *Mr. Henderson* contended for a preference in favor of Day, &c., which the counsel for the appellees opposed.

Mr. Henderson's point upon this branch of the case was as follows:

3. The complainants contend that by filing their bill to avoid the assignment, they thereby obtained a specific lien on the assets in the hands of the assignee, and were, under the law of the case, entitled to be fully paid to the exclusion of the other creditors, whose equity is not superior to complainants. It is a well-established rule in equity "that when the equities are equal, that title which is prior in time shall prevail."

1 Story's Equity Jurisprudence, 400.

This rule applies as well to a case like the one before the court as to equities growing out of conveyances. With regard to cases like this, the general rule is laid down by numerous adjudications that a creditor may file a bill in his own name and behalf, and for his sole benefit, or he may file in behalf of himself and all others who may be entitled and may choose to come in. If he proceeds on his own account alone, and no lien has been gained or can be acquired at law, he acquires a specific lien by filing the bill, and is entitled to priority over other creditors.

1 American Leading Cases, 85.

Edmondson *v.* Lyde, (before referred to,) 1 Page R., 637.

Corning *v.* White, 2 Page R., 567.

Butler et al. *v.* Jaffray et al., 12 Ind. R., (now in press.)

Farnham *v.* Campbell, 10 Page R., 598—601.

Weed *v.* Pierce, 9 Cowen, 722—728.

U. S. Bank *v.* Burk, 4 Blackf., 141.

Miers and another *v.* the Maysville Turnpike Co., 13 Ohio R., 197.
Douglass *v.* Hamilton, 6 Ohio R., 156.
Wakeman *v.* Grover, 4 Page R., 23.
Russel *v.* Lasher, 4 Barbour S. C. R., 232.
Burrell on Assignment, 600, 601.
Hobbs *v.* Bancraft et al., 4 Ind. R., 388.
1 Kent, note to 263—4.

Messrs. Macdonald and *Porter* opposed this view of the case, and added:

Whether the decree, so far as it directs a ratable distribution of the assets, was right or not, is not now before the court. The appellees do not and did not object to such ratable distribution. The question, so far as relates to that, is a question between the appellants and their co-complainants, and the latter are not made parties to the appeal. Of course, therefore, nothing affecting their interest will be adjudicated by this court.

7 Pet., 399; 16 Id., 521; 14 Curtis, 406.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Indiana.

The bill was filed in the court below by two mercantile firms, creditors of Washburn, against him and the assignee of his property, for the purpose of setting aside the assignment as fraudulent against creditors, and that the property might be applied in satisfaction of the complainants' demands. These demands were simple contract debts, not reduced to judgment.

The defendants demurred to the bill, and assigned, as the ground of the demurrer, the want of equity.

The court overruled the demurrer, and the defendants answered separately, among other things denying all fraud in the assignment. Replications were filed to the answers.

In this stage of the case, the other creditors of Washburn applied by petition to the court to be made parties to the bill,

charging fraud in the assignment, and praying that it might be set aside, and the property and effects of the debtor be subjected to the payment of all his debts, and be divided equally among all the creditors.

The court ordered that these petitioning creditors become co-complainants, and referred the case to a master to take an account of what was due to each of the complainants, which account was duly taken, and a report made to the court; and afterwards the defendant, Keith, was ordered to bring into court the amount of moneys admitted by him to be in his hands, made out of the assigned property, amounting to the sum of $2,437; and then, at a subsequent day in the term, the court overruled a motion made, on behalf of the two firms who filed the bill, to have the moneys in court applied to the payment of their debts in preference to the other creditors; and adjudged the assignment fraudulent as to creditors, and directed that the whole fund be distributed ratably among all of them, according to their respective demands, and referred the case to a master to make the distribution; and, on his report, confirmed the same.

The case is before us on appeal by the two firms who filed the bill, alleging for error the refusal of the court to give them preference in the distribution of the assets.

The proceedings in the case have not been conducted with much regularity, but the principles of equity governing the rights of the parties concerned are very well settled, and the application of them to the facts as presented will satisfactorily dispose of it.

The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a pro rata distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that

a legal preference is acquired, which a court of chancery will enforce. (2 John., ch. 283; 4 Ib., 691.)

The two firms, therefore, who filed the bill, the appellants here not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other co-complainants, or to object to an equitable distribution of the assets among all the creditors.

Indeed, the principle upon which the bill seems to have been drawn, and is now sought to be sustained, would preclude any preference in favor of the appellants—which is, that the debtor's property, in the hands of the assignee, constituted a fund for the benefit of creditors, which a court of equity only could reach, and hence that the creditor had a right to the interposition of the court, without first obtaining a judgment and execution. It is true, where a specific fund has been assigned or pledged for the benefit of creditors, and it is necessary to go into a court of chancery to make a distribution among them, the equitable lien of each creditor upon the fund lays a sufficient foundation for the interposition of the court. It will enforce this equitable lien thus arising out of the assignment or pledge for the benefit of the creditors, in the exercise of its own appropriate jurisdiction. But in all these cases, chancery, upon its own principles, distributes the fund pro rata among all the creditors, unless preference is given in the pledge or assignment of the fund. In the present case, as the assignment was made to Keith, in trust for the benefit of creditors, if the bill had been filed to enforce the trust, no judgment or execution would have been necessary, as preliminary steps to the interposition of the court; but in that case the appellants would not have been entitled to a preference, as none was given to them in the trust deed, but the contrary.

For this reason, doubtless, the bill was filed to set aside the deed as fraudulent, with a view to defeat the preferences given therein to other creditors. The objection that the demands of the appellants had not been reduced to judgment and execution before filing the bill, would have been fatal to the relief sought, if taken in time by the defendants. It was waived,

however, both as respected the appellants and the other co-complainants; and, as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the debtor, and to make the proper application of them; and, as we have seen neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors as decreed by the court below.

Decree affirmed.

CHARLES TATE AND OTHERS, PLAINTIFFS IN ERROR, *v.* JOHN G. CARNEY AND OTHERS.

Under several acts of Congress the register and receiver of the land office were authorized to grant a certificate to every person who should appear to be entitled to land in the section of country east of the Mississippi river and west of the Perdido river.

Under these acts, Robert Yair received a certificate in 1824 for the land now in controversy.

In 1848, the register and receiver decided that Nancy Tate had settled upon this land at a very early day. They annulled the former certificate and granted an order of survey, by means of which a patent was issued in 1853 to the representatives of Nancy Tate. The patent reserves the right of Robert Yair.

The decision of the register and receiver upon this question of title is not conclusive. They have power only to decide how the lands confirmed shall be surveyed and located. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of *bona fide* purchasers.

THIS case was brought up from the Supreme Court of the State of Louisiana holding sessions for the eastern district of Louisiana, being issued under the twenty-fifth section of the Judiciary act.

The head note has given an outline of the case so that the reader can understand it; and the opinion of the court contains a full statement.

Tate was sued in the court below, and disclaimed title otherwise than as one of the heirs of Nancy Tate, whose other heirs then intervened.

Carney and the others claimed under Yair's title.

The Supreme Court of Louisiana rejected the claim of the heirs of Nancy Tate, who brought the case up to this court.

It was submitted on a printed argument by *Mr. Benjamin* for the plaintiffs in error, and argued by *Mr. Taylor* for the defendants.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court by a writ of error to the Supreme Court of the State of Louisiana, under the 25th section of the Judiciary act of September, 1789. The defendant in error (Carney) commenced a suit in the District Court of the 8th judicial district of Louisiana, in which he asserted that he had purchased, in the year 1844, at the probate sale of the succession of Sarah Cohern, deceased, five hundred and sixty acres of land on Cool creek, in that district, and that Charles Tate had disturbed his possession and denied his title. He summoned Charles Tate to exhibit his claim to the land, and required the representatives of Sarah Cohern, deceased, to maintain the title they had warranted to him, or to refund the purchase money he had paid. The result of various proceedings in the District Court was the forming of an issue between the defendant in error and the plaintiffs in error relative to their respective rights in the said parcel of land. It is situated in the section of country east of the Mississippi river and the island of New Orleans, and west of the Perdido river, which was claimed by the United States under the treaty of Paris of 1803, for the cession of Louisiana, and which was adversely claimed and possessed by Spain as a portion of West Florida until 1812–'13. The act of Congress for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the Mississippi river and island of New Orleans, approved 25th April, 1812, is the first of the series of acts that apply to this district. 2 Stat. at Large, 713. The 8th section requires the commissioners to be appointed under the act to collect and report to Congress, at their next session, a list of all the actual settlers on land in said districts, respectively, who have no

claims to land derived either from the French, British, or Spanish Governments, and the time at which such settlements were made. The reports made by the commissioners appointed under the act of 1812 were submitted to Congress, and are the subject of the act of the 3d March, 1819, for adjusting the claims to land, and establishing land offices in the district east of the island of New Orleans. 3 Stats. at Large, 528.

The third section of this act provides, "that every person whose claim is comprised in the lists or register of claims reported by the said commissioners, and the persons embraced in the list of actual settlers not having any written evidence of claim reported as aforesaid, shall, when it appears by the said reports or by the said lists that the land claimed or settled on had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the fifteenth of April, 1813, be entitled to a grant for the land so claimed or settled on as a donation; provided that not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres. By the 9th section of this act, the register and receiver of the land offices in that district were authorized to make additions to the list of settlers, noting the time of their settlement, and to report the same to Congress. These, with other reports, were disposed of in the supplementary act for adjusting land claims in that district, adopted 8th May, 1822. 3 Stats. at Large, 707. The third section of the act of 1822 is in the same language as the corresponding section in the act of 1819 before cited. The sixth section of this act requires the register and receiver to grant a certificate to every person who shall appear to be entitled to a tract of land under the third section of the act, setting forth the nature of the claim and the quantity allowed. In 1820, Robert Yair made proof in the land office that in the year 1805 he had settled upon a parcel of land in the district, and had occupied and cultivated it from that time until the date of his application and proof. His claim was reported to Congress, and in 1824 a certificate issued to him for that land, which is the land in controversy. Robert Yair continued to occupy the land until his death, in 1825 or 1826, when it passed

to his widow and heirs. The defendant in error (Carney) traces his title to these heirs. The claim of the plaintiffs in error is traced to Nancy Tate, their ancestress, who made a settlement in the same district in 1811, and whose claim was reported under the act of 1812, before cited.

In the year 1847, her heirs applied to the register and receiver of the land office in that district for an order of survey, in which application they represented that Nancy Tate was entitled to a section of land under the acts of Congress aforesaid; that she had settled upon public land in an adjoining section, forty-one; that John Tate was settled upon the same section; and that both could not have their complement of land, from their proximity, out of land contiguous to their settlement. But that there was vacant land to the east and northeast, not claimed by any person, sufficient to make up the quantity she had been entitled to, and prayed for the order, as one that could not injure any other person. The register and receiver caused a notice to be served on the defendant in error, to show cause why the order should not be granted. There is no evidence that he appeared on this notice.

In February, 1848, the register and receiver made a decision, in which they declared that Nancy Tate had settled upon this land; that they were satisfied that Robert Yair, at the time of the confirmation to him, was the holder of another donation for one thousand arpents, and that he was not entitled to this under the act of 1822, for that reason. They annulled the certificate that had been issued to him, and granted the order of survey as applied for. The survey was made to include this land, and a patent was issued in favor of the representatives of Nancy Tate in 1853. This patent describes the land as covered by the claim of Robert Yair, and releases the land, subject to any valid right, if such exists, in virtue of the confirmed claim of Robert Yair, or of any other person claiming from the United States, the French, British, or Spanish Governments. The Supreme Court of Louisiana have found from the testimony that Nancy Tate was not an occupant of this land, and that the settlement of Robert Yair and his representatives had been continuous for some forty years. The

question for the consideration of this court is, whether the decision of the register and receiver of the land office in favor of the plaintiffs in error is conclusive of the controversy. The Supreme Court decided that it was not, and we concur in that opinion.

In Doe *v.* Eslava, 9 How., 421, the defendant in error relied upon a decision of the register and receiver of a land office in the same district, with the same powers as were confirmed upon these, as conclusive in his favor. This court answered: "We do not consider that the act of May 8th, 1822, and that of the same date, which is connected with it, and referred to as *in pari materia*, for a guide, meant to confer the adjudication of titles of land on registers and receivers. Sometimes, as in the case of pre-emptioners, they are authorized to decide on the fact of cultivation or not; and here, from the words used, no less than their character, they must be considered as empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated questions of title, involving, also, the whole interests of the parties, and yet allowing no appeal or revision elsewhere. The power given to them is, to decide only how the lands confirmed shall be located and surveyed. The further power to decide on conflicting and interfering claims should apply only to the location and survey of such claims, which are the subject-matter of their cognizance; and on resorting to the reference made to the second act of Congress, that act appears also to relate to decisions on intrusions upon possessions and other kindred matters."

The case of Cousin *v.* Blanc, 19 How., 203, involved a question of the effect and binding operation of a decision of the register and receiver of the land office upon a location and survey of a claim confirmed under the act of 1822, and refers to the act of the 3d March, 1831, as showing that the decisions of the register and receiver were not to be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to interfering claims. 4 Stat. at Large, 492.

It furnishes no support of the argument that the decision

of the register and receiver in such a case as this is conclusive of the title. There is no dispute in this case upon the subject of the location of the claim of Yair. The whole case shows that it had been identified and was actually possessed by Yair and his heirs. The patent of the defendants in error acknowledges that its location had been made, and that the new survey for the claim of Mrs. Tate covered this location. The decision of the register and receiver does not proceed upon any assumption of a conflict of location, but of a denial of the right of Yair. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of bona fide purchasers. It further appears that Mrs. Tate did not settle upon this parcel of land, and that the decision of the register and receiver in her favor is not supported by testimony. The judgment of the Supreme Court of Louisiana does not contain any error within the scope of the revising jurisdiction of this court, and it is consequently affirmed.

SAMUEL MASSEY AND OTHERS, PLAINTIFFS IN ERROR, *v.* JOSEPH L. PAPIN.

Before 1819, Mackay had a claim to land in Missouri under a Spanish grant, and in that year gave a bond in the nature of a mortgage on a part of the land to Delassus.

In 1836, Congress confirmed the claim to James Mackay or his legal representatives. This enured to the benefit of the claimants under the mortgage rather than to the heirs of Mackay.

An imperfect Spanish title claimed by virtue of a concession was, by the laws of Missouri, subject to sale and assignment, and, of course, subject to be mortgaged for a debt.

THIS case was brought up from the Supreme Court of Missouri by a writ of error issued under the 25th section of the Judiciary act.

The record was very voluminous, as it traced the title to land for a number of years. It is not necessary to follow this.

Mackay was the holder of a grant of land from Spain for 30,000 arpents, prior to 1819. In that year he gave a bond, by way of mortgage, in which he promised to convey fourteen-thirtieths of the land to Delassus, who assigned his interest in it to Leduc. In 1822, Mackay died, leaving a widow and eight children. In 1836, Congress confirmed the claim to Mackay or his legal representatives. In 1842, Leduc died, devising all his property to Hypolite Papin. Afterwards, in the same year, Papin died, devising all his property to his children equally. In 1854, Joseph L. Papin, one of the children, and the defendant in error, foreclosed the mortgage against the heirs and administrators of Delassus. It was sold, and Papin became the purchaser of fourteen-thirtieths of the 30,000 arpents. Papin then claimed a partition, which was resisted by Massey and others, who claimed under the heirs of Mackay. The Supreme Court of Missouri decided in favor of Papin, and the case was brought up to this court, where it was argued by *Mr. Blair* for the plaintiffs in error, and *Mr. Glover* for the defendant.

Mr. Justice CATRON delivered the opinion of the court.

This case is brought here by writ of error to the Supreme Court of Missouri.

In 1806, James Mackay presented his claim before the board of commissioners, sitting at St. Louis, to have confirmed to him 30,000 arpents of land. In 1809, the board rejected the claim.

In 1819, Mackay gave a bond in the nature of a mortgage on 14,000 arpents of the land to Delassus. Papin claimed as assignee of the mortgage, which he caused to be foreclosed, and purchased in the land, and took a title from the sheriff. Massey and others claim under Mackay's heirs.

The Supreme Court of Missouri decided that Papin, claiming under the mortgage of Mackay to Delassus, had a better title than Massey, who claimed under the heirs. And to reverse this decision, this writ of error is prosecuted.

The board of land commissioners of 1809 refused to confirm the claim; they were acting on the title as between the United

States and the claimant. The Government had the power to grant the land in fee, regardless of the opinion of the board. Accordingly, in 1832, an act of Congress was passed organizing another board to examine this description of Spanish claims, which had been rejected by the old board. The new board, in October, 1832, recommended the claim for confirmation "to said James Mackay, or his legal representatives." James Mackay had died, and his heirs presented the claim the second time; and it is insisted that the confirmation to them by the act of 1836 rejected the mortgage of Delassus, and that the heirs took the unincumbered legal title discharged of the mortgage.

An imperfect Spanish title, claimed by virtue of a concession, was, by the laws of Missouri, subject to sale and assignment, and of course subject to be mortgaged for a debt. The heirs of Mackay took the lands by descent, with the incumbrance attached, and held them in like manner that their ancestor held. The grant of the lands to the heirs by the act of 1836 carried the equities of the mortgagee with the legal title, of which he took the benefit—a consequence contemplated by the mortgage itself; and if the assignment had been in its form a legal conveyance of the lands, the grantee would have taken a legal title. And to this effect are the cases of Bissel *v.* Penrose, 8 How., and Landes *v.* Brant, 10 How.

It is ordered that the judgment be affirmed.

HENRY AMEY, PLAINTIFF, *v.* THE MAYOR, ALDERMEN, AND CITIZENS OF ALLEGHENY CITY.

In 1848, the Legislature of Ohio incorporated certain of its citizens under the name of the Ohio and Pennsylvania Railroad Company; and in 1849, the Legislature of Pennsylvania incorporated the same company by the same style, and adopted the act of Ohio.

In 1849, the Legislature of Pennsylvania exempted from taxation, except for State purposes, the certificates of loan theretofore issued or which might be thereafter issued by the city of Allegheny (amongst others) in payment of a subscription to the capital stock of the Pennsylvania Railroad Company, or to the capital stock of the Ohio and Pennsylvania Railroad Company.

The charter of the last-named company had previously authorized the city corporation of the city of Allegheny to subscribe for an amount of the stock not exceeding two hundred thousand dollars.

By virtue of two ordinances, and a supplement thereto, two hundred bonds of one thousand dollars each, with coupons attached, were executed and delivered to the company. They bore date January 1, 1850.

On the 14th of April, 1852, another act was passed by the Legislature, providing "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the Ohio and Pennsylvania Railroad Company to an amount not exceeding the subscription heretofore made by said city, &c.; provided no bonds for the payment of stock subscribed, as aforesaid, shall be issued of a less denomination than one hundred dollars."

On the 19th of June, 1852, an ordinance was passed authorizing the mayor to subscribe for four thousand shares, (equal to two hundred thousand dollars,) &c., &c. This ordinance was never recorded; but the stock was subscribed for and the bonds issued.

On the 8th of May, 1850, the Legislature had passed an act limiting the debt of the city of Allegheny to $500,000, exclusive of the first subscription above mentioned. The debt of the city had reached that limit prior to the second subscription.

These acts of the Legislature, mentioned in the first part of this note, conferred authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise called bonds, with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio and Pennsylvania Railroad Company.

The limitation in the act of 8th of May, 1850, only meant that the city council, by its own authority, should not go into debt to a greater amount than $500,000. But this restriction was not binding on the Legislature.

The circumstance that the ordinance of 19th of June, 1852, was not recorded or published, does not invalidate the bonds. The charter of the city requires that those ordinances only which were passed under the seventh section of the charter should be recorded and published. The ordinance in question did not belong to that class.

This court adopts the judgment of the courts of Pennsylvania, that the above acts of the Legislature were not inconsistent with the Constitution of the State.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the western district of Pennsylvania.

The nature of the case is explained in the head note of this report, and fully set forth in the opinion of the court.

It was submitted on printed arguments by *Mr. Knox* for the plaintiff, and *Mr. Loomis* for the defendant.

Mr. Knox divided his argument into the following heads:

1. The words of the acts.
2. The purpose of the acts.
3. The interpretation put upon them by the Legislature.

Under the first head, he contended that the power to issue bonds was included in the power to subscribe to the capital stock; and referred to Commonwealth *v.* M. Williams, 1 Jones, 62.

Carr *v.* Le Feure, 3 Carey, 413.

McMasters *v.* Reed's Executors, 1 Grant's Cases, 36.

Commonwealth ex rel Hamilton *v.* Pittsburg, Pittsburg Legal Journal, March 12, 1860, No. 35, pp. 274—276.

The popular use of the word "subscribe" corresponds with the grammatical and legal meaning, as stated in the above cases. Allegheny city has placed this interpretation upon them, and no different construction ought now to be admitted.

The words "certificates of loan" and "bonds" are considered identical by several acts of the Legislature, viz: 21st of April, 1851, 18th April, 1853, May 8, 1854.

2. The purpose of the acts.

The purpose was to enable the city of Allegheny to contribute by the use of its credit to the making of this road, and bonds, with coupons, were the only kind of securities that would serve the purpose of the act.

2 Peters, 661; 3 Wheaton, 388.

3. The interpretation placed on the act by the Legislature.

The act of May 8, 1850, passed after the issue of the first set of bonds, recognised them as a debt of the city.

The two first points relate to the act of 1852, as well as to the first act.

Mr. Loomis confined his argument to the following propositions, viz:

1. Whether the several acts of Assembly mentioned in the case stated conferred any authority on the corporation of the city of Allegheny to give bonds, with coupons, as stated in the cause.

2. Whether such bonds and coupons are null and void by reason of such want of authority.

3. Whether they are null and void for any other irregularity connected with their issue.

Upon the first point, *Mr. Loomis* expatiated upon the unreasonableness and injustice of binding the property of one man by the will of another, which was not sanctioned by the Constitution of Pennsylvania.

The only power given to the corporation was to subscribe, which might, perhaps, have given the railroad company a right of action. Under the city charter, no authority to issue the bonds existed; by the delegation of the authority to subscribe, none was conferred. The plaintiffs took the title at their peril. The public interest requires that corporate functionaries should be kept strictly within the pale of their authority and duty.

[*Mr. Loomis* then cited a number of authorities in support of these positions. His argument upon the other points must be omitted for want of room. The above notice constitutes but a faint outline of the arguments of both counsel.]

Mr. Justice WAYNE delivered the opinion of the court.

This case has been sent to this court on a certificate of division of opinion between the judges of the Circuit Court for the western district of Pennsylvania.

The plaintiff has sued the mayor and aldermen and citizens of Allegheny city, in actions of debt, upon several coupons of bonds which were issued by that corporation, and made payable to the Ohio and Pennsylvania Railroad Company, in payment for two subscriptions, of two hundred thousand dollars each, to the stock of the latter.

It was agreed by the parties upon the trial of the cause to submit it for the opinion of the court upon a statement, in the nature of a special verdict, and that verdicts upon the coupons should be entered accordingly.

The judges, however, in their consideration of the case, differed in opinion on the following points: "Whether the several acts of Assembly recited in the case stated conferred any

authority on the corporation of the city of Allegheny to issue bonds with coupons, as had been done, or whether the same are altogether null and void, by reason of such want of authority, or for any other irregularity connected with their issue."

It is admitted that the bonds were issued and delivered in payment for subscriptions of stock to the Ohio and Pennsylvania Railroad Company; that they were made payable to that company or its order; that the company had negotiated them to raise funds to construct the road, and that the road had been completed in conformity with the conditions of the subscriptions of the defendants.

The parties agree that the subscriptions had been made by the authority of acts of the Legislature of the State of Pennsylvania, in conformity with the charter of the railroad company, and were intended to be in pursuance of resolutions and ordinances of the select and common councils of the city of Allegheny.

The mayor was first instructed to subscribe for four thousand shares of the capital stock of the Ohio and Pennsylvania Railroad Company, to be paid for in bonds, with coupons attached for interest, payable semi-annually, the bonds having twenty-five years to run. The railroad agreed to pay the interest upon the bonds until the completion of the road, or so much of it as may be adequate to pay the interest, and that the proceeds of the bonds were to be applied to the construction of the road from the city of Allegheny to the mouth of the Big Beaver river, about twenty-five miles. And to secure the city and the bondholders, it was stipulated, in addition to the legal obligations incurred in making the subscription, that the stock, with the interest, earnings, and dividends of the road, should be pledged to pay the interest, and finally to redeem the bonds. Accordingly two hundred bonds of $1,000 were prepared, and were delivered to the railroad company, on the 1st of January, 1850, and the city at the same time received a certificate of four thousand shares. The coupons now sued upon were a part of those which were attached to those bonds.

The second subscription was made in virtue of another act of the Assembly of Pennsylvania, and in compliance with a resolution of the city, dated June 19th, 1852. That act authorized the city to increase its subscription to the capital stock of the railroad company, to any amount not exceeding its first subscription, *upon the laws and conditions which had been prescribed for the first;* but it restrained the city from making an issue of bonds of a less denomination than $100. The act also exempts the stock from the payment of any tax in consequence of the payment of any interest to stockholders, until the net earnings of the company shall realize six per cent. per annum on the capital stock. The city authorities passed an ordinance for this additional subscription, but it was not published in compliance with the charter of the city, nor was it recorded in the manner which it is said the charter requires the city ordinances to be. For those neglects, it is said the ordinance was null and void, and that the city had not the power to make the second subscription under the act of the Legislature. But the city bonds were issued, and the subscription was made. It is also objected that the ordinance was endorsed upon the bonds, without any proviso requiring the railroad company to pay the interest upon them according to its stipulation. But it is admitted that the road was built first from the city to the Big Beaver river, and afterwards completed to its termination on the western border of Ohio, and thence to Chicago.

The city continues to hold its stock in the railroad company. It has received five dividends from the company—one of $14,000, another of $16,000, another of $12,000—which were retained by the company by the consent of the city, and had been appropriated to the payment of the coupons for interest; and that $4,000 of those dividends had been paid in cash, and others in stock. Prior to the city's second subscription, it appears that the debt of the city had become $500,000, the limit prescribed by an act of the Legislature. That act is, "that it should not be lawful for the councils of the city, either directly or indirectly, by bonds or certificates of loan of indebtedness, or by virtue of any contract, or by any means or device what

soever, to increase its indebtedness to a sum which, added to the existing debt, shall exceed $500,000, exclusive of the subscription of $200,000 to the Ohio and Pennsylvania Railroad Company."

It is admitted, also, that the stock of the city in the railroad company had been voted at all elections of it by order of the city, except in a single instance, when the city refused to vote. The city was incorporated on the 11th April, 1840, with all the powers and authorities then vested by law in the select and common councils of the city of Philadelphia.

We have given the agreed case of the parties in every particular in any way bearing upon the points about which the judges in the court below were divided in opinion, and will now consider them.

The subscriptions of the defendants were made under the acts of the 5th April, 1849, and that of the 14th April, 1852. The first permitted a subscription of $200,000, to be paid for by "certificates of loan." The second permitted the increase of it, to an amount not exceeding the first, without, however, having altered the manner in which the corporate credit of the city was to be used for the payment of the second subscription. We infer from the words of the act, and do not see how it can be otherwise, that it was to be paid for by the *same certificates of indebtedness* which the Legislature had directed to be issued and used for the payment of the first subscription. The act is, "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the said Ohio and Pennsylvania Railroad Company to any amount not exceeding the subscription heretofore made by the said city, upon the terms and conditions prescribed in regard to said previous subscription; provided no bond for the payment of the subscription shall be issued of a less denomination than one hundred dollars." This proviso is merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than $100; and the words "no bond for the payment of the subscription shall be issued," when considered in connection with the act authorizing the second subscription, that it should be made "upon the same terms and conditions

of the first," cannot be interpreted into a permission or direction of the Legislature, that the city might use in payment for the stock any other legal or commercial instrument than "*certificates of loan.*" Such certificates are well and distinctly known and recognised in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as "certificates of loan," with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest—a coupon bond—*coupon* being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

Such certificates of loan have been resorted to for many years in the United States to raise money for internal improvements. They were as well known and used in Pennsylvania as elsewhere, and were permitted to be issued in that State, by just such enactments as those which authorized the city of Allegheny to subscribe to the capital stock of the Ohio and Pennsylvania Railroad Company. Such an issue was applicable to the subject-matter of legislation. The city solicited the State to be allowed to make the subscriptions. It was the policy of the State to grant the application. The subscriptions were made under the act of the 5th April, 1849, and that of the 14th April, 1852. The first permits a subscription of $200,000, which was to be paid for by certificates of loan. The act of the 14th April, 1852, allowed the increase of the subscription to an amount not exceeding the first, upon the same terms and conditions. It was the understanding of the Legislature, of the city, and of the railroad company, that the subscriptions were to be paid for by the corporate credit of the city by the issue of "certificates of loan." That appears

from the act of 1849, authorizing it, before the subscription was in fact made. That act provides, in anticipation of its being done, that the certificates of loan which shall hereafter be issued by the city of Allegheny in payment of any subscription to the Ohio and Pennsylvania Railroad Company, were to be exempt from all taxation, except for State purposes. The railroad company took from the city certificates of loan in payment of the subscriptions, sold them as such, and with the money built the road. Such a concurrence of contemporaneous action by all the parties interested in the subject-matter of legislation, proves that it was the intention of the Legislature that the authority given to the city to make the subscriptions to the railroad company, had been carried out just as it was meant to have been.

We answer, therefore, that the several acts of Assembly stated in the agreed case did confer authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio and Pennsylvania Railroad Company.

We will now inquire whether the bonds or certificates of loan which were issued are null and void "for any irregularity connected with their issue."

It is said there were two irregularities which made them so. The first is, that the debt of the city had reached its limit of $500,000 prior to the second subscription. The second is, that the city ordinance authorizing the issue for the payment of the subscriptions was null and void, from not having been published in conformity with the charter of the city.

The first objection depends upon the proper construction of the act of 8th May, 1850, section 4, in connexion with the act of the 14th April, 1852, which authorized the second subscription. The first declares that the indebtedness of the city should not be made to exceed five hundred thousand dollars, exclusive of the subscription of two hundred thousand dollars to the railroad company; and it is urged, that the act of 14th April, 1852, though it authorizes the city to make a second subscription of two hundred thousand dollars, does not permit

the city to increase its debt to a larger sum than seven hundred thousand dollars, to which it was limited by the first act of 1850. The objection has arisen from a misconception of the 4th section of the act of 1850. It provides that it shall not be lawful *for the councils of the city* of *Allegheny*, either directly or indirectly, or by bonds, certificates, or loans, or of indebtedness, or by virtue of any contract, or by any other means or device whatsoever, to increase the indebtedness of the said city, in a sum which, added to the existing debt, shall, taken together, exceed five hundred thousand dollars, exclusive of the subscription of two hundred thousand dollars to the Pennsylvania Railroad Company; meaning, obviously, that no increase of debt should be made by the councils beyond the sum of $500,000, but not intending that the Legislature might not authorize an increase of it beyond that amount, as it had previously done by authorizing the first subscription to the railroad company. The same political power which allowed the first subscription could, at a succeeding session of the Legislature, give authority to the city to make a second. Such authority was given by the act of the 14th April, 1852. The city councils could not under its charter have made either the first or second subscription without authority from the Legislature, *but by its charter it could contract debts for the purposes of its incorporation to a larger amount than* $500,000. When, then, the Legislature was called upon to authorize the city to make the first subscription, increasing its indebtedness two hundred thousand dollars, beyond what the city might have owed then for other purposes, it was thought prudent, as well for the protection of the citizens of Allegheny as for those who might purchase these certificates of stock with coupons, to declare that the councils of the city should not thereafter, by *virtue of their charter authority to contract debts*, by any device whatever, increase its amount to more than five hundred thousand dollars. And as it has turned out, judging from the attitude of the mayor, aldermen, and citizens of Allegheny in this suit, it must be admitted to have been upon the part of the Legislature of Pennsylvania a very commendable precautionary act of legislation.

Having thus disposed of the first irregularity imputed to the councils of Allegheny, in making their issue for the payment of the second subscription, we proceed to the second.

It is, that the ordinance of the city directing the issue for the payment of the second subscription had not been recorded within thirty days. It is admitted in the stated case that it had not been.

By the 8th section of the charter of the city of Allegheny, it is provided, that in order that a knowledge of the laws, ordinances, regulations, and constitutions of the city, authorized by the seventh section of the charter, may at all times be had and obtained, and the publications thereof at all times be known and ascertained, such and so many of them as shall not be published in one or more of the public newspapers published in the city, or in such other way as the select and common councils may direct, within fifteen days after these laws severally passed, &c., &c., and also recorded in the office for the recording of deeds, &c., &c., &c., within thirty days after these laws passed, &c., &c., shall be null and void.

Now, it does not require a very careful examination of the section to determine that it can have no bearing upon the ordinance directing the issue for the payment of the second subscription of the city to the Ohio and Pennsylvania Railroad Company, for in terms it is only applicable to ordinances, &c., *authorized by the 7th section of the charter*, and that did not permit such a subscription to be made, and paid for by the city stock, as the ordinance for that purpose was intended. It could only be made by the authority of the Legislature. In other words, the Legislature enlarged the powers of the councils of Allegheny, to do what it could not do by charter. Besides, if the section was not limited to such ordinances, &c., &c., as are *authorized by the 7th section of the charter*, and those words were not in it, it could have no application to an ordinance of the city passed for a special purpose to carry out an act of the Legislature, outside of the charter, as was the case here. We have determined that the acts of the Legislature have been carried out by the city in the way they should have been done. Neither the ordinance, nor the stock issued by

the city, are deficient in any substantial particular. The latter has every formality of the corporation to give them currency. They were circulated for ten years, and were constantly acknowledged by the city, as its bonds, for the purposes for which they were issued. They are now in the hands of *bona fide* transferees, to whom they must be paid according to their terms. It would be inequitable, if the city could repudiate them at all, and more especially, if that were allowed to be done upon the ground of any fault in the corporation in their issue. But we will not enlarge further upon the case. The points of objection of which we have treated have already been before this court in several cases, and they are worthy of perusal. See the cases of the Commissioners of Knox County, Indiana, *v.* Wallace, 21 Howard, 239; 3 Zabriskie *v.* Cleveland, Columbus, and Cincinnati Railroad Company, 23 Howard, 381.

We have not, in our treatment of this certified division of opinion, discussed that position of the learned counsel who argued it for the defendant, that the acts of the Legislature of Pennsylvania, authorizing the issue of the certificates of loan, were unconstitutional.

Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the acts upon which the subscriptions were made to the Ohio and Pennsylvania Railroad Company; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its Supreme Court, that acts for the same purposes as those are, which we have been considering, were constitutional.

We shall order it to be certified, that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the State of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the western district of Pennsylvania, and on the point or question upon which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the State of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny. Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

THE BOARD OF COMMISSIONERS OF KNOX COUNTY, PLAINTIFFS IN ERROR, *v.* WILLIAM H. ASPINWALL, JOSEPH W. ALSOP, HENRY CHANCEY, CHARLES GOULD, AND SAMUEL L. M. BARLOW.

Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy.

The Circuit Courts of the United States have authority to issue such writ of mandamus against the commissioners, where it is necessary, as a remedy for suitors in such court.

It is not a sufficient reason for setting aside a peremptory mandamus, that a previous alternative writ had not issued.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

The case is stated in the opinion of the court.

It was argued by *Mr. Porter* for the plaintiffs in error, and *Mr. Vinton* upon a brief filed by himself, and also one by *Mr. Judah*, for the defendants.

The principal point in controversy was the power of the Circuit Court, under the 14th section of the Judiciary act, to issue a writ of mandamus in this case. Upon this subject, a portion of the arguments of the counsel can be given.

Mr. Porter said:

If the Circuit Court of the United States has power to issue a writ of mandamus to enforce the payment of a judgment at law, it derives that power from the provisions of the 14th section of the Judiciary act of 1789.

It is not pretended that there is any other foundation for it.

The words of the section are: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

I maintain that the "exercise of jurisdiction," in any sense in which the writ of mandamus could be called in aid of it, was complete in this case upon the rendition of final judgment; that to enforce the payment of that judgment by means of this extraordinary writ would not be "agreeable to the principles and usages of law." Passing over the fact which appears in the record, that an execution was issued, and a levy actually made, which the party voluntarily abandoned to resort to his writ of mandamus; and conceding, for the sake of the argument, what the opposing counsel assumes in his brief, that "no execution can be levied on the general property and effects of the county," I affirm that this state of facts simply presents the ordinary case of a party holding a debt of record which cannot be realized by process of execution. And I deny that it follows that a writ of mandamus in such a case is, in any just sense, "necessary for the exercise of jurisdiction," or "agreeable to the principles and usages of law."

The writ of mandamus is the appropriate remedy to enforce the performance of some duty enjoined by law, where there is no other adequate remedy.

The duty imposed by law on the board of commissioners of the county of Knox, now sought to be enforced, was a duty to levy a tax for the payment of interest coupons, not judgments of a court of law.

The holders of those coupons had a right to go into the State courts, and enforce the levying of the tax for their payment, by mandamus; but they elected a different remedy.

They chose to sue in the ordinary form, in the Circuit Court, merged their coupons in a judgment at law, and must rely for the collection of that judgment on the ordinary and usual writs in use for that purpose.

If, upon the failure of these, they may resort to the writ of mandamus to compel the payment of their judgment, on the ground that such a writ is necessary to the exercise of jurisdiction, why may it not be used in every case, to compel the payment of judgments which cannot be collected in the usual way? The words of the statute, then, instead of being understood as words restraining the power to issue the writ in aid and furtherance of ordinary remedies only, will become a grant to the Circuit Courts of the power to employ a new and formidable process in all cases where the common writs of execution fail.

The defendants in error rely on the case of Wayman *v.* Southard to show that the words "necessary for the exercise of jurisdiction" apply to proceedings after judgment, as well as before.

The question decided in that case will appear from the certificate at the close of the opinion, which is as follows:

"*Certificate.*—This cause came on to be heard on the questions certified from the United States court for the seventh circuit and district of Kentucky, and was argued by counsel. On consideration whereof, this court is of opinion that the statutes of Kentucky in relation to executions, which are referred to in the questions certified to this court, on a division of opinion of the said judges of the said Circuit Court, are not applicable to executions which issue on judgments rendered by the courts of the United States; which is directed to be certified to the said Circuit Court."

10 Wheaton, 50.

That part of the opinion of the court which relates to the question now under consideration is as follows:

"The words of the 14th section are understood by the court to comprehend executions. An execution is a writ which is certainly 'agreeable to the principles and usages of law.'

"There is no reason for supposing that the general term 'writs' is restrained, by the words 'which may be necessary for the exercise of their respective jurisdictions,' to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act to suppose an execution necessary for the exercise of jurisdiction. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would consequently be necessary to the beneficial exercise of jurisdiction. If any doubt could exist on this subject, the 18th section, which treats of the authority of the court over its executions as actually existing, certainly implies that the power to issue them had been granted in the 14th section. The same implication is afforded by the 24th and 25th sections, both of which proceed on the idea that the power to issue writs of execution was in possession of the courts. So, too, the process act, which was depending at the same time with the Judiciary act, prescribes the forms of executions, but does not give a power to issue them. On the clearest principles of just construction, then, the 14th section of the Judiciary act must be understood as giving to the courts of the Union, respectively, a power to issue executions on their judgments."

10 Wheaton, 23, 24.

Now, I submit that all this is inapplicable to the case at bar.

The learned counsel for the defendants says, in his brief, after quoting from the opinion of the court in Wayman *v.* Southard, "all that is said above about writs of execution

must be equally applicable to writs of mandamus, when they are necessary to carry a judgment into effect."

Granting this, it must appear that in the case at bar a writ of mandamus was necessary to carry the judgment into effect.

That is the touchstone proposed by the counsel for the defendants; and tried by that very test, the case is, in my opinion, against them.

A case might be imagined, doubtless, where a writ of mandamus would be necessary to the "beneficial exercise of jurisdiction," and to carry the judgment into effect. Suppose, for instance, that an execution were lodged in the hands of the sheriff, and that he were to neglect or refuse to serve it. In such a case a mandamus might properly be invoked in aid of the jurisdiction, though more summary proceedings would probably be preferred. But in this case no obstruction is put in the way of the ordinary writs, which, "agreeably to the principles and usages of law," may issue upon judgments at law. All the remedies which any such judgment ordinarily supplies are open to the parties in this case. But they are said to be inadequate; yet it does not appear that ample property could not be found whereon to levy. The parties then propose to seek another remedy, not a means of carrying into effect the judgment already obtained, but a separate and independent proceeding, in which they must begin *de novo*, and conduct a new suit through the several stages of pleadings, hearing, and final judgment. The judgment already obtained is not the basis of this new proceeding. The claim on which that judgment was obtained is, it is a proceeding for enforcing the claim by a separate and independent action, not for enforcing the judgment. The object of the proceeding is, to create a fund out of which the claim may be paid. Is there any writ or proceeding in the same case by which a fund may be created for the payment of a judgment at law, "agreeably to the principles and usages of law?"

The proceedings in mandamus constitute a separate suit in general. So say the authorities. 6th Bac. Ab., 453.

Mr. Vinton said:

The Judiciary act of 1789, after having conferred on the several courts of the United States their respective jurisdictions over the matters subjected to their cognizance, and upon which they may pronounce judgments, proceeds in the 14th section to provide for the exercise of those jurisdictions—that is to say, for carrying them into execution, in the language of the above-recited clause of the Constitution, and, as I have already said, into full and complete execution. For that purpose it enacts "that all the before-mentioned courts of the United States, (the Circuit Court being one of them,) shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." 1 Statutes at Large, 81.

Under this section, the power of the Circuit Courts and of all other courts of the United States is limited to the issue of writs for the sole purpose or object of exercising their jurisdictions; but for the accomplishment of that object and purpose, the power is given to issue "all writs," whether of mandamus or any other writs not specially provided for by statute, which may be necessary, and are agreeable to the principles and usages of law. For the accomplishment of that purpose no language could be more comprehensive.

A construction was given to this 14th section in respect to the extent of the power conferred by it on the Circuit Courts to issue writs in the above-mentioned case of Wayman *v.* Southard, 6 Pet. Cond. Rep., 4.

In that case, it was insisted by one of the parties, that the power conferred by that section was limited to process anterior to the rendition of the judgment, and that when judgment was rendered the jurisdiction of the court was exercised and exhausted; and that, consequently, the Circuit Courts could not, by virtue of that section, issue executions on their judgments.

The court, after reciting the words of the 14th section, answer this objection by saying, "the words of the fourteenth section

are understood by the court to comprehend executions. An execution is a writ which is certainly agreeable to the principles and usages of law. There is no reason for supposing that the general term, 'writs,' is restrained, by the words 'which may be necessary for the exercise of their respective jurisdictions,' to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act to suppose an execution necessary for the exercise of jurisdiction." 6 Pet. Cond. Rep., 4, 5.

All that is said above about writs of execution must be equally applicable to writs of mandamus, when they are necessary to carry a judgment into effect.

This decision establishes two propositions, which have an important bearing on the case now before the court.

1st. That the jurisdiction of the Circuit Court over a case continues until its judgment is satisfied.

2d. That it has power to issue such writs, both before and after judgment, as may be necessary for the exercise of its jurisdiction, and are agreeable to the principles and usages of law.

From these propositions, it would seem to follow, as a necessary corollary, that if in any case the writ of mandamus was necessary for the satisfaction of the judgment, and the case itself was one where, by the principles and usages of law, the writ would issue, then the 14th section confers on the court power to issue it for that special purpose.

The question of the extent of power given to the Circuit Courts by this 14th section, to issue writs of mandamus, first came up for decision in this court, in the case of McIntire *v.* Wood, 2 Pet. Cond. Rep., 588.

Mr. Vinton then proceeded to comment on several subsequent decisions of this court.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs in error were defendants in a suit by Aspinwall and others, in which a judgment was recovered for interest coupons on bonds issued by the corporation. The cause was removed to this court, and may be found reported in 21 Howard, 539. The judgment of the Circuit Court was affirmed, and the record remitted.

In order to enforce the execution of this judgment, the plaintiffs moved for a mandamus to the commissioners, to compel them to levy a tax to satisfy the judgment. The record shows that the board of commissioners appeared in the Circuit Court and resisted the motion, on several grounds, but chiefly that the court had no jurisdiction to issue a mandamus in this case.

The act of Assembly of Indiana, which authorized the issue of the bonds and coupons which were the subject of the litigation, may be found in the former report of the case. (21 How., 542.)

It appears that by the 3d section of this act it is made the duty of the commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess a special tax, sufficient to realize the amount of the interest to be paid for the year."

This the commissioners had not done, and refused to do so, on notice and request of the defendants in error.

Now, it is not alleged nor pretended but that, if this judgment had been obtained against the corporation in a State court, the remedy now sought could have been obtained; for it must be admitted, that, according to the well-established principles and usage of the common law, the writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. That this case comes completely within the category is too clear for argument; for, even assuming that a general law of Indiana permits the public property of the county to be levied

on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of mandamus.

Why should not the Circuit Court of the United States be competent to give to suitors this only adequate remedy?

By the common law, the writ of mandamus is granted by the King's Bench, in virtue of its prerogative and supervisory power over inferior courts. The courts of the United States cannot issue this writ by virtue of any supervisory power at common law over inferior State tribunals. They can derive it only from the Constitution and laws of the United States.

The jurisdiction of these courts is, by the Constitution, extended to "controversies between citizens of different States." Congress has authority to make all laws which shall be necessary and proper for carrying this jurisdiction into effect. The jurisdiction of the court to give the judgment in this case is not disputed; nor can it be denied, that by the Constitution, Congress has the power to make laws necessary for carrying into execution all its judgments. (See Wayman *v.* Southard, 10 Wheaton, 22.) Has it done so?

By the 14th section of the Judiciary act of 1789, it is enacted "that courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, *and all other writs* not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles of the common law."

Now, the "jurisdiction" is not disputed, and it is "*necessary*" to an efficient exercise of this jurisdiction that the court

have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's remedy can be effected. The fund to pay this judgment, by the face of the contract, is a special tax laid and to be collected by defendants. They refuse to perform a plain duty. There is no other writ which can afford the party a remedy, which the court is bound to afford, if within its constitutional powers, except that afforded by this writ of mandamus.

It is "agreeable to the principles of the common law," and, consequently, within the category as defined by the statute.

A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgments. But no court, having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice. It is no objection, therefore, to the use of this remedy, that the party might possibly obtain another by commencing a new litigation in another tribunal.

We are of opinion, therefore, that the Circuit Court had authority to issue the writ of mandamus in this case.

It is no reason for setting it aside, that a previous alternative writ had not issued. The notices served on the commissioners gave them every opportunity of defence that could have been obtained by an alternative mandamus. There was no dispute about facts which could affect the decision. The court gave them an opportunity to comply with the demand of the plaintiffs; their excuse for not doing so was, palpably, "a mere colorable adjournment or procrastination of the performances of the act, for the purpose of delay." It is equivalent to a refusal. Having refused to perform the duty which the law imposed upon them on the proper day, without even the pretence of a reason for such conduct, the peremptory mandamus was very properly awarded, commanding the duty to be performed "*forthwith.*"

The judgment of the Circuit Court is, therefore, affirmed with costs.

HENRY T. BULKLEY, CLAIMANT OF THE BARQUE EDWIN, APPELLANT, *v.* THE NAUMKEAG STEAM COTTON COMPANY.

At Mobile, it is necessary for a vessel drawing much water to lie outside of the bar and have her cargo brought to her by lighters.

The usage is for the lighterman to be engaged and paid by the captain of the vessel, to give his receipt to the factor for the cotton, and to take a receipt from the captain when he delivers it on board of the vessel.

Where a lighterman, thus employed, was conveying bales of cotton to a vessel lying outside of the bar, but before they were put on board, an explosion of the boiler threw the bales into the water, by which the cotton was damaged; the vessel was held responsible for the loss upon being libelled in a court of admiralty, the master having included these bales in the bills of lading which he signed.

The delivery of the cotton to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master had engaged to carry the cotton to Boston. When delivered by the shipper and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed.

The cases in this court and in England examined.

THIS was an appeal from the Circuit Court of the United States sitting in admiralty for the district of Massachusetts.

The facts of the case are stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Loring* for the appellant, and *Mr. Andros* for the appellee.

The principal question involved was thus stated by *Mr. Loring* in the opening of his argument:

One of the questions presented, the only one decided in the courts below, is whether or not a vessel may be liable, in a suit *in rem*, for the loss of or damage done to merchandise never received on board.

It was held that the mere reception of goods by the master or owners, for the purpose of being carried in a particular vessel, did create a liability on the part of *the vessel* for any subsequent loss or damage, though the goods were never placed on

board, and the loss was not caused by the insufficiency of the vessel, or any fault of its owners, master, or crew.

The claimant, conceiving that this decision is contrary to the principles of the maritime law and without precedent, and that the question is of importance, presents it for the consideration of this tribunal, and respectfully asks its attention to the suggestions to be presented in his behalf.

It is impossible for the reporter to do full justice to the arguments of the counsel on both sides, because they included so many branches of inquiry, with references to authorities. All that he can do is to give merely the points raised on both sides.

Mr. Loring's points were the following:

1. The libellants cannot hold either the vessel or the owners under the bills of lading, because the goods in question were not on board; and having insisted upon the master's signing such bills, are prevented thereby from resorting to the original contract of shipment.

2. The owners of the vessel were not common carriers.

3. The vessel is not liable *in rem.*

So far it has not been considered whether or not the libellants have a lien or privilege upon the vessel for the loss they have suffered.

The inquiry has been as to the personal liability of the owners. If the court shall be of opinion that the owners are not liable on the bill of lading, because the goods were not on board; or on the original parol contract, because that was superseded by the written contract in the bill of lading, which the libellants elected to take; or, if bound by such contract, that the owners were private and not common carriers, and there is no proof of want of ordinary care—then it is unnecessary to inquire as to the liability of the vessel, it being well settled, that except in cases of bottomry and salvage, there can be no claim against the thing unless there is a personal liability on the part of its owners.

In the case of the Druid, 1 W. Rob., 399, Dr. Lushington says: "No suit could ever be maintained against a ship where the owners were not themselves personally liable, or where the

personal liability had not been given up, as in bottomry bonds." And the rule as stated by him, to this extent, is expressly recognised and affirmed by this court in the case of the Freeman, 18 Howard, 189.

If on any ground the court should be of opinion that the owners could not be held personally liable for the loss suffered by the libellants, it necessarily follows that the vessel is not liable, and that this suit cannot be maintained. It is absolutely essential that such personal liability must exist in order to create a charge *in rem*.

If, however, the court should be satisfied that a personal liability does exist on the part of the owners, it does not follow as of course that the vessel is liable.

The libellants must go further, and show that the policy of the maritime law secures their claim and gives it a preference over others, by creating a privilege against the vessel. The common law gives no such preference.

There is not even a presumption that the vessel is liable because the owners are. The liabilities depend upon different grounds, and are not at all reciprocal. In this court, of late years, the tendency has been very strong to limit maritime privileges, and to deny their existence in cases where they had before been recognised. In the case of the Yankee Blade, 19 Howard, 82, they are said to be *stricti juris*, and not to be encouraged. In Thomas *v.* Osborn, 19 Howard, 22, and Reed *v.* Pratt, 19 Howard, 359, the liens of material men are confined to cases of necessity. A recent rule of the court prohibits the enforcement of domestic liens by the District Courts. The privilege of the ship-owner upon goods for freight is apt to be treated as a mere common-law lien, depending upon possession; and in People's Ferry Co. *v.* Beers, 20 How., 401,) it is said that "liens on vessels encumber commerce, and are discouraged."

As in all of these cases there would exist a personal liability on the part of the owners, it is very plain that that does not necessarily establish a privilege against the ship.

Mr. Andros's propositions were the following:

1. That between the libellant and the master of the vessel

against which a lien is sought to be enforced in the present case there was a valid contract of affreightment, which is binding upon the claimant and owners thereof.

2. That the owners of said vessel are liable as common carriers, and that such liability commenced immediately the master received the libellant's merchandise for transportation.

3. That the owners being liable in damages for the non-delivery of the libellant's merchandise, which had been by his agents delivered to and received by the master of the said vessel for transportation, the ship in specie is also liable, and that this liability arises from the contract of affreightment, which has been executed on the part of the libellant.

4. That the reception and lading of the libellant's merchandise on board of the lighter by the master of the vessel, for the purpose of transporting it to the same, was a sufficient performance of the libellant's part of the contract of affreightment to enable him to hold the ship in specie as security for the due performance of the master's part of the agreement.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States, sitting in admiralty, for the district of Massachusetts.

The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the District and Circuit Courts, and upon which both courts decreed for the libellant.

From this agreed state of facts, it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libellant 707 bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading.

The condition of the bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case.

Vessels of a large size, and drawing over a given depth of water, cannot pass the bar in the bay, which is situate a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass the bar in ballast, go up to the city and take on board as much of their cargoes as is practicable, and, at the same time, allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board.

In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker, through whom the freight is engaged, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it, and gives his own receipt for the same. On delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge.

The usual bills of lading are subsequently signed by the master and delivered.

In the present case, the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and 100 bales were laden on board of her at the city to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the 100 bales was taken out, her boiler exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the 607 bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker, at Mobile, for account of whom it may concern; two were lost.

The master of the barque signed bills of lading, including

the 100 bales, being advised that he was bound to do so, and that if he refused, his vessel would be arrested and detained. On her arrival at Boston, the master delivered the 607 bales to the consignees, and tendered the fourteen, which were refused.

A question has been made on the argument, whether or not the libellant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

The court is of opinion that the vessel was bound for the safe shipment of the whole of the 707 bales of cotton, the quantity contracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed—the one entitled to all the privileges secured to the owner of cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognised by principles and usages of the maritime law.

The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the deliv-

ery and acceptance at the place of shipment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

The contract as thus explained being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow, upon the settled principles of admiralty law, which binds the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.

It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court and in England in support of the position. (18 How., 189; 19 Ib., 90; and 2 Eng. L. and Eq. R., 337; Grant and others *v.* Norway and others. 18 Eng. C. L. and Eq., 561; 29 Ib., 323.) But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfilment on the part of the shipper, namely, the delivery of the cargo.

It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel; but as the bill of lading had been signed by the master, in which he admitted that the goods were on board, the question presented was, whether or not the admission was not conclusive against the owner and the vessel, the bill of lading having passed into the hands of a *bona fide* holder for value.

The court, on looking into the nature and character of the authority of the master, and the limitations annexed to it by the usages and principles of law, and the general practice of shipmasters, held, that the master not only had no general authority to sign the bill of lading, and admit the goods on board when contrary to the fact, but that a third party taking the

bill was chargeable with notice of the limitation, and took it subject to any infirmity in the contract growing out of it.

The first time the question arose in England, and was determined, was in the case of Grant and others *v.* Norway and others, in the Common Pleas, (1851,) and was in reference to the state of facts existing in this and like cases, and in connection with the principles involved in its determination, that the court say the master had no authority to sign the bill of lading, unless the goods had been shipped; cases in which there had been no delivery of the goods to the master, no contract binding upon the owner or the ship, no freight to be carried, and, in truth, where the whole transaction rested upon similated bills of lading, signed by the master in fraud of his owners.

In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unlading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of la-

ding; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view, we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf.

The decree of the court below affirmed.

JOHN D. CLEMENTS, APPELLANT, *v.* JONATHAN R. WARNER.

In 1850, Congress granted to the State of Illinois every alternate section of land for six sections in width on each side of a proposed railroad, and until the State could make its selection, the land on either side of the track of the road was withdrawn from entry or sale.

In 1852, the selections were made, and the land not selected was offered for sale, and such as were not sold became subject to private entry.

In October, 1855, Clements began a settlement upon a portion of one of these sections.

In November, 1855, Warner purchased the same land at private sale at the land office.

In November, 1856, Clements claimed a pre-emption right, and the register and receiver granted a certificate of purchase accordingly.

This court holds that the land in question was subject to a pre-emption right in November, 1855, when Warner made his purchase. Consequently it is invalid, as against the pre-emption right of Clements.

THIS was an appeal from the Circuit Court of the United States for the southern district of Illinois.

The case is stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Ives* for the appellant, and *Mr. R. E. Williams* for the appellee.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee filed this bill in chancery in the Circuit Court to quiet his title to a portion of section thirty-three, in township seventeen north, of range eight east, of the third principal meridian, in the county of Champaigne, Illinois. By the act of Congress of the 20th September, 1850, for granting the right of way and making a grant of land to the States of Illinois, Mississippi, and Alabama, in aid of the construction of a railroad from Chicago to Mobile, (9 Statutes at Large, 466,) there was granted to the State of Illinois, for the purpose of making the railroad described in the title of the act, every alternate section of land designated by even numbers, for six sections in width on each side of the road; and in case any of these sections had been sold, or were subject to a pre-emption claim, then the State was authorized to select from the lands of the United States, contiguous to the tier of sections before mentioned, so much land in sections and parts of sections as should make up the full complement of land included in the concessions in the act. The act further provided, that the sections and parts of sections of lands which, by the grant, might remain to the United States within six miles on each side of the road, should not be sold for less than double the minimum price of the public lands, when sold. To comply with the requirements of this act, the Commissioner of the General Land Office withdrew from entry or sale the land on either side of the track of the road, until the State of Illinois could make the selections that were authorized by it. These

were completed in 1852, and during that year the President of the United States by a proclamation directed the sale of those sections and parts of sections along the line of the road that had remained to the United States, after the satisfaction of the grant to Illinois. Such of the sections as were not sold became subject to private entry. The section of land described in the plaintiff's bill, a portion of which forms the subject of this suit, was one of these, and was purchased at private sale at the land office, in November, 1855, by a person under whom the plaintiff derives his claim, and who has the usual receipt given by the receiver of the land office.

The conflicting claim against which the appellee seeks relief originates in an entry by the appellant in November, 1856, as having a pre-emption right under a settlement began in October, 1855, before the date of the entry on which the title of the appellee is founded. A patent issued to the appellant as having the superior claim. The object of the bill is to reverse the decision of the officers of the land office, and to obtain a relinquishment of the legal title evinced by this patent, and the only question presented is, whether the land was the subject of a pre-emption right in November, 1855.

The 10th section of the act of the 4th September, 1841, confers upon the beneficiaries of that act, "who shall make a settlement in person on the public lands to which the Indian title has been extinguished, and which shall have been surveyed prior thereto, and who shall improve and inhabit the same, as specified in the act, a right of pre-emption to one quarter section of land." Among the exceptions in the act to the exercise of this right of pre-emption, is one that includes "sections of lands reserved to the United States, alternate to other sections granted to any of the States for the construction of any canal, railroad, or other public improvement." 5 Statutes at Large, 466.

Subsequent acts of Congress extend the pre-emption privilege to lands not surveyed at the time of the settlement, and confer privileges upon settlers on school lands, and on lands reserved for private claims. 5 Statutes at Large, 620, sections 3, 9.

In 1853, the pre-emption laws, as they now exist, were extended to the reserved sections of public lands along the lines of all the railroads, wherever public lands have been granted by acts of Congress, in cases where the settlement and improvements had been made prior to the final allotment of the alternate sections to such railroads by the General Land Office. 10 Statutes at Large, 244.

In the administration of these laws, the Executive Department of the Government has decided, that after the restoration to market of the lands embraced in the exception we have quoted from the act of 1841, and when they have become subject to entry at private sale, they lose their character as reserved lands, and will then be subject to the privileges of pre-emption in favor of settlers. The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognises their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.

By the act of 1841, the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers. No act of Congress has defined the meaning of the term reserve, as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands fitted for agricultural purposes, after they have been offered at public sale, are affected by the privilege of the actual settler to have the preference of entry. No reason of public policy exists to exclude this class of public lands from the operation of the same law, under the same conditions. No violence is done to the language of the act by limiting the exception to the temporary withdrawal of the lands from the market, and the liberal policy of Congress in favor of the actual settler is better accomplished by a restrictive rather than extensive in-

terpretation of the exceptional clause in the act. We therefore sanction the construction adopted in the land office.

The Circuit Court overruled the demurrer of the defendant to the bill, and made a decree in conformity to the prayer of the bill. This is error. The decree of the Circuit Court is reversed, and the cause is remanded to the Circuit Court, with directions to dismiss the bill, with costs.

LESSEE OF ROBERT W. SMITH AND CAREY W. BUTT, PLAINTIFFS IN ERROR, *v.* WILLIAM MCCANN.

In Maryland, the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence.

The statute of George the Second which made lands in the American colonies liable to be sold under a *fieri facias* issued upon a judgment in a court of common law, did not interfere with this distinction, and under it a legal estate only and not an equitable interest could be seized under a *fi. fa.*

In 1810, an act of Assembly was passed making equitable interests subject to this process.

But the purchaser at the sale of an equitable interest under this process only buys the interest which the debtor had, and thus becomes the owner of an equitable and not a legal estate.

It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property, and not a barren legal title held in trust.

In the action of ejectment, in Maryland, the lessor of the plaintiff must show a legal title in himself to the land which he claims, and the right of possession under it, at the time of the demise laid in the declaration and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery.

Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.;* and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed.

But the plaintiff in the ejectment suit offered evidence to prove that the trusts in the deed were fraudulent, and that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors. And this proof was offered to show that the debtor had a beneficial interest in the property, liable to be seized and sold for the payment of his debts.

This parol evidence could not be introduced to enlarge or change the legal estate of the grantee against the plain words of the instrument.

If the evidence were admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed. Although the debtor may have paid the purchase money, that circumstance did not establish a resulting trust in his favor.

The lessors of the plaintiff had a plain and ample remedy in chancery, where all the parties interested could be brought before the court.

The instruction of the court below was therefore correct, that the plaintiff could not recover in the action of ejectment.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

The facts are stated in the opinion of the court.

It was argued by *Mr. Davis* and *Mr. F. L. Smith* for the plaintiffs in error, and *Mr. Campbell* and *Mr. Malcolm* for the defendants.

The points on behalf of the plaintiffs in error were the following. The counsel contended that the instruction given by the court below was erroneous, and cited these authorities:

McMechen *v.* Marman, 8 G. and J., 57, 73, 74, 75.
Jackson *v.* Graham, 3 Caines's R., 188.
Jackson *v.* Scott, 18 Johnson's R., 94.
Jackson ex dem. Cary *v.* Parker, 9 Cowen R., 85.
Jackson ex dem. Ten Eyck *v.* Walker, 4 Wendell, 462.
Culbertson *v.* Martin, 2 Yeates, 443.
Remington *v.* Linthicum, 14 Peters, 84.
Young *v.* Alger, 3 Watts, 223, 227.
Jackson *v.* Bush, 10 John., 223.

In ejectment against a defendant in an execution, or those claiming under him, the purchaser of land at a sheriff's sale, having complied with the terms of sale, is entitled, as plaintiff, to recover the possession against said defendant or his alience, and the defendant will not be permitted to controvert the title by showing it to be defective, or by setting up a better outstanding title in a third person.

Remington *v.* Linthicum.

McMechen *v.* Marman.

Lessee of Cooper *v.* Galbraith, 3 Wash. Cir. Ct. R., 546, 550.

Jackson *v.* Chase, 2 John. C. L. R., 82.

Jackson *v.* Pierce, Id., 221.

Jackson *v.* Deye, 3 John. C. L. R., 422.

Bayard *v.* Colfax et al., Cox's Digest S. C. U. S., 272, sec. 41.

Jackson *v.* Davis, 18 John. C. L. R., 7.

Jackson *v.* Van Slyck, 8 John. C. L. R., 486.

The trusts in the deed from Brown and wife to Richard D. Fenby being fraudulent and void, the deed passed an absolute title to Fenby of the land in controversy.

Bacon's Abr., vol. 2, Bouvier's Ed., 298, 305.

Hughes *v.* Edwards, 9 Wheat., 493.

That the terms of trust, in the deed from Brown and wife to Fenby, not being established by any evidence, *aliunde*, the said trust can be considered as existing, if at all, only from the date of the deed.

Hill on Trustees, top pp. 86, 87, note 2.

The counsel for the defendant in error made the following points:

1. This action of ejectment being brought in Maryland, and the common law in that State being unchanged, the plaintiff must show, in evidence, a legal title to enable him to recover. The Maryland statute, (1810, ch. 160,) which authorizes a sale on execution at law, of equitable estates, does not change an equitable into a legal title, and the purchaser must assert his rights in their appropriate form.

Carroll *v.* Norwood, 5 H. and J., 155.

Wilson *v.* Inloes, 11 Gill and Johnson, 351.

Hammond *v.* Inloes, 4 Maryland, 138.

2. To show themselves seized of a legal title, the plaintiffs in error give in evidence the deed from Brown and wife to Fenby, conveying the property which was levied on under the judgment against Fenby, and sold to the plaintiff's lessor.

This deed, (Rec. 25,) which conveyed the legal title to Fenby, conveyed it to him in trust for his wife and children, and gave him but a dry legal title, with no beneficial interest in himself, and so vested nothing in him which could be attached or taken in execution upon process against him.

Houston *v.* Newland, 7 Gill and Johnson, 493.

Aware of this insuperable difficulty, the plaintiffs in error seek, by a charge of fraud against the deed, to extinguish the trust, and thus convert the legal ownership of Fenby into a beneficial one. But if the deed be void against creditors, by reason of the trust for Fenby's wife and children, the statute of Elizabeth avoids it *in toto*, and the plaintiffs in error cannot, at the same time, set it up and destroy it. If the deed be wholly void, for fraud or any other cause, then the foundation of the plaintiff's title fails, for without it Fenby had no estate. If it be relied on as the source of Fenby's title, it must be taken as it is.

Mackie *v.* Cairns, Hopkins, 405.
5 Cowen, 580.
5 Shepley, 369.
4 Yerger, 164.
2 Sanford C. Rep., 630, Goodhue *v.* Berry.
6 Gill and Johnson, 231, State *v.* Bank of Maryland.

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

This case comes up upon a writ of error to revise the judgment of the Circuit Court for the district of Maryland, in an action of ejectment brought by the plaintiff in error against the defendant to recover certain lands lying in that State.

The plaintiff, in order to show title to the land claimed, offered in evidence, that Smith and Butt, lessors of the plaintiff, having sold cotton to Fenby & Brother, of Baltimore, in 1857, drew on them for the sum due, and their bills were protested to the amount of $13,708. They thereupon brought suit on the 3d of June, 1857, and recovered judgment in the Circuit Court on the 6th of April, 1858; and on the 10th of the same month they issued a *fieri facias*, which was on the same day levied by the marshal on the land in controversy; and after-

wards, on the 2d of September next following, sold at public auction. At this sale the lessors of the plaintiff were the purchasers, and received from the marshal a deed in due form.

The plaintiff further proved that a certain Robert D. Brown was seized in fee of the land at the times hereinafter mentioned, and read in evidence a deed from him and his wife, dated April 6th, 1857, whereby they conveyed it to Richard D. Fenby, one of the defendants, against whom the judgment was afterwards obtained, stating at the time he offered it in evidence, that he impeached the trusts in the deed for fraud, and intended to show such trusts to be void against him.

The deed purports to be in consideration of $7,800.50, and recited that the land was purchased by Fenby, from Brown, on the 13th of March, 1852, and then grants to Fenby, "*as trustee*," the lands in question in fee simple, in "trust" for the sole and separate benefit of Jane Fenby, the wife of the said Richard D. Fenby, for and during the term of her natural life, in all respects as if she was a feme sole, free from all liability for the debts of her husband, and from and immediately after the death of the said Jane Fenby, in trust for such child or children, and descendants of a deceased child or children of the said Jane, as she may leave living at the time of her death. Such child, children, and descendants, to take *per stirpes*.

The deed gives authority to Fenby to sell and dispose of any part of the trust property, and to invest the proceeds in safe securities upon the same trusts.

The plaintiff further offered evidence tending to prove that Fenby was hopelessly insolvent when this deed was made, and that he was in possession of the land from the time he purchased it in 1852.

The defendant, McCann, then read in evidence a deed from Fenby to him, dated March 23d, 1858, purporting to be made in execution of the power conferred by the trust deed, and conveying the property in fee simple in consideration of twenty-two thousand dollars.

And the plaintiff thereupon offered evidence tending to show that this deed was intended to cover the previous fraud of the one to Fenby; that McCann was privy to this design,

and co-operated in it; that he paid no money; and that notwithstanding this deed, Fenby continued in possession after the land had been advertised for sale by the marshal, and that the possession was delivered to McCann only a few days before the sale was actually made.

The defendant offered evidence for the purpose of rebutting the charge of fraud against Fenby and himself, and upon the whole testimony as offered, several instructions to the jury were moved for by each of the parties, which were all refused, and the following instruction given by the court:

"The deed from Robert P. Brown to Richard D. Fenby, of the 6th of April, 1857, conveyed only a naked legal interest to said Fenby, which could not be levied on and sold under a *fi. fa.* issued on a judgment against him, he having no beneficial interest therein. And as the plaintiff, to sustain this action, has offered the said deed in evidence, and as without it there is no evidence of any legal title whatever in said Fenby at the date of the levying of said *fi. fa.*, or at any other time, the plaintiff cannot recover in this action."

As this instruction disposed of the case, it is unnecessary to state at large the prayers offered by the respective parties, or the testimony upon which they respectively relied to prove or disprove the imputations of fraud.

In discussing the question thus presented by the decision of the court below, it is proper to state, that in Maryland the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence; and the action of ejectment is the only mode of trying a title to lands. And in that action the lessor of the plaintiff must show a legal title in himself to the land he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery; nor is the defendant required to show any title in himself; and if the plaintiff makes out a *prima facie* legal title, the defendant may show an elder and superior one in a stranger, and thereby defeat the action.

The law upon this subject is briefly and clearly stated by the Court of Appeals of the State, in 11 Gill and Johnson, 358, and 4 Maryland Reports, 140, 173.

We state the law of Maryland upon this subject, because very few of the States have preserved the distinction between legal and equitable titles to land. And in States where there is no court of equity, the courts of common law necessarily deal with equitable interests as if they were legal, and exercise powers over them which are unknown to courts of common law, where a separate chancery jurisdiction is established. Cases, therefore, decided in States which have no courts of equity, as contradistinguished from courts of common law, can have no application to this case so far as trusts or any other equitable interest is involved. And even in States where the chancery jurisdiction has been preserved, the decisions of their respective courts do not always harmonize in marking the line of division between law and equity. And as the title to real property, whether legal or equitable, and the mode of asserting that title in courts of justice, depend altogether upon the laws of the State in which the land is situated, cases like that now before the court are questions of local law only, in which we must be guided by the decisions of the State tribunals.

Since the passage of the act of George 2d, which made lands in the American colonies liable to be sold under a *fi. fa.* issued upon a judgment in a court of common law, the process of extent has fallen into disuse, and is regarded as obsolete in Maryland. But this statute did not interfere with the established distinction between law and equity, and an equitable interest could not be seized under a *fi. fa.* until the law of Maryland was in this respect altered by an act of Assembly of the State in 1810. But this law does not convert the equitable interest into a legal one, in the hands of the purchaser. He buys precisely the interest which the debtor had at the time the execution was levied; and if he purchased an equitable interest and desires to perfect his title, he must go into equity, where the court will decree a conveyance to him from

the holder of the legal title, if he shows that the debtor was entitled to it at the time of the levy.

But the statute of George 2d, which authorized the sale of lands under a *fi. fa.*, did not authorize the sheriff to deliver them, nor the court to issue the writ of hab. fac. poss. upon the return of the process. And the result of this was, that the purchaser was compelled to bring an ejectment to obtain the possession, in which, as we have already said, he must show a legal title to the land; and consequently must show that the debtor, at the time of the levy, had a legal title, and such a title as was subject to seizure and sale under the *fieri facias*. And if the debtor had but an equitable title, the purchaser was compelled to go into equity, and obtain a legal one before he could support an action of ejectment against the party in possession. A more summary process in certain cases has been since provided by a law of the State passed in 1825. But up to that time the principles above stated were the settled law of the State; and remain so, except in so far as they are altered by that act of Assembly. It is unnecessary to state the provisions of that act, because the plaintiff did not proceed under it. He has resorted to the action of ejectment to obtain possession, and cannot recover, unless he can show a legal title to the premises. It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property. And in Houston *v.* Newland, 7 Gill and Johnson, 493, where a party had sold the land to another *bona fide*, but had not conveyed the legal title, the court held that the title remaining in the vendors was a barren legal title, in trust for the purchaser, and could not be sold for the payment of his debts. And a still later case, 10 Gill and Johnson, 443, 451, 452, Matthews *v.* Ward's Lessee, where land had been conveyed to a trustee, in trust for third persons, and the *cestuys que trust* had died without heirs, the court decided that the land escheated to the State, although the heirs of the trustee to whom the legal estate was conveyed were still living, and said that "the rights of such trustee, who is a mere instrument, are treated with no respect, and the State deals with the property as her own."

We proceed to apply these principles to the case before us. The deed to Fenby, in plain and unambiguous words, conveyed to him a naked legal title; he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.*; and the deed of the marshal, therefore, conveyed no title to the lessors of the plaintiff. Standing only upon this title, derived under this deed to Fenby, and showing no other title, he certainly could not recover in an action of ejectment.

But the plaintiff offers evidence to prove that the trusts in the deed are fraudulent, and that Fenby purchased the land and procured the deed from Brown in this form, in order to hinder and defraud his creditors. And he offers this proof to show that Fenby had a beneficial interest in the property, liable to be seized and sold for the payment of his debts.

The proposition to enlarge or change the legal estate of the grantee in a deed, by parol evidence, against the plain words of the instrument, is without precedent in any court of common law. And in the case of Remington *v.* Linthicum, relied on by the plaintiff, the evidence was offered, not to change the estate limited in the grant, but to show that the grant was fraudulent, and utterly void, and conveyed no interest whatever to the grantee named in it. The party offering the evidence did not claim under that deed, but against it. And if, in this case, the evidence was offered for a like purpose, and the deed proved to be fraudulent and void, it would defeat the plaintiff's action instead of supporting it.

He does not, however, offer the parol evidence for this purpose, but offers it to enlarge the estate of Fenby, and to show that he had not merely a barren legal title, but a beneficial interest, which was liable for the payment of his debts. But if the evidence were admissible, we do not perceive how the fraudulent character of the trusts, as against his creditors, could enlarge his legal interest beyond the terms of the deed. It is true he paid the money for the property. And if this circumstance could be supposed to create a resulting trust for the benefit of Fenby, it would be a mere equitable right exclusively within the jurisdiction of a court of chancery, and a court of common law could neither enforce it nor notice it;

and consequently it would not be a title upon which an action of ejectment could be maintained. But it obviously is not a case to which the doctrine of resulting trusts can be applied; for, as between Fenby and the *cestuys que* trust, he can have no equity against the express trusts to which he assented, and which, indeed, according to the plaintiff's allegation, he procured to be made. And when the deed is offered in evidence by the plaintiff, in order to derive to himself a legal title under it, the interests and estates thereby conveyed cannot be enlarged or diminished by testimony *dehors* the deed. The deed must speak for itself.

If these trusts are fraudulent, the lessors of the plaintiff have a plain and ample remedy in the court of chancery, which has the exclusive jurisdiction of trusts and trust estates. In that forum all of the parties interested in the controversy can be brought before the court, and heard in defence of their respective claims. But as the case now stands, the only interest which the plaintiff seeks to impeach is that of the *cestuys que* trust; yet they are not before the court, nor can they by any process be made parties in this ejectment suit, nor even be permitted to make themselves parties if they desired to do so, and cannot have an opportunity of adducing testimony in defence of their rights. Under such circumstances, an inquiry into the validity of these trusts would not only be inconsistent with the established principles and jurisdiction of courts of common law, but also inconsistent with that great fundamental rule in the administration of justice, which requires that every one shall have an opportunity of defending his rights before judgment is pronounced against him.

The judgment of the Circuit Court is therefore affirmed.

JOSEPH H. ADLER, LEWIS SCHIFF, SOLOMON ADLER, AND LOBE RINDSKOFF, PLAINTIFFS IN ERROR, *v.* AARON D. FENTON, OLIVER H. LEE, WILLIAM H. DAVIS, AND MERRIT T. COLE.

Where a creditor, whose debt was not yet due at the time of bringing the action,

brought a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently so as to hinder and defeat the creditors in the collection of their lawful demands, the action will not lie.

The debtors were the lawful owners of the property at the time the suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demands.

The authorities examined to show that this cannot be done.

In this case, the creditor, by suing and levying an attachment upon the property of the debtor for such parts of the debt as had then become due, had waived the alleged fraud in the contract of sale and confirmed the sale.

THIS case was brought up by writ of error from the District Court of the United States for the district of Wisconsin.

The facts are stated in the opinion of the court.

It was argued by *Mr. Doolittle* for the plaintiffs in error, upon which side there was also a brief filed by *Mr. Brown*, and by *Mr. Lynde* for the defendants.

The points made by the counsel on both sides were so connected with the special circumstances of the case, that the effort to explain them to the reader would be fruitless without a long narrative.

Mr. Justice CAMPBELL delivered the opinion of the court.

This action was instituted by the defendants in error in the District Court, as creditors of two of the plaintiffs in error, Adler and Schiff, upon the complaint, that this firm had combined and conspired with their co-defendants in the court below, to dispose of their property fraudulently, so as to hinder and defeat their creditors in the collection of their lawful demands. By means of which fraudulent acts, they affirm they suffered vexation and expense, and finally incurred the loss of their debt.

The defendants pleaded the general issue. Upon the trial,

the plaintiffs proved that Adler and Schiff were traders in Milwaukie, and to carry on their business, in August, 1857, purchased of the plaintiffs, and other merchants in New York, upon credit, a large quantity of merchandise, which, with their other property, shortly after its delivery at Milwaukie, was assigned to one of their co-defendants, for the ostensible purpose of paying their debts, but really with the purpose of more effectually concealing it from the pursuit of their creditors.

There was testimony conducing to convict all the defendants of a common design to accomplish this purpose. The plaintiffs had extended a credit to Adler and Schiff of two, four, and six months. They caused an attachment to issue against this firm upon all their debt which had become due at the time these transactions occurred, which was levied upon sufficient property to satisfy it, and afterwards, and before the maturity of their remaining demand, this suit was commenced. At the time of the trial, this demand was their only claim against Adler and Schiff.

The defendants requested the court to instruct the jury, "that a creditor at large, as such, has no legal interest in the goods of his debtor, and cannot maintain an action for any damages done to such property; and that if the defendants had been guilty of a conspiracy to remove the property of a debtor, and thereby to defraud his creditors, a creditor at large, not having a present right of action against such debtor, has not such an interest in the subject of the fraud as to enable him to maintain an action for damages against the defendants, and that the declaration discloses no cause of action against the defendants." The court declined to give this instruction, but charged the jury "that the plaintiffs sold their goods to Adler and Schiff on credit; they had no interest in the goods sold, or in the other property of these defendants, but an interest in the debt owing for the goods so sold on credit. And if the defendants have been guilty of a conspiracy to remove the property of Adler and Schiff, and they did so remove their property with intent to defraud the plaintiffs in the collection of their debt when it should become payable, even though it was not payable when such removal was effected, the plaintiffs have

a cause of action after the debt became payable." To enable the plaintiffs to sustain an action on the case like the present, it must be shown that the defendants have done some wrong, that is, have violated some right of theirs, and that damage has resulted as a direct and proximate consequence from the commission of that wrong. The action cannot be sustained, because there has been a conspiracy or combination to do injurious acts. In Savile *v.* Roberts, 1 Lord R., 374, Lord Holt said, "it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature, and therefore sufficient ground for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution." There are cases of injurious acts for which a suit will not lie, unless there be fraud or malice concurring to characterize and distinguish them. But in these cases the act must be tortious, and there must be consequent damage. An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive. In Hutchins *v.* Hutchins, 7 Hill N. Y. R., 104, the defendants had successfully conspired to induce a testator by fraudulent representations to alter a will he had made in favor of the plaintiff.

The court said, "for injuries to health, liberty, and reputation, or to rights of property, personal or real, the law has furnished appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish, that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie." And because the plaintiff had a mere possibility of benefit, and was deprived only of hopes and expectations, it was decided

that the action in that case would not lie. In Stevenson *v.* Newnham, 13 C. B. R., 285, it was determined, that when the act complained of is not unlawful *per se*, the characterizing it as malicious and wrongful will not be sufficient to sustain the action. In the present suit, the plaintiffs do not allege that they were defrauded in the contract of sale of their merchandise, although there is abundant testimony to show that the purchases were made by Adler and Schiff, with the intention of defrauding their vendors. But the plaintiffs, by electing to sue for the price, have waived that fraud, and confirmed the sale. Adler and Schiff were the lawful owners of the property at the time this suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demand.

The authorities are clear, that chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it. In Moran *v.* Dawes, Hopkins's Ch. R., 365, the court says: "Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor, and those of a creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any in-

terposition of equity. There are cases in which the violation of the rights of a creditor within these limits has formed the subject of an action at law against third persons. Smith *v.* Tonstall, Carth., 3; Penrose *v.* Mitchell, 8 S. and R., 522; Kelsy *v.* Murphy, 26 Pen. R., 78; Yates *v.* Joyce, 11 John., 136. But the analogies of the law, and the doctrine of adjudged cases, will not allow of an extension by the courts of the remedy employed in those cases in favor of a general creditor. This subject was discussed much at large in Lamb *v.* Stone, 11 Pick., 527.

"The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor, in order to aid and abet him in the fraudulent purpose of evading the payment of his debt. The court ask, what damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien; for he had none. No attachment has been defeated; for none had been made. He has not lost the custody of his debtor's body; for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor; for he had never procured any writ of attachment against him. He has lost no claim upon, or interest in the property; for he never acquired either. The most that can be said is, that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. * * * On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite, and contingent, to be the ground of an action." The same court reaffirmed this doctrine in Wellington *v.* Small, 3 Cushing R., 146.

Unquestionably, the claims of morality and justice, as well as the legitimate interests of creditors, require there should be protection against those acts of an insolvent or dishonest debtor that are contrary to the prescriptions of law, and are unfaithful and injurious. But the Legislature must determine upon the remedies appropriate for this end; and the difficulty of the subject is evinced by the diversity in the systems of different States for adjusting the relations of creditor and

debtor, consistently with equity and humanity. Bankrupt and insolvent laws, laws allowing of attachment and sequestration of the debtor's estate, and for the revocation of fraudulent conveyances, creditors' bills, and criminal prosecutions for fraud or conspiracy, are some of the modes that have been adopted for the purpose. In the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors. The charge of the district judge is erroneous, and the judgment of that court is reversed, and the cause remanded for further proceedings.

ARNOLD MEDBERRY, JOHN LAWHEAD, ROBERT H. NUGEN, AND ABNER J. DICKENSON, PLAINTIFFS IN ERROR, *v.* THE STATE OF OHIO.

Whether this court has or has not jurisdiction under the 25th section of the Judiciary act may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court.

But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone this court can resort to ascertain the subject-matter of the litigation.

Therefore, where the record showed that the only question presented to the State Court, and decided by them, was, whether the provisions of an act of the Legislature were consistent with the Constitution of the State, this court has no power to review their judgment.

THIS case was brought up from the Supreme Court of the State of Ohio by a writ of error issued under the 25th section of the Judiciary act.

The facts of the case are stated in the opinion of the court, and also in 7 Ohio State Reports, p. 523.

It came up on a motion to dismiss for want of jurisdiction, which was sustained by *Mr. Wolcott* and *Mr. Stanton*, and opposed by *Mr. Pugh.*

Mr. Justice GRIER delivered the opinion of the court.

The defendant in error moves to dismiss this case for want of jurisdiction, because the record does not present any question which this court has authority to re-examine, by the 25th section of the Judiciary act.

The construction of this section has been so often before this court, and the cases are so numerous which define and establish the conditions under which we assume jurisdiction, that it would be tedious to notice them, and superfluous to repeat or comment upon them.

For the purposes of this case, it is only necessary to say, "that it must appear from the record of the case, either in express terms or by clear and necessary intendment, that one of the questions which this court has jurisdiction to re-examine and decide was actually decided by the State court."

This may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone we can resort to ascertain the subject-matter of the litigation.

In this case, the declaration counts upon a contract made by the plaintiffs with the board of public works of Ohio, in 1855, for keeping a portion of the canal in repair for five years. It avers performance, and readiness to perform, and that those officers, acting under and by authority of an act of Assembly of Ohio, entitled "An act making appropriations for the public works for 1857," "in violation and in open disregard of such contract, did wrongfully hinder and prevent," &c.

The Supreme Court gave judgment for the defendants on a demurrer to this declaration.

It is not averred in the pleadings, or anywhere on the record, that this or any statute of Ohio was void, because it impaired the obligation of contracts.

The only legitimate inference to be drawn from the face of this record is, that the Supreme Court decided that the board of public works had no authority to make such contract. If we go out of the record to search for the reasons, we find no

evidence that there was any complaint that the act of 1857 was contrary to the Constitution of the United States, or that the court gave their judgment for the defendant on account of any of its provisions. It is not referred to, except for the purpose of showing that the plaintiffs might bring their suit against the State for damages. The contract declared on was made by virtue of an act of Assembly of 1845. In 1851, the people of Ohio formed a new Constitution. This contract was made in 1855.

The only question presented to the court, and decided by them, was, whether the provisions of the act of 1845 were consistent with those of the new Constitution.

This is a question of which this court has no authority to take judicial cognizance.

The writ of error is therefore dismissed.

JAMES D. PORTER AND OTHERS, PLAINTIFFS IN ERROR, *v.* BUSHROD W. FOLEY.

Where an act of Assembly of the State of Kentucky was objected to in the State court because said act and supplement were unconstitutional and void, the court properly considered the question as relating to the power of the Legislature to pass the act under the Constitution of the State, and not under the Constitution of the United States.

There is therefore no ground for the exercise of jurisdiction by this court under the 25th section of the Judiciary act.

THIS case was brought up from the Court of Appeals for the State of Kentucky by a writ of error issued under the 25th section of the Judiciary act.

A motion was made by *Mr. Mooar* to dismiss it for want of jurisdiction, under the following circumstances:

Porter and others, the plaintiffs in error, filed a petition in the State court to recover the title and possession of a lot of land in the town of Covington. They claimed under a grant

from the Commonwealth of Virginia, in 1787, to James Welsh, and a series of mesne conveyances to themselves.

The defendants below claimed under the same original title, and also under two acts of the Legislature of Kentucky passed on November 10 and November 26, 1823, by which William Porter was authorized to sell and convey certain parcels of ground which had been conveyed to his children. The plaintiffs objected to the admission of these acts as being unconstitutional and void. The court below, however, and the Court of Appeals, sustained them.

The reader can now understand the points made by the counsel.

In support of the motion to dismiss, *Mr. Mooar* made the following points:

1. As the bill of exceptions does not state that the statutes were repugnant to the Constitution of the United States, it must be presumed that the State Constitution was referred to; and this court has decided, in numerous cases, it had no jurisdiction on a writ of error from a State court to declare a State law void on account of its collision with a State Constitution.

3 Peters, 289.

4 Peters, 563.

20 Howard, 84.

Ibid, 522.

2. The ground of jurisdiction must be stated with precision, and the ruling of the court, to bring the case under the 25th section, must appear on the record to have been decided against the right claimed.

18 Howard, 196.

The only ruling of the court in this case was in overruling the objections of the plaintiffs to the introduction of the two State legislative acts as evidence in the cause. The reasons of the court for admitting the evidence are not stated in the record; nor did the counsel who made the objection rely upon any clause of the Constitution of the United States which renders said statutes unconstitutional and void. In Maxwell *v.* Newbold, 18 Howard, 517, Mr. Chief Justice TANEY said,

"the clause in the Constitution should have been specified by the plaintiffs in error in the State court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the State court." Neither the Constitution of the United States, nor any clause thereof, was specified or referred to in this case; nor is it sufficient that the judges of the State court, in their opinion, may have stated that certain clauses of the Constitution of the United States were involved in the decision, because, as Mr. Justice Story said, in the case of the Ocean Insurance Company *v.* Polleys, 13 Peters, 165, the opinion of the judges in the State court "constitutes no part of the record; and it is to the record, and the record only, that we can resort to ascertain our appellate jurisdiction in cases of this sort." As the record in this case does not show that the acts of the Legislature of Kentucky were objected to because of their repugnancy to the Constitution of the United States, or any clause thereof, no case is presented for the appellate jurisdiction of this court, and the writ of error should therefore be dismissed.

Mr. Headington opposed the motion to dismiss the writ upon the ground that the statutes in question violate the seventh section of the compact of 1789 between Virginia and Kentucky, (1 Stanton's Ky. Stat., 82,) and are therefore repugnant to the tenth section of the first article of the Constitution of the United States.

Green *v.* Biddle, 8 Wheaton, 1.

The defendant in error now moves to dismiss the case on the ground that the record does not show that it falls within the twenty-fifth section of the Judiciary act of 1789.

1 Stat. at Large, 85.

The verdict and judgment in the Circuit Court were in favor of the defendant; and an appeal was taken to the Court of Appeals, and the judgment affirmed. The whole title of the defendant rested upon the above acts of the Legislature, the validity of which was sustained. If, therefore, the claim now made under the compact with Virginia, and the Constitution of the United States, was made in the Circuit Court, or Court

of Appeals, it was necessarily involved in the decision, which was adverse thereto. Does the record show that the claim was made?

It is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms; it is sufficient if this appears by clear and necessary intendment.

Wilson *v.* the Blackbird Creek Marsh Co., 2 Peters, 250.
Satterlee *v.* Matthewson, Id., 409—10.
Harris *v.* Dennie, 3 Peters, 302.
Craig *v.* the State of Missouri, 4 Peters, 427—8.
Davis *v.* Packard, 6 Peters, 48.
Crowell *v.* Randell, 10 Peters, 398.
Armstrong *v.* the Treasurer of Athens Co., 16 Peters, 285.
Nelson *v.* Lagow, 12 Howard, 109.

When the above acts were offered in evidence in the Circuit Court, the plaintiffs objected to their admission on the ground that they "were unconstitutional and void;" the objection was overruled, and an exception taken.

It is contended that this objection might have referred to the State Constitution, and is therefore not sufficient evidence that a claim was made under the Constitution of the United States. This is a common form of expression, however, applied to acts repugnant to the Constitution of the United States. A like inhibition exists in both Constitutions, and the finding that the acts did not conflict with the one necessarily involved a finding that it did not conflict with the other. The Court of Appeals affirmed the judgment of the Circuit Court, and thus overruled every claim which by necessary intendment could be brought within the above objection.

But whether the question was raised in the Circuit Court or not, it is presented on the record, and if decided by the Court of Appeals, is the proper subject of revision in this court.

Davis *v.* Packard, 6 Peters, 49.
Nelson *v.* Lagow, 12 Howard S. C., 110.

The record shows what would appear to be a general order of affirmance by the Court of Appeals. But this order was

suspended, and the final order is in fact contained in the opinion, at the conclusion of which the judgment is affirmed.

This opinion, or judgment, states that it was urged against the validity of the above acts, "that they are opposed to both the Federal and State Constitutions, because they in effect impair the obligations of the contracts." There is no mistaking the meaning of this language; the objection was not sustained, and the only question is whether the opinion forms a part of the record in the case.

Under the 909th section of the Code of Practice, governing the Supreme Court of Louisiana, that court is required to state the reasons for its judgments by citing as exactly as possible the laws on which it founds its opinions. When appeals are prosecuted in Louisiana, the court of last resort acts on the law and facts as presented by the whole record. And their opinions or decisions have been uniformly held by this court to form a part of the record, so as to allow them to be referred to for the purpose of determining a question of jurisdiction under the twenty-fifth section of the Judiciary act.

Cousin *v.* Blanc's executor, 19 Howard S. C., 207.

Crowell *v.* Randell, 10 Peters, 398.

Now, in Kentucky, a case is taken from the Circuit Court to the Court of Appeals by appeal, and no assignment of errors is necessary, but the judgment may be reversed or modified for any error appearing upon the record.

Civil Code of Kentucky, secs. 876, 896.

And there is a statute of that State of precisely the same import and effect as the above section of the Code of Louisiana. It provides that the decisions of the Court of Appeals must be so written as to show the governing principle thereof, except in cases involving matters of fact.

1 Stanton's Ky. Stat., 309.

Under this statute the decision of the Court of Appeals in the present case forms a part of the record, and has been certified as such to this court.

It is not desired, nor would it be proper, to discuss the merits of the case on the present motion.

Mr. Justice GRIER delivered the opinion of the court.

The record of this case does not show that any question arose or was decided by the State court, which this court has authority to re-examine by virtue of the 25th section of the Judiciary act.

Without entering into a tedious analysis of the case, it is sufficient to state, that the chief or only question in it was, whether an act of Assembly of Kentucky, authorizing an executor to sell the real estate of minors, was a valid exercise of power by the Legislature.

The counsel for plaintiff objected to the admission of the deed made in pursuance of such authority, "because said act and supplement were unconstitutional and void."

This objection was very properly construed by the court as having reference to the validity of the act of the Legislature of Kentucky, not as contrary to any provision of the Constitution of the United States, but as raising the question whether the Legislature had a power under the Constitution of that State, by general or special enactment, to authorize the sale of real estate of infants. The court decided that it had such power; and if it had, it is abundantly evident that there is no article nor clause in the Constitution of the United States which could interfere with it.

Let the writ of error be dismissed.

WILLIAM C. REDDALL, PLAINTIFF IN ERROR, *v.* WILLIAM H. BRYAN, ALFRED L. RIVES, WILLIAM H. PILES, JOHN CAMERON, JAMES PAINE, CHARLES HUTCHINSON, AND JOHN MOORE.

Where a decree of the Court of Appeals of Maryland affirmed the decree of the court below and remanded the case to that court, this is not such a final decree as will give jurisdiction over the case to this court.

The decree of the court below was merely an interlocutory order; and although State laws allow an appeal to State courts from such an order, this cannot enlarge the jurisdiction of this court given by act of Congress.

Moreover, the judgment of the State court was in favor of the authority set up

under the laws of the United States, and therefore no appeal lies to this court under the 25th section of the Judiciary act.

THIS case was brought up from the Court of Appeals of Maryland by a writ of error issued under the 25th section of the Judiciary act.

The case is stated in the opinion of the court, and is reported in 14th Maryland Reports, pages 470, 471.

It was argued by *Mr. John S. Tyson* and *Mr. Mayer* for the plaintiff in error, and by *Mr. Stanton* (Attorney General) for the defendants.

Mr. Chief Justice TANEY delivered the opinion of the Court.

This is a writ of error to revise the decree of the Court of Appeals of Maryland, affirming a decree of the Circuit Court for Montgomery county, in that State.

This case, as it appears on the record, is this:

The bill in equity of the plaintiff in error, filed in the Circuit Court for Montgomery county, in Maryland, alleges that the defendants have trespassed on land of his in Montgomery county, in Maryland, digging it up and erecting abutments and structures for an aqueduct, and so breaking up and dividing the land as to render it incapable of tillage, and inflicting great and irreparable damage upon the complainant; and that the defendants meditate, for completing the aqueduct, still further damage, of the same aggravated character, to the land, by digging to great depths of twelve to fifteen feet, and at other points raising embankments and building walls, and in conducting through the land a large and constant stream of water, for the sole use of the aqueduct.

The bill further states that the defendants claim to thus act under authority of the Executive of the United States, unsanctioned, however, as the bill alleges, by any action of Congress, and for supplying water to the cities of Washington and Georgetown, and under color of an act of the Legislature of Maryland, (session of the year 1853, chapter 179,) purporting to authorize the United States "to purchase land in Maryland

for so supplying water, through construction of dams, reservoirs, buildings, and other works," and in case of sale not being agreed by owners, to allow the United States to adversely appropriate to herself the land, by condemnation and on valuation, to be effected in manner as provided in case of the Chesapeake and Ohio Canal Company's occasions for land and materials for that company's works.

The bill also avers that no such purchase was authorized by Congress, nor any attempt ever made on behalf of the United States toward an agreement for the purchase of complainant's lands, and insists that these pretended sanctions of the act of the Maryland Legislature, and of the United States Executive, are repugnant to the Constitution of the United States and of Maryland, and that the land is thus intruded on for no public purpose of Maryland, nor for any connected with the United States as such, and of a Federal character, nor even so declared in the Maryland act of Legislature, or in any action of Congress. And the bill prays injunction, to prevent the trespass and encroachments complained of from being carried on. The Circuit Court refused the injunction, and from the order of refusal, the plaintiff appealed to the Court of Appeals. That court affirmed the order of the Circuit Court and remanded the case.

From this decision of the Court of Appeals, the case is here upon writ of error.

It is evident, from this statement, that the appeal to this court cannot be sustained. In the first place, the decree of the Court of Appeals merely affirms the decree of the inferior court, and remands the case. It is, therefore, still pending, and there is no final decree. And although the State of Maryland in her own courts may authorize an appeal from such an interlocutory order, it cannot affect the jurisdiction of this, which is governed by the act of Congress, and that act authorizes the writ of error only in cases where there is a final decree or judgment.

In the second place, we do not see in the plaintiff's bill any right claimed under the laws of the United States. On the contrary, the claim is against the rights asserted by the United

States, and exercised by the agents of the Government under its authority; and even if there had been a final decree by the dismissal of the bill, in addition to the refusal of the injunction, we perceive no ground upon which the writ of error could be maintained under the 25th section of the act of 1789.

It is therefore dismissed for want of jurisdiction.

JOSEPH A. SHEIRBURN, PLAINTIFF IN ERROR, *v.* JACOB DE CORDOVA AND OTHERS.

By a statute of Texas, actions of ejectment, trespass to try title, &c., can be maintained upon certificates for head rights or other equitable titles.

But this court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title.

A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain his action.

THIS case was brought up by writ of error from the District Court of the United States for the western district of Texas.

The bill of exceptions contained the evidence of the title of Sheirburn, the plaintiff, when the defendants objected to the admissibility of said locations and entries because the same were vague, uncertain, and indefinite, and also because surveys thereon were not returned to the General Land Office; but the court overruled said objections, and the defendants excepted thereto. The plaintiffs here closed.

The objection made in this court, viz: that the plaintiff could not maintain the suit upon a head right in the court of the United States, did not appear to have been made upon the trial; but the question seemed to turn upon the validity of the title of the defendants, which was sustained; and upon that ruling the plaintiff brought the case up to this court.

It was argued by *Mr. Hale* for the plaintiff in error, and *Mr. Paschal* for the defendants, both on printed arguments.

Mr. Paschal thus brought forward the objection upon which the judgment of this court turned:

1. That the plaintiff showed no standing in court—no such title in himself as would enable him to attack the mere naked possession of the defendants, much less their valid paper titles. The plaintiff showed nothing but a mere incipient equity—a naked entry—which of itself, without a survey, according to the decisions of this court, did not detach the land from the public domain.

See Vaughan *v.* Chesnut, 2 Wash. C. C. Rep., 160.

This case held that the mere entry was not property subject to sale.

In the case of Lessee of Sims *v.* Irwin, 3 Dallas, 425, (which was a great case,) the subject of entries and surveys was fully discussed, and after great difficulty the court arrived at the conclusion, that in Pennsylvania, the entry payment and survey might constitute a legal title. And in Dubois *v.* Newman et al., 4 Wash., 77, Mr. Justice Washington refused to go one step further.

Therefore, the mere entry in Texas could give the plaintiff no standing in a court of law, unless it can be deduced from the twenty-first section of the Texas statute of limitations.

Acts of the Republic, vol. 5, p. 163; Hartly's Digest, art. 3,230.

As in Texas there is a mixed jurisdiction of law and equity, the right to support trespass to try title there may well exist, without it following, from the reasoning in the cases cited, that the holder of this mere incipient equity can support ejectment upon the common-law side of the Circuit Court of the United States. Such a right has no standing in a court of law.

Hart *v.* Turner, 2 Tex., 374.

It could only be used by one mere locator against another. But, if the second locator had first obtained a survey, owing to a want of diligence in the first, then he has no right to question De Cordova's title.

See Dubois *v.* Newman, 4 Wash., 76.

The history of the statute is, that the location or survey was made color of title, as a defence under the sovereignty of the soil, coupled with three years' actual possession.

See 15th section of the Texas statute of limitations.

An amendment was added, enabling the locator to support an action to protect his location. But this must have had reference to the location upon vacant land, just as the mere possessor, who is judicially turned out, may maintain ejectment against the naked trespasser. It cannot be that a locator upon appropriated land can maintain an action at law upon such an equity, in order to test the validity of the first patent. Such a doctrine is contrary to principle.

Christy *v.* Scott, 14 Howard, 282.

Dubois *v.* Newman, 4 Wash., 76.

Mr. Justice CAMPBELL delivered the opinion of the court.

This was a suit by the plaintiff to recover a parcel of land in the county of Guadalupe, in the State of Texas. The title of the plaintiff consists of certain entries of head-rights embracing the land in dispute. One of these is in these words: Joseph A. Sheirburn, assignee of Victor Ed. Gaillon, enters one-third of a league of land, situated on a noted island, about six miles above the town of Walnut Springs, and extending on the main land on the northeast side of the Guadalupe river for quantity; the said location is also a short distance below a very elevated mound on the west of the river. Certificate 222. Harrisburg county, October 16, 1838. In January, 1853, the plaintiff applied to the district surveyor of Guadalupe county for the survey of this and other land embraced in the entries, who declined to execute the surveys, but it is admitted that the entries cover the land in controversy. The defendants relied upon a Mexican grant, issued in 1831 in favor of Antonio Maria Esnourizar, for eleven leagues of land, and which embraces the same land. The District Court pronounced this grant to be a valid appropriation of the land described in it, and the plaintiff alleges that there is error in that decision.

By a statute of Texas, "all certificates for head-rights, land scrip, bounty warrants, or any other evidence of right to land recognised by the laws of this Government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass, or any other legal remedy given by law." Hart.

Dig., art. 3,230. The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in Fenn *v.* Holme, 20 How., 481, that a further discussion is unnecessary.

Judgment of the District Court affirmed.

ALFRED TRACY, SURVIVING PARTNER OF EDWARD TRACY, PLAINTIFF IN ERROR, *v.* WILLIAM HOLCOMBE.

Where the judgment of the court below reverses the decision of the inferior court and awards a new trial, it is not a final judgment from which a writ of error will lie to this court.

THIS case was brought up by writ of error from the Supreme Court of the State of Minnesota.

The record showed that a suit was brought by Tracy as surviving partner against Holcombe, and on the 30th of December, 1857, the judgment of the court was entered that he should recover $2,340.71, with costs.

On the 13th of July, 1859, the Supreme Court ordered that "the judgment of the court below be, in all things, reversed, and a new trial granted."

On the 8th of October, 1859, a writ of error was issued pursuant to section third of the act of Congress entitled, "An act for the admission of Minnesota into the Union," passed May 11, 1858, and section eighteen of the act of Congress entitled, "An act making appropriations for sundry civil expenses of the Government for the year ending 30th June, 1859," passed June 12, 1858.

It was submitted on the record by *Mr. Phillips* for the plaintiff in error.

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

This case has been brought here by a writ of error directed to the Supreme Court of the State of Minnesota. But upon looking into the transcript, it appears that the judgment which it is proposed to revise is a judgment reversing the decision of the court below, and awarding a new trial. There is, therefore, no final judgment in the case, and the writ must be dismissed for want of jurisdiction in this court.

JAMES H. SUYDAM, PLAINTIFF IN ERROR, *v.* WILLIAM H. WILLIAMSON.

Subsequently to the decisions of this court in the cases of Williamson *v.* Berry, Williamson *v.* the Irish Presbyterian Church, and Williamson *v.* Ball, reported in 8 Howard, the Court of Appeals of the State of New York affirmed a different opinion from that of this court respecting the title to the real property involved in those decisions.

This court now adopts the decision of the court of New York in conformity with the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals.

Cases cited in support of this rule, and the cases in 8 Howard commented on.

THIS case was brought up writ of error from the Circuit Court of the United States for the southern district of New York.

The facts of the case are stated in the opinion of the court, and also in the report of the cases in 8 Howard.

It was submitted on printed argument by *Mr. Ellingwood* for the plaintiff in error, and argued by *Mr. David Dudley Field* for the defendant.

The points of law involved in the case are fully stated in the reports in 8 Howard, and it is unnecessary to repeat them in the arguments of counsel now. And, moreover, the decision of this court turned upon another point, which is fully explained in the opinion.

Mr. Justice CAMPBELL delivered the opinion of the court.

This was an action of ejectment in the Circuit Court for certain lots of land in the city of New York, by the defendants in error, against the plaintiff in error. The plaintiff in the Circuit Court claimed, under a devise in the will of Mary Clarke, who died in the year 1802, by which she gave to trustees therein named that part of the farm upon which she resided, and which she owned, called Chelsea, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, during his natural life; and from and after the death of said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke, living at his death, in fee. The property in dispute is a portion of this estate. Thomas B. Clarke died in 1826, and the plaintiffs have the title to this property of his three children, who were living at his death.

The defendant's title is deduced from Thomas B. Clarke, who disposed of the property under the authority of certain acts of the Legislature of the State of New York, and orders of the court of chancery of that State.

In March, 1814, T. B. Clarke represented to the Legislature the existence and terms of the will of Mary Clarke, and that the trustees named in the will were consenting to such acts of the Legislature of the State as it might deem proper to pass for his relief, and also requested, with their sanction, that another trustee might be substituted in their stead; and further represented, that the estate could not be so improved and made productive as to fulfil the object of the testator; that he had married and had a family of five children, and that some other disposition of the estate was essential for the support of his family and himself. The Legislature thereupon passed an act for the discharge of the trustees named in the will, and empowered the court of chancery to appoint one or more trustees to execute and perform the trusts and duties specified in the will and in their act. The act authorized the subdivision of a specified portion of the farm into city lots, and their sale within a convenient time thereafter, with the assent of said

Clarke, and for the investment and application of the income of the proceeds of the sales.

In March, 1815, upon the petition of Thomas B. Clarke, representing that he could not procure a suitable person to execute the trusts of the act of 1814, and that no other person was interested in the property beside his family and himself, an act was passed authorizing Clarke to become trustee, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Clarke might apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children; and that no sale should be made until the said Clarke should have procured the assent of the chancellor of the State to such sale, who shall, at the time of his giving such assent, direct the mode in which the proceeds of sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke, as trustee; and further, that it shall be the duty of the said Clarke to render an account annually, to the chancellor, of the principal, the interest being applicable as the said Clarke might think proper, for his own use and benefit, and the maintenance and support of his children.

After the passing of this act, the chancellor, upon the petition of Clarke, made sundry orders for the sale of the lots and the appropriation of the proceeds of sale, under the directions of a master of the court. In one of these orders the chancellor directed that so much of the net proceeds to arise from the sales be applied, under the direction of one of the masters of the court, for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family.

In March, 1816, the Legislature of New York further enacted, that the said Clarke, under the order heretofore granted by the chancellor, or under any subsequent order, might mortgage or sell the premises which the chancellor permitted or might permit him to sell as trustee under the will of Mary Clarke, and to apply the money so raised by mortgage or sale to the

purposes required or to be required by the chancellor, under the acts theretofore passed for his relief.

In March, 1817, the chancellor authorized Clarke to sell the southern half of the property included in the devise, and to convey any part or parts of the said estate in payment and satisfaction of any debt due and owing from the said Clarke, upon a valuation to be agreed on between him and his respective creditors: provided, nevertheless, that every sale and mortgage, and conveyance in satisfaction, that may be made by the said Thomas Clarke, shall be approved by one of the masters of the court, and that a certificate of approval be endorsed upon every deed or mortgage to be made in the premises; and that the said Clarke be authorized to receive and take the moneys arising from the premises, and apply the same to the payment of his debts, and invest the surplus in such manner as he may deem proper, to yield an income for the maintenance and support of his family.

In October, 1818, Thomas B. Clarke executed a deed to Peter McIntyre for a number of lots, including those described in the declaration, in which he recited that he had been empowered to sell, or mortgage, or convey, in satisfaction of any debt due from him to any person, the property devised by Mary Clarke, as aforesaid; and that Clarke was indebted to McIntyre in a large sum of money; and that in consideration of the premises, and of thirty-seven hundred and fifty dollars, the receipt of which he acknowledged, he granted, &c., &c., in fee simple to McIntyre.

The master in chancery endorsed upon the deed an approval, that "having examined the within deed, he approved it in manner and form," and contemporaneously conveyed to McIntyre an interest he held as trustee for Clarke.

Upon the trial, it appeared that the sale was made upon the consideration of some debts of Clarke, that McIntyre assumed to pay; of occasional advances of small sums of money to Clarke, and payment of bills, in which the children were interested; of some two or three years of board of Clarke and a portion of his children, and two notes for about fifteen or sixteen hundred dollars. It was shown that others of the chil-

dren were neglected by Clarke, and subsisted through the bounty of friends and relatives.

The defendant connects himself with the title of McIntyre as a purchaser at a sale of the property under a decree of foreclosure of his mortgage, in 1844, by the court of chancery in New York.

The plaintiffs impugn the proceeding under which the conveyance to McIntyre was made, and the sufficiency of the consideration to support the conveyance. They contend that every material question in this case is *res judicata* in this court, having been adjudged in the cases of Williamson *v.* Berry, 8 How., 495, 549, Williams *v.* the Irish Presbyterian Church, 8 How., 565, and Williamson *v.* Ball, 8 How., 566. They insist that it is not material whether the Court of Appeals of New York persist in their adherence to the decision in the case of Cochran *v.* Van Surley, 20 Wend., 365. If they are not willing to re-examine the grounds of that decision, that is not a reason why this court should recede. The decision here was made, after great deliberation, with the decision in Cochran *v.* Van Surley before it. Property has since been bought and sold upon the faith of the opinion here delivered, and the judgment by this court pronounced. Every principle by which our law of precedents is justified, tends against the reopening of the case in this court.

The litigation in respect to the property conveyed by Clarke, under the authority derived from the acts of the Legislature, and the orders of the chancellor, commenced before the death of Clarke. Sinclair *v.* Jackson, 8 Cow., 543.

The case of Clarke *v.* Van Surley was tried at the New York Circuit in 1833, and was decided in the Supreme Court in 1836. 15 Wend., 436. It was removed to the court for the correction of errors, and was affirmed in that court, but with much division in the court, in 1838. Cochran *v.* Van Surley, 20 Wend., 365.

The decree of foreclosure and sale, under which the defendant claims, was rendered in 1840, and the sale took place in 1844. The purchaser, subsequently to the sale, objected to complying with his purchase, because of a notice from the

devisees of Mary Clarke, that they were claimants of the property, and forbade his entering upon the same. The vice chancellor, upon the motion requiring the purchaser to comply, and the chancellor, upon appeal from his order, compelled the purchaser to complete his purchase. The reasons for this order do not appear. But the vice chancellor and chancellor might have said, that it had become the settled law of the State that such a title was valid, and could have rested upon the authority of the case of Clarke *v.* Van Surley.

In 1851 the case of Towle *v.* Farley came before the superior court of the city of New York, and involved the title to one of the lots conveyed to McIntyre by Clarke, and sold under the decree of foreclosure. That case was determined in that court, and its judgment affirming the validity of that title was sanctioned in the Court of Appeals subsequently to the decisions reported in the 8th Howard, in this court. The Court of Appeals, in answer to the argument derived from the adjudication in this court, say, that perhaps there may be a difference between the cases which were determined in this court in 1851 and that case, but that the more suitable answer is, that as between the judgments of their own courts, and those of the courts of the United States, their own are binding where there is a conflict between them, except in cases arising under the Constitution and laws of the United States, when the judgments of the Supreme Court of the United States are of controlling authority. That court declares that the judgment in Clarke *v.* Van Surley is a determination of the court of last resort in this State, not only upon all the questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case, and the defendant in the present case, claimed to own the premises in controversy in the respective suits. * * * In such a case, there being no pretence of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested in the question, as well as upon the parties to the particular action. Towle *v.* Farley, 14 N. Y. R., 426; S. C., 4 Duer, 164; Clarke *v.* Davenport, 1 Bosw.

R., 96. S. C. affirmed on appeal; and the question is now presented to this court, whether they should adhere to their own opinion as expressed in the cases in 8th Howard, or acknowledge the authority of the courts of New York to settle finally the contest upon this title.

The subject of the dispute is real property situated within the State of New York, and her laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them. *Communis et recta sententia est, in rebus immobilibus servadum esse jus loci in quo bona sunt sita.* Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the State, requiring them to abstain from any interference with the proprietary right they recognise or establish; and in respect to this subject the sovereignty of New York has not been impaired by her adoption of the Federal Constitution. The power to establish federal courts, and to endow them with a jurisdiction to determine controversies between certain parties, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign. The title of the devisees of Mary Clarke was divested by authority conferred by the Legislature of the State, which was exercised subject to the oversight of her own tribunals. The persons affected by this authority were natives of the State—children under the superintending care of the parental jurisdiction of the State. It was in the constitutional exercise of this supreme and exclusive jurisdiction that this title was disturbed. It behooves every other State to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisprudence of this court attests the care with which this court has observed the general obligation, (of which this is a particular instance,) in its administration throughout the Union.

In Jackson *v.* Chew, 12 Wheat., 162, this court say:

"The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any prin-

ciple of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals."

In Beauregard *v.* New Orleans, 18 How., 497, the court say:

"The judgments of the Supreme Court of Louisiana, upon the validity of the sales impugned in this bill, were given more than twenty years ago. They have formed the foundation upon which the expectations and conduct of the inhabitants of that State have been regulated. They have quieted apprehension and doubt respecting a title to an important portion of a large and growing city. They have invited a multitude of transactions and engagements in which the well-being of hundreds, perhaps thousands, of the citizens of that State depend. In this bill there are several hundred of defendants. The constitution of this court requires it to follow the laws of the several States wherever they properly apply; and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title to lands. Upon cases like the present, the relation of the courts of the United States to a State is the same as that of her own tribunals. They administer the laws of the State, and to fulfil that duty they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion."

In the case of Arguello *v.* United States, 18 How., 539, this court determined that the colonization regulations of Mexico, of 1824 and 1828, did not prohibit the settlement of the littoral or coast leagues by natives, under the authority of the Governor of California, and without the consent of the Central Government in Mexico. The same question was presented in the case of League *v.* Smith, at this term, from the District Court of the United States in Texas, in reference to the coast leagues in that State. This court found a contrary opinion had prevailed in the courts of that State, and had become a

rule of property there, and without re-examining their own opinion, or making any attempt to account for or to reconcile the difference, without any hesitation applied the rule adopted in Texas to the determination of controversies existing there.

The cases reported in the 8th Howard, referred to, came before this court upon a division of opinion between the experienced judges of the Circuit Court of the southern district of New York. The authority of Clarke *v.* Van Surley was thus impugned in that tribunal. The decision in the court of errors was far from being unanimous; nor was the dissent in that tribunal feeble or equivocal.

The majority of this court were convinced that the questions might be examined anew, and their answers were accordant with the opinion of the minority in the court of errors. But in the present case there is no room for doubt as to what the settled opinion of the courts of New York is in reference to this title, and therefore no occasion for any hesitation concerning the obligation we have to perform. The Circuit Court decided adversely to the defendant. Its judgment is reversed, and the cause remanded for further proceedings.

JACOB E. CURTIS, PLAINTIFF, *v.* THE COUNTY OF BUTLER.

On the 9th of February, 1853, the Legislature of Pennsylvania passed an act entitled "An act to incorporate the Northwestern Railroad Company."

By the seventh section, the counties through parts of which the railroad may pass were authorized to subscribe to the capital stock of the company, and to make payments on such terms and in such manner as may be agreed upon by the company and proper county; and the subscription of the counties was to be held to be valid when made by a majority of its commissioners.

The county of Butler was one of the counties through which the railroad was to pass, and coupon bonds were issued, signed by two of the three commissioners of the county, in payment of a subscription of two hundred and fifty thousand dollars on the part of the county of Butler.

Other parts of the act required certain other things to be done, which were complied with.

The proper construction of this act is, that power was given in the act and by the agreement of subscription and terms of payment, to the commissioners of

Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them.

The bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the western district of Pennsylvania.

In order to show the state of the case as it was presented to the Circuit Court the entire record will be inserted, which was as follows:

Jacob E. Curtis, a citizen of the State of Virginia, *v.* the County of Butler, a corporation composed of citizens of Pennsylvania.

Summons—Debt—Issued October 20th, 1857, *returnable the first Monday of November next.*

This was an action of debt brought on forty-nine coupons claimed to have been attached to certain bonds alleged to have been issued by the county of Butler to the Northwestern Railroad Company, in payment of an alleged subscription of the said county to the capital stock of said company. The declaration is in debt on the bonds and coupons, and the defendant pleaded *nil debit.*

The cause came on to be tried before the Honorable R. C. Grier and the Honorable Wilson McCandless, judges of the said court, at Pittsburg, at May term, 1859.

The plaintiff, to sustain the action on his part, gave in evidence the seventh section of the act of the General Assembly of Pennsylvania, approved the 9th February, 1853, entitled "An act to incorporate the Northwestern Railroad Company," as follows: "That the counties through parts of which said railroad may pass shall be, and they are hereby, severally authorized to subscribe to the capital stock of said railroad company, and to make payments on such terms and in such manner as may be agreed upon by the said company and the proper county: provided, that the amount of subscription by any county shall not exceed ten per cent. of the assessed valuation thereof, and that before any such subscription is made, the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same. Upon

the report of such grand jury being filed, the county commissioners may carry the same into effect by making, in the name of the county, the subscription so directed by said grand jury: provided, that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value, and no bonds shall be in less amounts than one hundred dollars; and such bonds shall not be subject to taxation until the clear profits of said railroad shall amount to six per cent. on the cost thereof, and that all subscriptions made or to be made in the name of any county shall be held and deemed valid, if made by a majority of the commissioners of the respective counties."

The plaintiff also gave in evidence bond No. 1, as follows:

1,000. United States of America. 1,000.
No. 1. County of Butler, Pennsylvania. No. 1.

Bonds issued for stock in the Northwestern Railroad Company; faith of the county and stock of the company pledged.

Know all men by these presents that the county of Butler, in the Commonwealth of Pennsylvania, is indebted to the Northwestern Railroad Company in the full and just sum of one thousand dollars; which sum of money said county agrees and promises to pay twenty years after the date hereof, to the said Northwestern Railroad Company, or bearer, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July, at the office of the Pennsylvania Railroad Company in the city of Philadelphia, upon the delivery of the coupons severally hereto annexed; for which payments of principal and interest well and truly to be made, the faith and credit and property of the said county of Butler are hereby solemnly pledged, under authority of an act of the Assembly of this Commonwealth, entitled "An act to incorporate the Northwestern Railroad Company," which said act was approved the ninth day of February, A. D. eighteen hundred and fifty-three.

In testimony whereof, and pursuant to said act of the Legislature of Pennsylvania, and resolutions of the county commissioners in their official capacity, passed the 31st day of

March, 1853, the commissioners of said county have signed, and the clerk of the said commissioners has countersigned these presents, and have hereto caused the seal of said county to be affixed, this first day of July, A. D. one thousand eight hundred and fifty-four.

[Seal of county.]

JAMES MITCHELL,
JOHN MILLER,
Commissioners of Butler County.

THOS. ROBINSON,
Clerk of Commissioners.

The plaintiff, further to maintain the action, gave in evidence a certified copy from the records of the court of quarter sessions of Butler county, No. 16, March sessions, 1853, as follows:

Presentment of the grand jury recommending a subscription of two hundred and fifty thousand dollars to the capital stock of the Northwestern Railroad Company on the part of the county of Butler.

And now, to wit, March 29, 1853, petition filed setting forth as follows, to wit:

To the honorable the Grand Jury and Commissioners of Butler county:

GENTLEMEN: The undersigned, commissioners of the Northwestern Railroad Company, request of the county of Butler a subscription of two hundred and fifty thousand dollars to the capital stock of the Northwestern Railroad Company.

(Signed by the commissioners named in the act.)

And now, to wit, 29th March, 1853, presentment of the grand jury, as follows, to wit:

GRAND-JURY ROOM, *March*, 1853.

BUTLER COUNTY.

To the honorable the Judges of the Court of Quarter Sessions in and for the county of Butler:

The grand jury, to whom was referred the application of the Northwestern Railroad Company for the subscription of two hundred and fifty thousand dollars to the capital stock on the

part of the county of Butler, beg leave to report that they have given the subject the calm consideration that the importance would seem to demand; that they, the said grand jury, do hereby fix and determine, according to the provisions of the act of Assembly, the sum of two hundred and fifty thousand dollars, the amount that the commissioners of Butler county may subscribe on behalf of the said county, and they earnestly request that they may make a subscription of that amount to the capital stock of the said company. The grand inquest further requests the honorable court to direct the finding to be duly filed, together with the application of the company, and that a certified copy of the same may be laid before the commissioners of Butler county for their consideration. All of which is respectfully submitted.

(Signed by the Grand Jury.)

The plaintiff, further to maintain the issue on his part, gave in evidence 21 coupons of $30, and 28 coupons of $15, in form as follows, to wit:

County of Butler. Warrant No. —, for thirty dollars, being for six months' interest on bond No. —, payable on the first day of July, A. D. 1857, at the office of the Pennsylvania Railroad Company, in the city of Philadelphia.

$30. THOMAS ROBINSON, *Clerk.*

The plaintiff further offered testimony, tending to prove that the said coupons were signed by Thomas Robinson, and that he was the clerk of the commissioners at the date of the bonds, and it was admitted that the county of Butler was one of the counties through which said railroad was intended to pass, and if ever made would pass, and the plaintiff rested.

The defendant, to maintain the issue on his part, then gave in evidence the following subscription and agreement between the commissioners of the county of Butler and the Northwestern Railroad Company, as to the terms and manner of payment, to wit:

By authority of an act of the General Assembly of the Commonwealth of Pennsylvania, passed the ninth day of

February, A. D. one thousand eight hundred and fifty-three, entitled "An act to incorporate the Northwestern Railroad Company," and by virtue of the action of the grand jury of the county of Butler, had at the March sessions, A. D. 1853, at the court of said county, fixing and determining the amount of subscription to be made to the said Northwestern Railroad Company by said county of Butler, we, the undersigned, commissioners of said county, do hereby subscribe, for and in the name of the county of Butler, to the capital stock of the Northwestern Railroad Company, the sum of two hundred and fifty thousand dollars, being five thousand shares of said capital stock.

It is understood, that whenever the amount of this subscription is required from the county of Butler by the said company, it is to be paid in the bonds of this county, to be given in sums of not less than one thousand dollars each, payable in twenty years after date, or such other time after date as may be agreed upon by the commissioners of Butler county and the said railroad company; the interest on said bonds to be paid semi-annually, and said interest to be paid by said railroad company until such time as the Northwestern railroad is completed.

In testimony whereof we have hereunto set our hands and affixed the seal of the said county of Butler, this 18th day of August, A. D. one thousand eight hundred and fifty-three.

[Seal of the County.] THOMAS WELSH,
JAMES MITCHELL,
JOHN MILLER,
Commissioners.

Attest:
JOHN SULLIVAN, *Clerk.*

Resolution passed by the board of directors of the Northwestern Railroad Company, August 16, 1853:

"On motion of Mr. Cunningham and S. A. Purviance, it was—

"*Resolved*, That the president is hereby requested to procure the subscription to the company from the counties of Lawrence and Butler, as proposed to be subscribed by them—

to wit: two hundred thousand dollars by Lawrence county, and two hundred and fifty thousand dollars by Butler county—upon the following terms, to wit: that the subscriptions be paid in the bonds of the respective counties of one thousand dollars each, payable in — years after date, with interest payable semi-annually; the interest to be paid by the company until the road is completed.

"Attest: WILLIAM HASLETT,
Secretary."

The defendant further gave in evidence, tending to show that these bonds had been disposed of by the railroad company at less than their par value, and that the plaintiff had notice of the agreement with the county as to the payment of interest by the company, &c., and of notice to the plaintiff to show how he came by these instruments.

Whereupon the defendant prayed the said court to instruct the jury, that no power is given in the said act of Assembly of the 9th February, 1853, or by the said agreement of subscription and terms of payment, to the commissioners of the county of Butler, to make the instruments upon which the suit is brought, and thereby bind the said county to pay them; and that if any power was given to issue bonds payable to bearer, with coupons attached, it could not be exercised by two out of the three commissioners of the said county; and these bonds, having been signed by but two of the said commissioners, are not binding on the said county.

Upon which prayers the said judges were divided in opinion; whereupon the said defendant requested the said judges to certify, under their hands and seals, and cause to be certified under the seal of the said court, their division of opinion upon the said prayers of the said defendant, to the Supreme Court of the United States of America; which is accordingly done, and the clerk of the said Circuit Court is hereby ordered to certify the same, under the seal of our said court, to the said Supreme Court, at its next session.

In testimony whereof we have hereunto set our hands and

seals, this 25th day of May, A. D. one thousand eight hundred and fifty-nine.

R. C. GRIER, [SEAL.]
WILSON McCANDLESS, [SEAL.]

The case was argued in this court by *Mr. Stanton* for the plaintiff, and *Mr. Black* for the defendants.

Mr. Stanton, in order to show that the Legislature had power to pass the act, referred to the decisions of the Supreme Court of the State, in 9 Harris, 147; 8 Casey, 218; and 8 Casey, 144, which related to this very act.

Assuming the power to exist, he then made the following points:

1. It is admitted that Butler county comes within the scope of the act; it is one of "the counties through parts of which the said railroad may pass."

2. It is admitted that this county, through its officers, "the commissioners, or a majority of them," is authorized to subscribe to the capital stock of the railroad company, and "make payment on such terms and in such manner as may be agreed upon by said company and the county." It is, however, claimed that such a great and special power could not be delegated by such vague and indeterminate language as that used in this act; that the power "to make payment on such terms and in such manner as may be agreed upon by the company and the proper county" does not necessarily imply that such securities as bonds with coupons attached may be given, and that to infer such a power would be highly dangerous.

An examination of the terms and phraseology of the act, however, clearly shows that the power to issue bonds was intended to be conveyed. In this very section, it is provided that "whenever bonds of the respective counties are given in payment of subscriptions," &c., and that "no bonds shall be given less than one hundred dollars," &c. Here we have a legislative construction of the act, showing that the authority to issue bonds in the name of the county was intended to be conferred. In construing our acts of legislation, a considera-

tion of the provisos is often of vital importance; they often contain, instead of exceptions, or restrictions, the principal features of the statute, which without them would be inoperative or senseless.

In the actions of all the parties concerned we find a similar construction put upon the act. Nobody ever supposed that the county could make payment of her subscription in any other manner than by her credit pledged in her bonds. Until the convenience of the plea was felt, no one ever dreamed of questioning the power of the commissioners to make these bonds. The same astuteness that we now find employed in the endeavor to repudiate these obligations, was then engaged in advising and procuring their execution. But the defendants' own construction of the law in making these obligations will now be applied by courts of justice in enforcing their fulfillment.

By a reference to the case of the county of Lawrence against the Northwestern Railroad Company, reported in the thirty-second volume of the Pennsylvania State Reports, at page 144, it will be seen that this matter has been before the Supreme Court of the State. That was a proceeding by the county of Lawrence, which stands in precisely the same category with the county of Butler, against the Northwestern Railroad Company, asking for an injunction against the further negotiation of the bonds of the county by the company, for certain reasons which it is needless here to state. The Supreme Court granted the injunction, on terms implying and recognising the validity of the bonds before that time negotiated by the company.

Of the "terms and manner of payment agreed upon by the said company and the proper county," the best, and to affect the plaintiff, the only evidence, is to be found in the bonds themselves. Hence, the agreement of the 18th August, 1853, put in evidence by the defendants, was superseded by the agreement of the 1st July, 1854, evidenced by the bonds; and any provision of the earlier agreement inconsistent with the terms of the bonds cannot avail as a defence against a *bona fide* bearer of the bonds.

II. But suppose a fair construction of the terms of the act of 9th February, 1853, shows authority in the county and its proper officers to issue the instruments given in evidence—a second question arises under the facts as stated in the certificate of division of opinion, namely, whether bonds signed by two of the three commissioners would be binding.

It has not been seriously contended that the commissioners were not the proper officers to execute the bonds. The corporate powers of the county are by law exercised by the commissioners.

Act 15th April, 1834, Purdon's Digest, 176.

But it is claimed that the execution should have been by the entire board of commissioners, consisting of three persons; that such an extraordinary power should be construed strictly.

Now, by the 19th section of the act of April, 1834, it is enacted as follows: "Two of the commissioners aforesaid shall form a board for the transaction of business, and, when convened in pursuance of notice or according to adjournment, shall be competent to perform all and singular the duties appertaining to the office of county commissioners."

See Purdon's Digest, 176.

This point was considered by the Supreme Court of Pennsylvania, in the case of the Commissioners of Allegheny county against Lecky, 6 S. and R., page 166—a case that arose before the act of 1834 was passed—and it was unanimously held that all powers conferred upon the commissioners might be legally executed by two, without the concurrence of the third. And to the same effect is the case of Cooper and Grove *v.* Lampeter Township.

8 Watts's Reports, 128.

5 Binney's Reports, 481.

It may be further remarked, that signing the bonds was not a duty of a deliberative nature. It was merely carrying into effect the previous deliberations of the board and their agreement with the company.

Of *Mr. Black's* argument the reporter has no notes.

Mr. Justice WAYNE delivered the opinion of the court.

This case has been sent to us upon a certificate of division upon two points, which occurred between the judges upon the trial of it in the court below: 1. Had the commissioners of Butler county legal authority to issue the bonds given in evidence? 2. If they had, was such power or authority well exercised by two out of the three commissioners of the said county, or were the bonds signed by two of them binding?

The act under which the bonds were issued was passed 9th February, 1853. The first section enumerates the persons by name who were to become commissioners to open books, receive subscriptions of stock, and to organize a company by the name, style, and title, of the Northwestern Railroad Company, with all the powers, and subject to all the duties, restrictions, and regulations, prescribed by an act regulating railroad companies, approved the 19th of February, 1849, "so far as the same are not allowed and supplied by the provisions of this act."

By the second section of the act, the capital stock of the company was to be divided into twenty thousand shares, of fifty dollars each, with the privilege to be increased, if the exigencies of the company shall require it, to any sum not exceeding two millions of dollars, as the president and directors of said company may deem expedient. By the third section, the company have the right to build and construct a railroad from some point on the Pennsylvania or Allegheny railroad, at or west of Johnstown, by the way of Butler, to the Pennsylvania and Ohio State line, at some point on the western boundary line of Lawrence county, &c., &c., to connect with any railroad now or which might be thereafter constructed at either end, or at any intermediate point on the line or route thereof. For doing this, the company was authorized to borrow money to an amount not exceeding the capital stock of the company, upon bonds to be issued by it whenever the president and directors might deem it expedient to do so. The rate of interest upon the bonds was not to exceed seven per cent., and they were to be convertible into the stock of the company, whenever the holders of it and the

company might agree to have that done. The sixth section of the act we need not speak of, as it relates to matters unconnected with the questions certified, or from which there is not any impeachment of the correct action of the company.

By the seventh section, the counties through parts of which the railroad may pass were authorized to subscribe to the capital stock of the company, "and *to make payments on such terms and in such manner as may be agreed upon by the company and proper county.*" But the amount of the subscription of any county was not allowed to exceed ten per centum of the assessed valuation thereof, (for taxes,) and before any subscription could be made for any county, the amount of each was to be determined and approved by a grand jury of the county. Upon the report of a grand jury being filed, the county commissioners were to carry it into effect, accordingly. Then, whenever bonds of the respective counties were given in payment of subscriptions, the commissioners were prohibited from selling them at less than at par; and such bonds the State exempted from taxation until the clear profit on the business of the railroad amounted to six per cent. on the cost thereof; and it was declared that the subscription of the counties was to be held to be valid when made by a *majority* of its commissioners. With this analysis of the act, under which the bonds sued upon were issued, we proceed to consider the points submitted to us.

In the first place, after a careful examination of the act to which this act was made subordinate, we do not find that anything was done by the commissioners inconsistent with it, or bearing upon the points certified.

We think that the county commissioners had authority from the Legislature to execute the bonds, and to pledge the faith, credit, and property of the county, to pay them. Authority was given by the seventh section of the charter. It declares that the county shall have power to subscribe to the capital stock of the railroad company, and to make payment in such manner and upon such terms as may be agreed upon between the county and the company.

It cannot be denied that this was an authority to the county

to make a contract of subscription, and that it contemplates a payment for it prospectively "by bonds which, when made in the name of any county, were to be held valid, if made by a majority of the commissioners of the respective counties." The power to subscribe, the manner of payment, the limitation upon the amount of subscription, the mode of carrying that out through the intervention of a grand jury's approval and report, the allowance of bonds to be given in payment, the restriction of the same upon the railroad company to which they were to be transferred, not to sell the bonds at less than par, the hindrance upon the issue of bonds of less than one hundred dollars, the exemption of them from taxation upon a contingency until the clear profits of the railroad shall amount to six per cent. upon the cost of it, are significant of what was intended. All of those particulars in this section of the statute are to be considered together in the construction of it.

No one questions that the Legislature, then, had the power to incorporate such companies, and to allow the counties of the State to become interested in them upon the faith of county securities, for the transportation of persons and things in all of the vehicles used for commerce and the carrying trade, either by water, or by land upon ordinary artificial roads. And that associations of persons might be incorporated for the construction of the latter, either by money already subscribed, or by money to be raised or borrowed by certificates of indebtedness, with certificates of interest attached, separable from the former, for the payment of interest, payable at particular times.

The objection now, as we understand it, is not that the Legislature had not such a power. But it is said, in the exercise of it, that the railroad company, and the counties through which the road might be constructed, had mistaken the terms upon which the counties might subscribe to the capital of the railroad company, as to the manner for the payment of the subscription; in other words, that the counties in issuing bonds with coupons had mistaken the special authority given to them by the seventh section of the act, and had made a different contract, which could not be judicially enforced.

That section is as follows: "That the counties through parts of which said railroad may pass shall be authorized to subscribe to the capital stock of the railroad company, and to make payment on such terms and in such manner as may be agreed upon by said company and the proper county: provided, that the amount of subscription by said county shall not exceed ten per cent. of the assessed valuation thereof, and that before any such subscription shall be made, that the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same; and that upon the report of such grand jury being filed, the county commissioners may carry the same into effect *by making in the name of the county* the subscription directed by the grand jury: provided, that whenever the bonds of the respective counties are given in payment of subscriptions, that the same shall not be sold by the railroad company at less than par value, and no bonds shall be in less amount than one hundred dollars, and that such bonds shall not be subject to taxation until the clear profits of said railroad company shall amount to six per cent. upon the cost thereof; and that all subscriptions made or to be made in the name of any county shall be held and deemed valid if made by a *majority* of the commissioners of the respective counties."

Now, we freely subscribe to the rule that neither privileges, powers, nor authorities, can pass by an act of incorporation, unless they be given in unambiguous words, and that an act giving special privileges must be construed strictly. That in such a case, where a sentence is capable of having two distinct meanings, that a construction must be given to it most favorable to the public. But in applying these principles to this case, it must be done with reference to the subject-matter contemplated by the Legislature as a whole, and not allow its manifested intention and design to be defeated by denying to the counties the only means of paying their subscription, by which the main object could be accomplished.

Why was it that the Legislature, in drawing the section, directed that the subscriptions of the counties should be made upon terms and in manner as the railroad and the counties

might agree upon; that it limited the amount of subscription upon an assessed valuation of the property of the county; that it contemplated a taxation contingently upon the bonds of the counties, respectively, that they were to be given in payment of subscriptions, unless it had been its clear intention that the subscriptions were to be paid for by county bonds, when both company and county should make such a contract?

This, in our view, is not a case of ambiguity in the power given, but one of as clear designation as could have been expressed. Nor was it a case in which the Legislature imposed a public burden. It was no more than giving to the people of the county a right to tax themselves for an anticipated advantage to arise from an expenditure of their own money in the construction of a railroad. It was the concern of the county; the same as it would have been if the county had been legislatively empowered to tax themselves to clear out a river for a better navigation, or for the cutting of a canal. Whether the allowance for the issue of bonds for either of those purposes will be judicious depends upon the subject and the regulations which the Legislature may impose for their execution.

In our best judgment, applied as it has been to the 7th section of the act to incorporate the Northwestern Railroad Company, in connection with a full consideration of the rules for the construction of the powers of corporations, we have been unable to find anything in the 7th section equivocal or doubtful as to the power given to the counties to make and to pay for their subscriptions to the railroad company, and nothing wrong as to that company having received them according to its charter.

We therefore answer to the first point certified to this court, "that power was given in the act of the 9th February, 1853, and by the agreement of subscription and terms of payment, to the commissioners of Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them."

We will now proceed to the second point certified to this court: and if any power was given to issue bonds payable to

bearer, with coupons attached, it could not be exercised by two out of the three commissioners of the said county; and that these bonds having been signed by but two of the said commissioners are not binding on the county.

We have examined the acts relating to who are designated to exercise the corporate powers of the county. By the act of the 15th April, 1834, the commissioners are to do so; and it is now claimed, as there are three, that all of them should have signed the bonds to make them binding upon the county. But by the 19th section of the act, it is declared that two of the Commissioners shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment, shall be competent to perform all and singular the duties appertaining to the office of county commissioners. Purdon's Digest, 176.

Before the act of 1834 was passed, it was held in the case of the commissioners of Allegheny county against Lecky, 6 S. and R., page 166, that all powers conferred upon the commissioners might be legally executed by two, without the concurrence of the third. The same ruling will be found in Cooper and Grove *v.* Lampter Reansbey, 8 Watts, 128; 5 Binney's Reports, 481. But why cite authorities, when the act in terms makes the bonds valid if made by a *majority of the commissioners* of the respective counties?

We therefore answer the second point certified, that the bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler.

WATSON FREEMAN, MARSHAL OF THE UNITED STATES, PLAINTIFF IN ERROR, *v.* JABEZ C. HOWE, JOHN H. WILKINS, AND WILLIAM MINOT, JUN.

Where the marshal, by virtue of mesne process issuing out of the Circuit Court of the United States for the district of Massachusetts, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff of Middlesex county under a replevin brought by the mortgagees of the railroad company, the proceeding of the sheriff was entirely irregular.

I. The suit upon the replevin was instituted and carried on to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the Federal and State courts.

II. Also in respect to the appropriate remedy of the mortgagees of the railroad cars for the grievances complained of.

I. In the case of Taylor et al *v.* Carryl, (20 Howard, 583,) the majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.

This principle is equally applicable to the case of property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of property seized in admiralty, and the proceedings *in rem.*

The distinction examined which is alleged to exist between a proceeding in admiralty and process issuing from a common-law court.

Whether the railroad cars which were seized were or were not the property of the railroad company, was a question for the United States court, which had issued the process to determine.

Cases and authorities examined which are supposed to conflict with this principle.

II. Although both parties to the replevin were citizens of Massachusetts, yet the plaintiffs were not remediless in the Federal courts. They could have filed a bill on the equity side of the court from which the process of attachment issued, which bill would not have been an original suit, but supplementary merely to the original suit out of which it had arisen. It would therefore have been within the jurisdiction of the court, and the proper remedy to have been pursued.

Cases cited to illustrate this.

THIS case was brought up from the Supreme Judicial Court of the Commonwealth of Massachusetts within and for the county of Middlesex, by a writ of error issued under the 25th section of the Judiciary act.

The case is stated in the opinion of the court.

It was argued by *Mr. Parker* for the plaintiff in error, and *Mr. Hutchins* for the defendants.

The counsel on both sides appeared to consider that the whole proceedings of the State court were open to revision by

this court, and therefore discussed many points relating to the validity of the mortgage, attachment, &c. Their notice of the clashing of jurisdiction by the two sets of courts was as follows. The counsel for the plaintiff in error said:

1. Persons and property "in the custody of the law" of a State are withdrawn from the process of the courts of the United States, (unless Congress have otherwise specially enacted;) and in like manner, persons and property "in the custody of the law" of the United States are not subject to any State process.

The Oliver Jordan, 2 Curtis's C. C. Rep., 414.
Taylor *v.* the Royal Saxon, 1 Wallace Jr., 311.
Cropper *v.* Coburn, 2 Curtis's C. C. R., 465, 469.
Ex parte Robinson, 6 McLean, 355.

2. An attempt was early made to draw a distinction in favor of the United States in matters of admiralty jurisdiction.

Certain logs of Mahogany, 2 Sumner, 589.

This was on the ground of the peculiar character of the admiralty jurisdiction, and that it was vested under the Constitution solely in the United States, to the exclusion of State courts.

But even in admiralty matters, the earlier doctrine has been definitely overruled by the Supreme Court of the United States, in order to maintain the general doctrine now laid down.

Taylor *v.* Carryl, 20 Howard, 597.

Sustaining the judgment of the courts below in the same matter, 12 Harris's Pennsylvania R., 264.

Chief Justice TANEY and several of the judges dissented in the above case (20 Howard) from the judgment and opinion of the court, but did so solely on the ground of a necessity growing out of the peculiar character of the admiralty jurisdiction under the Constitution of the United States.

Chief Justice TANEY takes care to enforce the general doctrine more strongly, if possible, than it was stated in the opinion of the court. (Pp. 604—5.)

With respect to this case, the counsel for the defendant in error said:

The case of Taylor et al *v.* Carryl, 20 How., 538, is not in point. The opinion of the majority of the court in that case proceeded upon the ground that the process from the State court and that from the United States court were both proceedings *in rem*, and of course that which was prior in time had precedence, and the property could not be taken from the possession of the State court, because possession of the property was essential to its jurisdiction.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of Massachusetts.

The case was this: Selden F. White, of the State of New Hampshire, in 1856 instituted a suit in the Circuit Court of the United States for the district of Massachusetts, against the Vermont and Massachusetts Railroad Company, a corporation under the laws of Massachusetts, to recover certain demands claimed against the defendants. The suit was commenced in the usual way, by process of attachment and summons. Freeman, the marshal, and plaintiff in error, to whom the processes were delivered, attached a number of railroad cars, which, according to the practice of the court, were seized and held as a security for the satisfaction of the demand in suit in case a judgment was recovered. After the seizure, and while the cars were in the custody of the marshal, they were taken out of his possession by the sheriff of the county of Middlesex, under a writ of replevin in favor of Howe and others, the defendants in error, issued from a State court. The plaintiffs in the replevin suit were mortgagees of the Vermont and Massachusetts Railroad Company, including the cars in question, in trust for the bondholders, to secure the payment of a large sum of money which remained due and unpaid.

The defendant, Freeman, in the replevin suit, set up, by way of defence, the authority by which he held the property under the Circuit Court of the United States, which was overruled by the court below, and judgment rendered for the plaintiffs. The case is now before us on a writ of error.

I. The suit in this case has been instituted and carried on

to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the Federal and State courts; and also in respect to the appropriate remedy of the plaintiffs for the grievances complained of.

As it respects the effect to be given to the processes of the courts, whether State or Federal, the subject was so fully and satisfactorily examined in the case of Taylor et al. *v.* Carryl, the last of the series on the subject, we need only refer to it, as all the previous cases will there be found. 20 How. R., 583.

The main point there decided was, that the property seized by the sheriff, under the process of attachment from the State court, and while in the custody of the officer, could not be seized or taken from him by a process from the District Court of the United States, and that the attempt to seize it by the marshal, by a notice or otherwise, was a nullity, and gave the court no jurisdiction over it, inasmuch as, to give jurisdiction to the District Court in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process.

In order to avoid the effect of this case, it has been assumed that the question was not one of conflict between the State and Federal authorities, but a question merely upon the relative powers of a court of admiralty and a court of common law in the case of an admitted maritime lien. But no such question was discussed by Mr. Justice CAMPBELL, who delivered the opinion of the majority of the court, except to show that the process of the District Court in admiralty was entitled to no precedence over the process of any other court, dealing with property that was, in common, subject to the jurisdiction of each. On the contrary, he observed, at the close of the opinion, that the view taken of the case rendered it unnecessary "to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable, or as perishable, upon them."

The minority of the court took a different view of the question supposed to be involved in the case. It is succinctly

stated by the Chief Justice, at the commencement of his dissenting opinion. He observes: "The opinion of the court treats this controversy as a conflict between the jurisdiction and rights of a State court and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their own officers within the sphere of their acknowledged powers. In my judgment, this is a mistaken view of the question presented by the record. It is not a question between the relative powers of a State and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in the case of an admitted maritime lien;" and hence the conclusion was arrived at, that the power of the admiralty was paramount. The majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should, for the time, prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.

Another distinction is attempted by the defendants in error. It is admitted that in the case of a proceeding *in rem*, the property seized and in the custody of the officer is protected from any interference by State process. But it is claimed that the process of attachment issued by a common-law court stands upon a different footing, and the reasons assigned for the distinction are, that in the one case the property seized is the subject of legal inquiry in the court, the matter to be tried and adjudicated upon, and which, in the language of the counsel, lies at the foundation of the jurisdiction of the court; but that, in the other, the property seized, namely, under the attachment, is not the subject-matter to be tried, like the property which is the subject of a libel *in rem*, as the process is, simply, for the recovery of a debt, without any lien or charge upon the property, except that resulting from the

attachment to secure the debt, and that the question of lien upon the property is a collateral one, which the Federal court could not hear and decide in the action before it; and further, that the question of liability of the Railroad Company was upon certain bonds, the trial and judgment upon which would not be affected by the possession or want of possession of the property seized by the marshal.

The idea which seems to prevail in the mind of the learned counsel on the part of the defendant in error is, that there is something peculiar and extraordinary in a proceeding *in rem* in admiralty, and in the lien upon which it is founded, that invests them with a power far above the proceedings or liens at common law, or by statute; and that while the seizure of the property in the one case by the marshal protects it from all interference by State process, in the other no such protection exists.

The court is not aware of any such distinction. In the case of a proceeding *in rem* in admiralty, the lien or charge which gives the right to seize the property results from the principles of the maritime law. In the proceeding by attachment in a court of common law, the lien results from statute or common law; and in both cases, unless the party instituting the proceedings sustains his demand to secure which the lien is claimed, the property is discharged. In both, the property is held contingently, dependent upon the result of the litigation. In the admiralty, in the case of collision, upon a bill of lading, or charter party, for salvage, &c., &c., the main questions litigated are not the questions of lien, but fault or not in the collision, the fulfilment or not of the contract in the bill of lading, or charter party, or the right to salvage.

The same observations are alike applicable to all cases of attachment in courts of common law, where the lien is given by statute.

It is true, in a proceeding *in rem*, any person claiming an interest in the property paramount to that of the libellant may intervene by way of defence for the protection of his interest; but the same is equally true in the case of a proceeding by

attachment in a court of common law, as will be shown in another branch of this opinion.

Some stress has also been placed upon the idea, that the forcible dispossession of the marshal of the property under the attachment would not affect the jurisdiction of the court, or interrupt the proceedings in the suit; but the same is equally true as respects the proceedings *in rem* in the admiralty. The forcible dispossession of the marshal of the property once seized would not affect the jurisdiction, or prevent a decree in the case.

Another and main ground relied on by the defendants in error is, that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the Federal process, and which it belongs to the Federal, not the State courts, to determine. This is now admitted; for though a point is made in the brief by the counsel for the defendant in error, that this court had no jurisdiction of the case, it was given up on the argument. And in the condition of the present case more than this is involved; for the property having been seized under the process of attachment, and in the custody of the marshal, and the right to hold it being a question belonging to the Federal court, under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the State court, to interfere with it. We agree with Mr. Justice GRIER, in Peck et al. *v.* Jenniss et al., (7 How., 624—5:) "It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." "Neither can one take the property from the custody of the other by replevin, or any other process; for this would

produce a conflict extremely embarrassing to the administration of justice."

The case of Slocum *v.* Mayberry, (2 Wh. R., 2,) has been referred to as holding a different doctrine from that maintained by the plaintiff in error in the present case.

We have examined the case attentively, and are satisfied that this is a misapprehension. There was no interference there with goods seized under the process of a Federal court, and in the custody of the marshal, nor any attempt to draw questions involved in a suit instituted in a Federal court into a State court for decision. It is quite apparent, from the opinion of the court, if this had been the question before it, what would have been its decision.

Chief Justice Marshall observed: "Any intervention of a State authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would, unquestionably, be a violation of the act; and the Federal court having cognizance of the seizure, might enforce a redelivery of the thing by attachment or other summary process against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officers, or of the court having cognizance of the cause." The reason why the replevin of the cargo in the State court was maintained was, that the vessel only was seized by the officer, and not the cargo, and the latter was not, therefore, within the protection of the principle announced.

Reference was made, also, on the argument in the present case, to an opinion expressed by Chancellor Kent, in his Commentaries, (vol. 1, p. 410,) as follows: "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the

State courts have jurisdiction to protect the person and the property so illegally invaded."

The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the Federal courts, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the Federal court to that of the State the decision of the question in the example given; for it is quite clear, upon the principle stated, the jurisdiction of the former, and the validity and effect of its process, would not be what the Federal, but State court, might determine. No doubt, if the Federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the Federal or State, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the Federal court, as a moment's consideration will show. It would draw after it into the State courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the Federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final process of the person in both civil and criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the State court, and the question of jurisdiction of the Federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark, that no Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. But we shall not pursue this branch of the case further. We regard the question as settled, at least as early as 5 Cranch, 115, United States *v.* Peters, familiarly known as the Olmstead case, and which is historical, that it belongs to the Federal courts to determine the question of their own ju-

risdiction, the ultimate arbiter, the supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most careful and deliberate consideration, in the opinion of the present Chief Justice, in the case of the United States *v.* Booth, (21 How., 506.)

II. Another misapprehension under which the counsel for the defendant in error labors, and in which the court below fell, was in respect to the appropriate remedy of the plaintiffs in the replevin suit for the grievance complained of. It was supposed that they were utterly remediless in the Federal courts, inasmuch as both parties were citizens of Massachusetts. But those familiar with the practice of the Federal courts have found no difficulty in applying a remedy, and one much more effectual than the replevin, and more consistent with the order and harmony of judicial proceedings, as may be seen by reference to the following cases: (23 How., 117, Pennock et al. *v.* Coe; Robert Gue *v.* the Tide Water Canal Company, decided this term; 12 Peters, 164; 8 Ib., 1; 5 Cranch, 288.)

The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.

The case in the 8 Peters, 1, which was among the first that came before the court, deserves, perhaps, a word of explanation. It would seem from a remark in the opinion, that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law.

In the case of Pennock *v.* Coe the bill was filed by the mortgagee of the railroad company, in trust for the bondholders, answering to the position of the plaintiffs in the replevin suit in the case before us. Gue *v.* the Tide Water Canal Company, decided at this term, is an instructive case upon this

subject, in which the Chief Justice suggests the difficulties of a court of law dealing with this description of property with a proper regard to the rights of all concerned.

In that case the bill was filed on the equity side of the Circuit Court of the United States for the district of Maryland, to restrain a sale of the defendant's property on execution. Gue, the judgment creditor, was a resident of Pennsylvania.

We shall not look into the questions raised upon the mortgage, whether executed by the proper authority, or if it was, whether it covered after-acquired property, as not material to the case before us. The latter question was fully examined in this court in the case above referred to, of Pennock *v.* Coe.

Neither shall we inquire into the questions raised under the attachment laws of Massachusetts, as they are unimportant in our view of the case.

Upon the whole, after the fullest consideration of the case, and utmost respect for the learning and ability of the court below, we are constrained to differ from it, and reverse the judgment.

THACKER B. HOWARD, PLAINTIFF IN ERROR, *v.* FRANCIS BUGBEE.

A statute of the State of Alabama, authorizing a redemption of mortgaged property in two years after the sale under a decree, by *bona fide* creditors of the mortgagor, is unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract.

This question was decided by this court in the case of Bronson *v.* Kinzie, 1 Howard, 311, and the decision has been since repeatedly affirmed.

THIS case was brought up from the Supreme Court of the State of Alabama, by a writ of error issued under the twenty-fifth section of the Judiciary act.

The case is stated in the opinion of the court.

It was argued by *Mr. Phillips* for the plaintiff in error, and

submitted on a printed argument by *Mr. Clay* for the defendant.

Mr. Phillips stated the case, and then proceeded with his argument.

The statute under consideration is in all respects like that which in Bronson *v.* Kinzie was held to be unconstitutional. There the question was, whether the mortgagee was not entitled to an absolute sale, regardless of the statute. Here the question is, whether the purchaser, under such a sale, can be deprived of his right to the fee simple by virtue of the redemption provided by the statute. As the purchaser under a foreclosure suit is vested with all the rights of the mortgagee, the question as to the validity of the statute must be the same, whether applied to the one or the other.

The case of Grantley *v.* Ewing, 3 Howard, 716, in which the statute was determined to be unconstitutional, was, as in this, a contest with the purchaser, and only differs from it in the fact that the obnoxious statute was passed after the decree, but before the sale, while in this case it was passed before the decree.

An unconstitutional statute is no more obligatory on State than on Federal tribunals. It is absolutely void to all intents and purposes. It cannot, therefore, be said that such a statute controlled the decree and the purchase made under it. The purchaser was vested, by the register's deed, with full and absolute property, and cannot be divested by the terms of a statute which the State had not constitutional authority to enact.

The opinion of the Supreme Court of Alabama in this case is founded upon their previous decision in Iverson *v.* Shorter, and very frankly and naively admits that "the decision in Iverson *v.* Shorter is a plain departure from the principle upon which the Supreme Court of the United States asserted in Bronson *v.* Kinzie the unconstitutionality of the statute of Illinois."

It would seem, therefore, to be confessed by the State court, that if this court adhere to its decision in Bronson *v.* Kinzie, their own judgment in this case must be reversed.

See, also, McCracken *v.* Haywood, 2 Howard, 612.

Mr. Clay contended that the statute of Alabama did not impair the obligation of a contract, for the following reasons:

The distinction between rights and remedies, between those statutes which confer a right, and those which furnish a remedy for the enforcement of that right, is so marked that under ordinary circumstances I would not deem it necessary to offer any remarks upon it. The one inheres in and follows the contract wherever it may go. The other is dependent on the local legislation of the place where the parties seek to enforce the right. This distinction is taken in the following cases:

The People *v.* Tibbetts, 4 Cow., 384.
Baughn *v.* Nelson, 9 Gill, 299.
United States Bank *v* Longworth, 1 McL., 35.
Pratt *v.* Jones, 25 Verm., 303.
Searcy *v.* Stubbs, 12 Geo., 437.
Paschal *v.* Perez, 7 Texas, 348.
Hope *v.* Johnson, 2 Yerg., 125.
Maltby *v.* Cooper, 1 Morris, 59.
West *v.* Creditors, 1 La. Ann. Rep., 365.
Newton *v.* Tibbets, 2 Eng. (Ark.,) 150.
Rockwell *v.* Hubbell, 2 Doug., 197.

It is also well drawn in the able dissenting opinion of Justice McLean, in the case of Bronson *v.* Kinzie, 1 How. U. S., 311, 322. See, also, the cases cited in the opinion of Ch. J. Walker, of the Alabama Supreme Court.

The statute of 1842 takes away no right. It leaves the debt unimpaired, leaves the debtor's property subject to the debt, and only modifies the form of enforcing the decree. It does not take away all substantial remedy, which, it is conceded, would impair the obligation of the contract. It simply enlarges the time, at the completion of which the purchaser at the mortgage sale will acquire an indefeasible title. It does not weaken the binding efficacy of the mortgage, nor does it impair the mortgagee's lien. It but changes the remedy for the enforcement of the lien.

Mr. Justice NELSON delivered the opinion of the court.

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

The case was this:

Enoch Parsons executed a mortgage of the premises in controversy, on the 9th December, 1836, to Sarah Tait, to secure the payment of $13,246.66. The last instalment fell due in January, 1841. In March, 1846, proceedings were instituted in the court of chancery to foreclose the mortgage for default in payment; and in September, 1848, Howard, the appellant, became the purchaser of the premises, under the decree of foreclosure, and held a deed of the same duly executed by the proper officer.

In January, 1842, the Legislature of the State of Alabama passed an act authorizing a judgment creditor of the mortgagor, or of his estate, at any time within two years after the sale under a mortgage, to redeem the land from the purchase on paying the purchase money, with a certain per cent. interest, besides charges.

Bugbee, the appellee, and plaintiff in the court below, having recovered a judgment against the estate of Parsons in 1843, tendered within the two years the purchase money, interest, and charges, to Howard, and also a deed of the premises to be executed; all of which were refused. This bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale and execute the deed.

The main ground of the defence in that suit was, that the mortgage from Parsons, under which the defendant derived title, having been executed before the passage of the act providing for the redemption, the act as respected this debt was inoperative and void, as impairing the obligation of the contract.

The court of chancery so held and dismissed the bill. But on appeal to the Supreme Court, that court reversed the decree below, and entered a decree for the complainant. The case is now here on a writ of error to the Supreme Court.

The only question involved in this case was decided in Bron-

son *v.* Kinzie, 1 How., 311. It was there held, after a very careful and extended examination by the court, through the Chief Justice, that the State law impaired the obligation of the mortgage contract, and was forbidden by the Constitution. This decision has since been repeatedly affirmed. 2 How., 612; 3 Ib., 716.

It is due to the judges of the court below to say that they felt bound by a decision of their predecessors, which they admitted to be in direct conflict with the case of Bronson *v.* Kinzie, and that the two decisions could not be reconciled.

We are entirely satisfied with the soundness of the decision in the above case, and with the grounds and reasons upon which it is placed, and shall simply refer to them as governing the present case.

Decree below reversed. Case remitted with directions to enter decree for the plaintiff in error.

CHARLES MCMICKEN PERIN, CLYDE PERIN, AND MARY E. PERIN, INFANTS, BY THEIR FATHER AND NEXT FRIEND, FRANKLIN PERIN, COMPLAINANTS AND APPELLANTS, *v.* FREEMAN G. CAREY, WILLIAM CROSSMAN, AND WILLIAM M. F. HEWSON, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES MCMICKEN, DECEASED, THE CITY OF CINCINNATI, ELIZABETH RANDALL, DAVID P. STELLE, AND ELIZABETH STELLE, HIS WIFE, AND ANDREW MCMICKEN, RESPONDENTS.

Charles McMicken, a citizen and resident of Cincinnati, in Ohio, made his will in 1855, and died in March, 1858, without issue.

He devised certain real and personal property to the city of Cincinnati and its successors, in trust forever for the purpose of building, establishing, and maintaining as far as practicable, two colleges for the education of boys and girls. None of the property devised, or which the city may purchase for the benefit of the colleges, should at any time be sold. In all applications for admission to the colleges, a preference was to be given to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants.

If there should be a surplus, it was to be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose

parents were living; preference to be given to our relations and collateral descendants.

The establishment of the regulations necessary to carry out the objects of the endowment was left to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution.

This will can stand; and with reference to the various points of law connected therewith, this court establishes the following propositions, viz:

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio; but not by express legislation, nor was that necessary to give courts of equity in Ohio that jurisdiction.
2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the Governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.
3. The city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.
4. Those devises and bequests are charities in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.
5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.
6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons as to who should be pupils in the colleges which he meant to found was a lawful exercise of his rightful power to make the devises and bequests.
7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.
8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

THIS was an appeal from the Circuit Court of the United States, sitting in equity, for the southern district of Ohio.

The bill was filed by the appellants to set aside the devises and bequests in the will of Charles McMicken to the city of Cincinnati, in trust for the foundation and maintenance of two colleges.

The nature of the devise is stated summarily in the head

note of this report, and more particularly in the opinion of the court.

The bill specified the following objections to the validity of the devises and bequests:

1. "Said city of Cincinnati was formerly a municipal corporation, created and having certain powers conferred upon it by an act of incorporation of the Legislature of the State of Ohio, but it now exists only as a political division of the State, under a general law having a uniform operation throughout the State, and is without any power or authority to accept said devises and bequests, to acquire or hold the title to the property mentioned in said devises and bequests for the purposes therein expressed, or to execute the trusts or any of them therein set forth and declared.

2. "Said Charles McMicken, deceased, has undertaken, by said alleged devises and bequests, to render a large amount of real estate above described, situate in said city of Cincinnati, in said State of Ohio, and an indefinite amount of real estate to be hereafter purchased in said city of Cincinnati, forever unalienable, contrary to the law and public policy of said State.

3. "There are no persons mentioned or referred to as beneficiaries, under the trusts attempted to be created by said will, who are so described that they are entitled to and can claim the benefit of said trusts or any of them, and the same are therefore void for uncertainty.

4. "By the terms of said will, the establishment of the regulations necessary to carry out the objects of the endowment attempted to be made, and the power to appoint directors of the institutions therein named, are vested in the corporate authorities of the city of Cincinnati, but there are no persons, either artificial or natural, who fall within or are sufficiently identified by said description.

5. "The trusts attempted to be created by said will are uncertain and illegal for the further reason, that the distribution of the trust fund between the two objects, of the education of white boys and girls and the support of poor white male and female orphans, is to be left to the unrestrained discretion of

the city of Cincinnati, or of the corporate authorities of the city of Cincinnati.

6. "The trust attempted to be created by said will for the support of poor white male and female orphans is illegal and void, because, without authority of law, and in violation of the statutes and public policy of the State of Ohio, it is therein required that before they shall receive any benefit therefrom, their guardians, or those in whose custody they are, shall have first entirely relinquished their control of them to the said city; and provided, that those orphans who may have remained until they have reached any age between fourteen and eighteen years shall be bound out by the said city to some proper art, trade, occupation, or employment."

The respondents demurred to the bill, which was sustained by the Circuit Court and the bill dismissed. The complainants appealed to this court.

It was argued by *Mr. Headington* and *Mr. Ewing* for the appellants, and by *Mr. Pugh* and *Mr. Taft* for the appellees.

A separate argument was filed by *Mr. Headington*, of one hundred pages; a joint one by *Mr. Ewing* and himself, of twenty pages; an argument by *Mr. Pugh*, of thirty pages; and one by *M. Taft* and *Mr. Perry*, of eighty-seven pages.

The reporter is embarrassed by the quantity of matter, all of which he would lay before his readers if it were possible. But being obliged to select only a part, he prefers to omit the arguments relating to the English system of trusts and charities, with which the profession are doubtless acquainted, and, after some general points, to confine his attention to those arguments which relate especially to the state of the law in Ohio.

Mr. Headington and *Mr. Ewing* laid down these general propositions:

In behalf of the appellants, we claim that the devise and bequest to the city in trust should be held void, on the

grounds that the trustee, the city of Cincinnati, is incapable of taking and executing the trust, and that the *cestuis que trust* are dependent on the selection and designation of the trustee; consequently, that there is not, nor can there ever be, either trustee or *cestui que trust.*

And that in violation of the Constitution of Ohio, it withdraws the colleges from the power of the Legislature, and makes them immortal, and it creates a perpetuity in the lands with which they are endowed, making them inalienable forever, which is against the letter and the policy of the law.

The course of argument led to the examination of this devise, irrespective of the law of charities, under the ordinary rules of equity; and afterwards as a charity. Upon both of these grounds the devise was claimed to be void, and both points were investigated at great length.

The counsel then spoke of the course of decisions in England, commented on by this court, and proceeded as follows:

3. This system is not ours; it is not the law of this court, nor is it the law of Ohio.

In 1795, the Northwestern territory adopted from the Virginia code a law adopting British statutes prior to the fourth year of James I. The Ohio Legislature enacted it in 1805, and repealed it in 1806; so we have none of it. We have in Ohio laws respecting religion, education, and charities, but they are to be construed, as we submit, precisely as if there had never been a statute of Elizabeth in England.

But it is said there has been a course of legislation in Ohio tending to the same result with the statute of Elizabeth, and that *pro tanto*, at least, the decisions under that statute ought to be regarded. An analysis of those laws will, I think, set this question of legislative sanction at rest. Each act which that Legislature has ever passed on the subject performs its own special office distinctly and exactly, and leaves everything else under the implied negative, that the Legislature did not choose to include it. They are six in number, providing:

1. That a devise to the poor of a township shall vest the estate in the trustees of the township, for the use of the poor

Swan, 612, sec. 14.

2. A devise to the State of Ohio, or to any person whomsoever, in trust for the common-school fund, the same shall be vested in the common-school fund.

Swan, 832, sec. 5; 839, sec. 11.

3. The respective township boards of education shall have power to take and hold in trust for the use and benefit of any "central or high shool, or sub-district school in the township."

Swan, 852.

4. The trustees of the lunatic asylum may take and hold in trust any lands, &c., conveyed, &c., to be applied to any purpose connected with the institution.

Swan, 556 and 127.

5. Townships which have been lawfully laid off and designated shall have power to receive any devise, &c., to the township, for the benefit of the township, either for a public square or other useful purpose specified in such devise, &c., and shall hold the same in trust for the township, for the purposes specified in such conveyance.

Swan, 992, sec. 1.

6. The trustees of any university, college, or academy, (created according to the provisions of the act in which the authority is found,) may hold in trust any property devised, bequeathed, or donated, upon any specific trust, consistent with the objects of such corporation.

Swan, 192, sec. 3.

Now, all these provisions are very distinct and exact, and require no loose or irregular construction. On the contrary, they seem intended to prevent it, by laying down plain rules for conveyances to all such uses as the Ohio Legislature thought proper to regard with favor; and if any of the requisites of an ordinary conveyance in trust is dispensed with, it is written down in plain terms.

There was a clause in a statute of 1838 (36 Ohio Laws, p. 35, sec. 43) which admitted of a very large construction. It directed the superintendent of common schools "to take an account of all funds and property given in any way for the support of education, except chartered colleges, and to carry into effect, *as nearly as may be*, the object of the trust."

In the revision under the Constitution of 1851 this was repealed, and in its stead the attorney general is directed "to cause proper suits to be instituted at law and in chancery to enforce the performance of trusts for charitable and educational purposes, and restrain the abuse thereof." All that is loose and latitudinarian in the act of 1838 is excluded from the act of 1852, namely: "funds and property given *in any way*," and directions to carry "into effect, *as nearly as may be*, the object of the trust." "*As nearly as may be*" *cy pres* adopted and repealed, not *repealed by accident*, but because the legal world condemned it. The attorney general, in its stead, is directed to enforce the performance of *trusts*—valid trusts, of course, such as the laws authorize.

The statute of March 26, 1856, is relied on by defendants' counsel. It provides:

"That whenever any person shall by deed, devise, gift, or otherwise, set apart any lands, moneys, or effects, as an endowment of a school or academy, not previously established, and shall not provide for the management of such school or academy, the court of common pleas of the proper county shall appoint five trustees, who shall have the control and management of the property, moneys, and effects so set apart, and of the school or academy thus endowed, and shall hold their offices for five years," &c.

It cannot be supposed that this act under any ordinary construction can reach the case; but enlarged and extended under the statute of Elizabeth, it might answer any purpose to which chancellors should please to apply it. According to the ordinary rules of construction, it has the reverse effect. The Legislature had the subject of donations for educational purposes before them. They provided for schools and academies, but did not choose to provide in like manner for colleges. Colleges were already provided for just as the Legislature thought most proper.

Swan, 193, 196.

And the testator did not think fit to give his land or money to a school or academy under the control of trustees selected by the court of common pleas.

While denying the application of the statute of Elizabeth in Ohio, we are safe in saying, that this devise could not be sustained in the English chancery by the present settled construction of the law under that act. They would hold this to be a specific charity, carefully and accurately defined, which could not go into effect according to the expressed intent of the donor. And as there is no expression of a general charitable intent, *dehors* the defined object, equity could not apply it *cy pres* to any other like charity.

Att'y Gen. *v.* Whitechurch, 3 Vez., 145.

Corbyn *v.* French, 4 Vez., 431.

Clarke *v.* Taylor, 21 Eng. Law and Eq. Rep., 308—9.

It is a devise, too, on the express condition that the provisions of the will "shall be faithfully complied with;" and the English chancery would give the testator the benefit of that condition.

De Themmines *v.* De Bonneville, 5 Russel, 288.

Now, in this case the testator declares that he gives his estate to no such trustees as the law offers him, to no such purpose as the law points out, and he submits it to no such regulations as the law makes for him. He prescribes his own conditions; the law does not admit, and cannot be modified so as to admit them. The condition of the devise cannot be complied with; the devise therefore would fail under the law of charities as now administered in England.

But we are, in Ohio, as we have shown, quite clear of the statute of Elizabeth, and of the King's prerogative, by which that statute was perverted, and we have in its stead specific legal provisions, defining the mode of donation and endowment of the various charities which it was thought fit to encourage. He who desires to found or endow an institution of learning or a charity has no need of other aid than the regular administration of the laws gives him, unless, as in this case, he desires to do what the law will not permit.

There are some familiar cases where corporations or associations made trustees were incompetent to execute the trust; in which the Legislatures, as *parentes patriæ*, have passed enabling acts granting the power, as in case of the Sailors' Snug

Harbor in New York, the Girard College in Pennsylvania, and the McIntyre Poor School in Ohio.

But the Constitution of Ohio of 1851 does not admit in future of such enabling statutes. The Legislature of that State cannot now confer on a corporation any special powers.

Art. 13, sec. 1, Swan, 27.

The statute of April 9, 1852, in strict conformity with the Constitution, provides that colleges may be founded by individuals, and incorporated under its provisions. A city cannot found a college. One man, however rich, may not found a college and be the autocrat and controller of education and mind forever; but five or three, all citizens resident, may found and incorporate a college, (Swan, 193, 195, 196,) but they cannot give it perpetuity. The directors may sell and dispose of the real estate with which it is endowed; it may be sold on execution to pay the debts of the college, and the Legislature may repeal the law under which it is incorporated, and thus alter or destroy the institution at pleasure.

Const., art. 13, sec. 2.

The 6th article of the Constitution of 1851 provides for common schools; the 1st section of the 7th article for institutions for the benefit of the insane, blind, deaf and dumb; while colleges are left to be worked out under the 13th article, with other corporations. They are placed on the same footing with railroads, mining and manufacturing companies, and the Legislature cannot, if they would, divest themselves of the power to destroy at pleasure the organization of any one of them when created according to legal warrant.

Const., art. 13, sec. 2, Swan, 27.

Act of April 19, 1852, Swan, 193—196.

This devise, then, cannot be made to conform to any law, common or statute, in Ohio, without disregarding the intent of the testator. It would require the extreme application of the *cy pres* doctrine to apply it in any known legal form. The city authorities, which the will requires should found the colleges, cannot found them; required to select the beneficiaries, they cannot select them; they cannot manage the funds nor govern the colleges; nor can the institutions come into being

stamped with the immortality and immunity from change which the testator makes a condition of their creation; nor can the lands with which they are endowed be withdrawn from the operation of law forever, without violating a long-established and well-settled principle of our jurisprudence. The testator did not create, or intend to create, a trust, such as the laws of the State can suffer to be executed. He creates the trust if it may be clothed with these impossible attributes; not otherwise. In every case of charity cited from Ohio, and we believe in every case sustained there, there was a good trustee. In no case has a corporation, without special power, been held capable of executing a trust.

There is no judicial decision in Ohio, even prior to the Constitution of 1851, which would sustain this trust. The first case that was supposed to involve the English doctrine of charities was that of the McIntyre Poor School, 9 Ohio Rep., 262. This was a devise to Amelia McIntyre and her issue; and if she should die without issue, remained to the Zanesville Canal and Manufacturing Company, in trust for the maintenance of a poor school for the town of Zanesville. The testator died; the Legislature afterwards passed a special act enabling the company to execute the trust. Amelia McIntyre died without issue, after the enabling act. The court held that the corporation thus empowered took the estate as a contingent remainder, and this is all that was decided in that case.

Chief Justice Lane, in the written opinion of the court, says: If there had been no competent trustee, the estate would descend to the heir charged with the trust. This was obiter, as the court held the trustee competent, and the estate did not descend. But the dictum was right if the trust was not discretionary, and wrong if it was. It does not seem to have been discretionary; there was no selection of beneficiaries—not on the tax list. Judge Lane cited in its support a dictum of Mr. Justice Thompson in Inglis *v.* the Sailors' Snug Harbor, 3 Pet., 119, which rests on a special provision of the will, attaching the trust to the legal estate, wherever it might pass. Mr. Justice Thompson cites Malim *v.* Keighley, 2 Vez. Jr.,

335, a case of ordinary trust for designated *cestuis que* trust, conferring no discretionary power on the trustee.

The case of Urmey's Executors *v.* Wooden, 1 O. S. R., 160, is also relied on. In that there was a competent trustee, and a *cestui que* trust recognised by statute.

In the same volume, p. 478, is the case of Williams *v.* the First Presbyterian Church of Cincinnati, in which a conveyance in trust for the use of an unincorporated church, created in 1797, while the statute of Elizabeth was in force in the Territory, and vested in competent trustees, who, after the church was incorporated, executed the trust, was holden valid.

These, we believe, are all the cases decided in Ohio which touch the question even remotely; and in no one of the cases in which the trust was sustained do the two fatal elements meet—an incompetent trustee and a *cestui que* trust dependent on his selection. There are, however, loose dicta by judges in some of these cases, such as are noticed by this court in Fontaine *v.* Ravenal, but no decided case in Ohio; and I believe none of these dicta sustain this devise. Since the adoption of the Constitution of 1851, and the act of 1852, above referred to, no case has been considered in the courts of that State involving the question. We have, then, in Ohio, no current of decisions; no local usage creating a special law in case of charities variant from the law in other cases; and we have nothing to do with the decisions in other States, founded partly on statutes, partly on usage, and partly on mistaken notions of the powers of a court of chancery.

17 How., 484.

If the court apply the English decisions, under the statute of Elizabeth, to Ohio, the first difficulty is to determine what shall be favored as charities. The enumeration in that statute, to which it can hardly be contended we are bound, fails us in some of its most material elements. For example, we have no established church in Ohio. The Christian religion itself forms no part of the law of that State.

Bloom *v.* Richards, 2 O. S. R., 387.

We, therefore, cannot legally distinguish pious uses from superstitious uses. All forms of religion, all the wild vagaries

of the human mind, which relate to the being or non-being of God, and the origin, the spiritual condition, and final destiny of man, if embodied and taught, must be regarded alike by our laws; and if donations forever to our leading religious sects, their colleges, or universities, be favored beyond the ordinary rules of law, so must the most absurd and most objectionable, if they be not absolutely immoral. Under these conditions, it would not greatly subserve the public good to set up special laws for the protection and perpetuation of religious or collegiate educational charities. The decisive objection to it, however, is, that our law contemplates no such thing, but has, in effect, forbidden it, and provided for the incorporation of religious societies and colleges by a statute always subject to repeal; and it has provided for their endowment in property, real and personal, and made it all subject to alienation. Then, if the course of decisions, under the statute of Elizabeth, be adopted, we must resort to our own laws to find the cases to which the special rules apply.

The English cases rest upon the enumeration in that statute. The chancellor, in Attorney General *v.* Lord Lansdale, says: "The institution of a school for gentlemen's sons is not, in popular language, a charity; but in view of the statute of Elizabeth, all schools for learning are to be so considered." We speak the popular language, and colleges are not written down in any of our statutes as charities. Swan, 51.

The 15th section of the act of May 1, 1852, making it the duty of the attorney general to cause proper suits to be instituted to compel the performance of trusts for charitable and educational purposes, will be relied on by counsel for appellees. This does not create trusts, or mend those that are imperfect, but applies only where trusts exist, created according to law. We have contemporary statutes, showing how trusts for those purposes may be created; this act directs how they may be enforced. The remarks of Ch. Just. Marshall, in Baptist Association *v.* Hart's Executors, 4 Wh., 48, 49, are most apposite to this point. He says: "It is not to be admitted that legacies not valid in themselves can be made so by force of the prerogative, in violation of private right. This superin-

tending power of the Crown, therefore, over charities, must be confined to those which are valid in law." And so with the power and duty of the attorney general, under the Ohio statute. He has nothing to do with this, unless it be a valid devise in law, and the trustee neglects or prevents it.

Mr. Pugh's points were the following:

I. The doctrines founded upon the statute of 43d Elizabeth, chapter 4, have been adopted by the courts of Ohio, and are recognised in that State by express legislation.

Brown *v.* Manning, 6 Ohio Rep., 303.

Bryant *v.* McCandless, 7 Ohio Rep., (part 2d,) 136.

Mason *v.* Muncaster, 9 Wheat., 445.

Williams *v.* First Presbyterian Society, 1 Ohio State Rep., 478, 501.

McIntyre Poor School *v.* Zanesville Canal Co., 9 Ohio Rep., 203, 287.

Zanesville Canal Co. *v.* City of Zanesville, 20 Ohio Rep., 488.

Urmey *v.* Wooden, 1 Ohio State Rep., 164.

Attorney General's Act, May 1, 1852, sec. 14, Swan's Stat., 51, 52.

Derby *v.* Derby, 4 Rhode Island Rep., 439.

II. The devises and bequests are to the city of Cincinnati, for its own use, as a corporation, and are valid, therefore, without regard to the statute of 43d Elizabeth.

1. There is no statute of mortmain in Ohio, nor any exception against bodies corporate in the act relating to last wills and testaments.

Helfenstine *v.* Garrard, 7 Ohio Rep., (part 1st,) 275.

Hall *v.* Ashby, 9 Ohio Rep., 96, 98.

Crawford *v.* Chapman, 17 Ohio Rep., 449, 452, 453.

2. The city is a corporation authorized by law to take and hold property, real and personal, by deed or will, for both the purposes designated.

Municipal Corporation Act of May 3, 1852, secs. 18, 34, Swan's Stat., 960, 964.

Vidal *v.* Girard, 2 How., 186, 187, 189, 190.

McDonough *v.* Murdoch, 15 How., 406, 407.
Collins *v.* Hatch, 18 Ohio Rep., 524.

Statutes of Ohio cited:

Act of January 14, 1853, Ohio Laws, vol. 51, p. 503.
Act of March 14, 1853, Swan's Stat., 610.
Act of March 11, 1853, Swan, 988, 989.
Act of April 29, 1854, Swan, 991 a., 991 b.
Act of March 8, 1831, Swan, 41.
Act of March 12, 1853, Swan, 43, 44.
Act of March 11, 1853, Swan, 588.
Philips *v.* Bury, 2 Term Rep., 353.

III. The city has capacity, as a corporation, to take by devise; whether she can hold the estate for the purposes designated or not, is a question with which the appellants have no concern.

Runyan *v.* Coster, 14 Pet., 122.
Goundie *v.* Northampton Water Co., 7 Penn. State Rep., 239, 240.
Leasure *v.* Hillegas, 7 S. and Rawle, 320.
Sheaffe *v.* O'Neal, 1 Mass. Rep., 257, 258.
Fairfax *v.* Hunter, 7 Cranch, 603.
Coke upon Littleton, 2.

IV. The devises and bequests are for the benefit of whole denominations of persons, and to endow colleges and asylums particularly described; they are valid, in equity, therefore, without any trustee, and independently of the statute of Elizabeth.

McCartee *v.* the Orphan Asylum Society, 9 Cowen, 484.
Bartlett *v.* Nye, 4 Metcalf, 378.
Baptist Association *v.* Hart, 4 Wheat., 1.
Inglis *v.* the Sailors' Snug Harbor, 3 Pet., 99.
Vidal *v.* Girard, 2 How., 127.
McDonough *v.* Murdoch, 15 How., 367.
Smith *v.* Swormstedt, 16 How., 288.
McIntyre Poor School *v.* Zanesville Canal Co., 9 Ohio Rep., 203, 287.

Statutes of Ohio cited:

Act of May 3, 1852, concerning wills, sec. 67, Swan's Stat., 1034.

Act of March 26, 1856, "to provide for the government of schools and academies specially endowed," 53 Ohio Laws, 33, 34.

Act of March 11, 1853, "for the better management of orphan asylums," Swan's Stat., 588.

Fontaine *v.* Ravenal, 17 How., 369.

Clark *v.* Taylor, 21 Eng. Law and Eq. Reports, 308.

Wheeler *v.* Smith, 9 How., 55.

V. McMicken's direction that certain real estate shall not be alienated, (section 32,) is only a condition subsequent; and whether valid, or invalid, cannot affect the devise.

McDonough *v.* Murdoch, 15 How., 410, 411, 412.

VI. The persons intended as beneficiaries, by McMicken, are described with sufficient certainty.

Vidal *v.* Girard, 2 How., 192, 193, 196.

McDonogh *v.* Murdoch, 15 How., 414.

Whicker *v.* Hume, 14 Beavan, 509.

Pickering *v.* Shotwell, 10 Penn. State Rep., 23.

VII. The phrase "corporate authorities of the city of Cincinnati" affords an apt description of those by whom McMicken's bounty is to be administered.

Act of January 14, 1853, section 1, Ohio Laws, vol 51, p. 503.

McIntyre Poor School *v.* Zanesville Canal Co., 9 Ohio Rep., 218.

VIII. It furnishes no ground for objection that the apportionment of bounty, as between the colleges and the asylums, will depend somewhat on circumstances, or even the discretion of the municipal authorities.

Vidal *v.* Girard, 2 How., 127.

McDonough *v.* Murdoch, 15 How., 367.

Pickering *v.* Shotwell, 10 Penn. State Rep., 23.

IX. The statutes of Ohio authorize such disposition of orphan and destitute children as the 36th section of McMicken's will contemplates.

Act of March 12, 1853, concerning apprentices and servants, secs. 1, 2, 3, 4, Swan's Stat., 43, 44.

Act of March 11, 1853, "for the better management of orphan asylums," sec. 2, Swan's Stat., 588.

Amendment of March 25, 1854, Swan's Stat., 588.

X. It furnishes no ground of objection that McMicken stipulated for the preference of particular persons, as pupils or beneficiaries, whether such persons be his own relatives or the children of certain friends, or others.

Attorney General *v.* Earl of Lansdale, 1 Simons, 105.

Wright *v.* Linn, 9 Penn. State Rep., 433.

XI. It is of no consequence whether the colleges intended by McMicken be or be not within the act of April 9, 1852, "to enable the trustees of colleges, academies, universities, and other institutions for the purpose of promoting education, to become bodies corporate," or its supplement of March 12, 1853, Swan's Stat., 193, 295.

The colleges need not be incorporated, inasmuch as the title of all the property is vested in the city of Cincinnati, and the city is a corporation with perpetual succession. If this were otherwise, the act of March 26, 1856, would be amply sufficient.

Ohio Laws, vol., 53, p. 33.

The points made by *Mr. Taft* and *Mr. Perry* were the following:

I. The bequest of Mr. McMicken to the city of Cincinnati creates a meritorious and well-defined charitable trust, which is not subject to any just legal objection for vagueness or uncertainty.

II. The city of Cincinnati has the legal capacity to take the title of property given to her by deed or by will in trust for a valid charity, though it be not certain that such trust falls within the specified purposes of the corporation, in which case the State only, and not the heirs, can intervene to prevent her from holding the title and executing the trust.

III. The city of Cincinnati has capacity to acquire and hold the property, and to execute the trust under this will.

IV. That, whether the city be capable or incapable as a trustee, such uses as these in Mr. McMicken's will are good and

lawful uses by the common law of England, which is the common law of Ohio.

V. That such trusts are entitled to protection in equity upon general principles of equity jurisdiction, which protect all lawful trusts whether there be a trustee or not.

VI. That the original jurisdiction of courts of equity to protect and preserve such charitable trusts as this under Mr. McMicken's will has been recognised and thoroughly established, both by statute and by judicial decisions in Ohio, where it is now the settled law, as it is in nearly all the States of the Union.

The argument upon the first five points must be omitted, as was that of *Mr. Pugh.*

Upon the state of the law in Ohio, the argument was as follows:

4. Let us now examine the law of Ohio on this subject, as shown by her history, and expressed by her Legislature and her courts.

1. It is fair to presume that any one of the States where the common law of England prevails does and will protect its charities. They are descended from a country under whose laws and whose courts, in the days of their colonial connection with it, charity never failed. It is for the plaintiffs' counsel, therefore, to show that the State of Ohio, though deriving from England the great body of the common law, has rejected the English law of charities. The policy of Ohio, and all its historical associations and recollections, have been unqualifiedly in favor of the laws of charity, and especially of educational charity.

It is well known that Ohio was the first of the new States formed out of the great Northwestern territory to experience that most liberal policy, on the part of the Federal Government, which not only enjoined upon the Territorial Legislature the encouragement of learning, but made munificent grants of land for the uses of education.

By the 3d article of the ordinance of 1787, Swan's Statutes, (1st revision,) 46, it is provided, "that religion, morality, and knowledge being necessary to good government and the hap-

piness of mankind, schools and the means of education shall be forever encouraged."

By the act of 1785, Congress destined section 16 in every township to the support of schools, and section 29 of each township to the support of religion, and several entire townships were dedicated to the support of universities and academies.

Ohio was pledged, while yet in her tutelage, by the Federal Government, to an unreserved and fervent support and encouragement of all the means of education for all her people. These were the first vows required of her before she had formed her Constitution. It would have been ungrateful and unfilial, after these early pledges, if she had built up a Constitution and a system of laws excluding so important a "means of education" as these great educational charities like that of Mr. McMicken. She would have been false to her origin and to her early vows. But she has not been forgetful of her duty in that regard, as will appear by reference to her old as well as to her new Constitution, and to the laws enacted under them, and the decisions of her courts.

In 1799, the form of government was changed from the Governor and judges of the Territory to the Governor and Territorial Legislature.

On the termination of the first session held in Cincinnati, in 1799, the Legislature issued an address to the people, in which it says: "Religion, morality, and knowledge, are necessary to all good government. Let us, therefore, inculcate principles of humanity, benevolence, honesty, and punctuality in dealing, sincerity, charity, and all the social affections."

The lands devoted to educational purposes by Congress in the territory of which Ohio was formed amounted, in the aggregate, to more than a half a million of acres—a magnificent charity, created by the Federal Government itself; and yet it was not more certain in its objects than is this charity created by Mr. McMicken.

The object of the one and the other is identical. The General Government sought to encourage by these townships of land the highest grades of education.

When Congress gave this land for a university, it did not mean to limit the institution to a small Western college. It intended to say to the people of the State: Cherish your common schools, but do not neglect the universities.

If our Western institutions have failed hitherto to rank with the oldest and best-endowed universities of the East, it has been because they have lacked the accumulation of endowments to stimulate and encourage them. But if we follow out the original and oft-repeated injunction of the old Congress to the Territory, not only by applying these national charities strictly to their objects, but also by availing ourselves of the charities of benevolent individuals devoted to the same great purposes, we shall not long want the merit, though we may want the fame, of these ancient seats of learning.

And here we must be allowed to claim, as the first fruit of the first university founded on that early national charity, a lawyer and a statesman whose fame and influence have not been confined to his own State of Ohio or the West; who has been an ornament of the Senate and the Cabinet, and who still adorns the bar of the Union; an alumnus whom Harvard or Yale would be proud to claim.

It cannot be hoped that, by sustaining Mr. McMicken's charity, many specimens can be produced like the first graduate of the "Ohio University;" it is nevertheless to be hoped that many young men, sharing in his spirit, may grow up under the influence of these institutions to do honor to their age and country—men who will have character, and can afford to give calm counsel even amid the strife of parties and the fury of local jealousies.

By the 25th section of the same Constitution of 1802, page 38 of Swan's first revision of Ohio statutes, it is provided, "that no law shall be passed to prevent the poor in the several counties and townships within this State from an equal participation in the schools and colleges and universities within this State which are endowed, in whole or in part, from donations made by the United States for the support of schools and colleges; and the doors of said schools, academies, and universities, shall be open for the reception of scholars, students,

and teachers, of every grade, without any distinction or preference whatsoever, contrary to the intent for which said donations were made."

It is worthy of especial observation how perfectly the testator's will harmonizes with the policy of the State as well as of the United States on the subject of education and educational institutions. Neither the State nor the United States was content to limit its encouragement and support of education to common schools. They provided for academies and universities.

By the 27th section of the same article it is provided, "that every association of persons, when regularly formed within this State, and having given themselves a name, may, on application to the Legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and for other purposes."

The new Constitution of 1851 is equally explicit and strong in its encouragement of education. By the last clause of article I, section 7, it is declared, that "religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Article VI, section 1, of the same Constitution, provides:

"Sec. 1. The principal of all funds arising from the sale or other disposition of lands or other property granted or intrusted to this State for educational and religious purposes shall forever be preserved inviolate and undiminished, and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations.

"Sec. 2. The General Assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State."

The policy of the State is thus shown by its fundamental law to have been, and to still be, to foster alike the common

schools, the academies, and the universities, and to cherish and protect every dollar which had been or might be donated for any of these purposes.

The legislation of the State in behalf of schools, academies, high schools, and colleges, has been voluminous, and institutions of learning of every grade are encouraged, and all funds donated or appropriated by law to these purposes are looked after with extraordinary care.

By an act of 1838, (36 Ohio Laws, 35, sec. 43,) it was made the duty of the general superintendent of schools "to take an account of all funds and property given in any way for the support of education, except chartered colleges, and report the condition of the same annually to the Legislature;" "and where, in his opinion, waste is committed, or about to be committed, either by misuser or nonuser, he may report the same to the prosecuting attorney of the county," &c., "and such proceedings shall be had by injunction, decree, or otherwise, as shall prevent misuser of such property, and carry into effect as near as may be the object of the trust."

In 1852, when the office of attorney general of the State was created, this duty of looking up charities was cast upon him, and the office of general superintendent of schools was abolished at the same time, and the act above quoted was repealed.

By the act of 1852, "to prescribe the duties of the attorney general," (Swan's Stat., 51—2, sec. 14,) it is provided, "that it shall be his duty to cause proper suits to be instituted at law and in chancery to enforce the performance of trusts for charitable and educational purposes, and restrain the abuse thereof, whenever, upon the complaint of others, or from his own knowledge, he may deem that to be advisible, or whenever by the Governor, the Supreme Court, or either house of the General Assembly, he may be directed so to do, which said suits may be brought in his own name, upon behalf of the State or the beneficiaries of the trust, in the court of Franklin county, or in the court of common pleas of any county wherein the trust property may be situated or invested; and which suit shall not abate nor discontinue by any change of the officer, but shall be prosecuted to final judgment, mandate, or decree,

as if no such change had occurred: provided, however, that the attorney general may refuse to institute proceedings as aforesaid, except when directed by the Governor, the Supreme Court, or either house of the General Assembly, unless some responsible freeholder of the State will become relator in the cause and liable for the costs thereof; but whenever the Governor, the Supreme Court, or either house of the General Assembly, may direct any such suit, he shall cause the same to be commenced and diligently prosecuted, without any other relation."

Now, although the act of 1838, creating the general superintendent and assigning to him so specifically his duties, was repealed when the attorney general act was passed, it is not to be supposed that the repeal of that act affected in any manner the validity of "all funds and property in any way given for the support of education, except chartered colleges," the condition of which the superintendent was to report annually to the Legislature; and in case of apprehended waste, report the same to the prosecuting attorney, who was to cause such proceedings to be had by injunction, decree, or otherwise, as should prevent misuse of such property, and carry into effect, as near as might be, the object of the trust." Neither the superintendent's act nor the attorney general's act gave validity to the educational and charitable trusts, nor did the repeal of the former act impair that validity, but its enactment was evidence of the recognition and existence of that kind of trusts. They are all trusts which have an object given them by the donor; and it is provided that if they cannot be carried out strictly according to the gift, "it shall be carried out as nearly as may be." This is an accurate description of the *cy pres* mode of proceeding, and shows that, in Ohio, even if it be not practicable to carry out the purpose of the gift precisely as specified by the testator, it is valid nevertheless as a charity, and to be carried out "as nearly as may be." No Legislature in Ohio would presume by statute, in an indirect way, to take from heirs and next of kin property which by the law of the land belonged to them. Nothing could more strongly show that the doctrine by which chancery aids charities is fully

recognised in Ohio as an existing, unquestioned judicial principle, to enforce which the Legislature may prescribe different remedies at different times, without in any manner leaving the right itself doubtful.

And even if no remedy at all were provided by statute, the right itself would not be lost, but would remain; and whenever it should come before a tribunal competent to protect and enforce it, it would no longer be dormant. In 2 How. R., 196, Vidal *v.* Philadelphia, the court passed upon a similar question. They say: "Whatever doubts, therefore, might properly be entertained upon the subject when the case of the Trustees of the Philadelphia Baptist Association *v.* Hart's executors, 4 Wheat., 1, was before this court, (1819,) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

"If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say that if so it was dormant, and that no court possessing equity powers now exists, or has existed, in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law, and remedies may from time to time be applied by the Legislature to supply the defects. It is no proof of the non-existence of equitable rights that there exists no adequate legal remedy to enforce them. They may slumber, but they are not dead."

It is clear that the Legislature of Ohio intended by the "act to prescribe the duties of attorney general," passed 1852, to provide for the preservation of "proceeds of property given in any way for the support of education," which was protected by the act of March 7, 1838, "for the support and better regulation of common schools, and to create permanently the office of superintendent," above recited, as well as for other charities. Trusts for charitable and educational purposes are terms which have a judicial meaning, which the Legislature undoubtedly had in view. If the trusts intended were only such as had a *cestui que* trust in being capable of suing, why was the significant word "charitable" used? If it was intended to

protect only trusts which needed no such aid as charities are known to need, why did not the Legislature say, "it shall be his duty to cause proper suits to be instituted to enforce the performance of trusts in which the public has an interest?" It is true that the public have an interest in charities. But it would seem as if the Legislature sought to use language that was not doubtful—language which had a well-understood historical as well as judicial meaning.

What more did the statute of Elizabeth itself enact than this law of Ohio? The statute of Elizabeth was entitled, "An act to redress the misemployment of money heretofore given to certain charitable uses;" and it provides a remedy for abuses of such trusts. In the preamble it enumerates twenty different kinds of charities, and this preamble has in modern times been referred to, both in this country and in England, as containing all the charities which are entitled to the aid of a court of equity as such, except, perhaps, some which are considered as falling within the spirit and meaning of the enumeration.

The cases of dedication have been regarded in Ohio as involving the same principle as the cases of charity, and this identity of principle has been often recognised in this court.

It is said by the counsel for the plaintiff that a dedication is founded on an estoppel against claiming property which has been dedicated, while a charity presumes a grant. But whether it be called an estoppel or a preumed grant is quite immaterial; the result is the same, and the principle of favor to the object is the same, and the trust in both cases is preserved without a legal grantee on precisely the same ground of favor in equity. A grantee with warranty, whose grantor had no title at the time of conveyance, takes by estoppel the benefit of any subsequent purchase of the title by the warrantor. But if there were no grantee, the estoppel would not pass the title any more than any other mode of passing title. There must be a grantee in whose favor an estoppel can operate, unless it be for public, pious, or charitable uses. Estoppel is a distinct mode of acquiring title. But it does not in

any manner affect the question whether a grantee is necessary to a valid transfer of title.

The courts, therefore, are entirely correct in regarding public, pious, and charitable uses, in States where the statute of Elizabeth is not in force, as falling under one and the same rule, and entitled to the same favor in a court of chancery. And even in England, where the statute of Elizabeth was in force, dedications have from time immemorial been protected and preserved with equal favor as charities. This circumstance does, of itself, furnish a strong argument in favor of the original jurisdiction of the court of chancery over charities. All these purposes are of public interest, and for that reason have ever been regarded as entitled to especial favor. They all stand upon the same principle, and it is now too late to dispute that all gifts for public, pious, or charitable purposes are entitled to peculiar favor in courts of equity.

We will now examine some of the cases which have been decided in Ohio, and we claim that those cases show conclusively that all the doctrines in favor of charities which have been adopted anywhere in this country, whether by this court or any State court, have been entertained and freely adopted, without the slightest hesitation or doubt, in Ohio. This is what should be expected of Ohio, from its origin and history, as we have shown it.

Another consideration would lead to the same expectation. Ohio, though the oldest of the Northwestern States, is young, and comparatively destitute of those public benefactions which come from the growth, in wealth and civilization, of a prosperous country. Neither Ohio nor any of the Western States could afford to reject any of those rare bounties, which, like angels' visits, are few and far between in a young country, whose wealth is far more in hope and prospect than in present enjoyment.

We may therefore safely say that there is not to be found a decision or a dictum in any Western State, not only which is not friendly to charities, but which does not sustain the most liberal doctrines as to the original chancery jurisdiction over charitable bequests; and that there has never been a case

known in the West of a trust for any charitable object so uncertain that it has not been sustained. The Western courts have not waited for an English statute to countenance them in carrying the good and noble purposes of such of their citizens as have remembered the poor and the young and ignorant in the disposition of their surplus wealth.

And even in all the Southern States, if we except Louisiana, which has a code peculiar to itself, charities are upheld liberally and steadily.

In this remark we do not include Virginia, as to whose present position on the subject we shall have some remarks before closing.

But if we commence with North Carolina, and pass to South Carolina, and to Georgia, Alabama, and Mississippi, we shall find that in each and all of those States their supreme courts have spoken out decidedly in favor of charities. If we then come up to Tennessee, and on to Kentucky, we find some of the most able and satisfactory opinions expressed on the subject, all in favor of the most beneficent principles of charity. The Arkansas courts have taken the same ground on the subject; and Missouri we are happy to be able now to add to the list. And in all these States which have been now named, it is not only true that the conclusion has been in favor of charities, but there is not to be found a dictum or a decision in their jurisprudence adverse to charities, or expressing doubt or hesitation on the subject.

It is not a matter of surprise, therefore, that the very learned and experienced counsel for the plaintiff should not resort to the courts of Ohio in their attempt to overthrow this bequest. Indeed, the senior counsel for the plaintiff has already had experience of the way in which all Ohio courts regard objects of charity, and how it cures defects of legal title, and supplies trustees in aid of a charity, especially an educational charity; and how it has never suffered an opportunity to pass in which a charitable donation is involved, however remotely, but it has shown its unqualified favor to its support and the carrying it fully into effect, without ever expressing the slightest doubt of its original jurisdiction over the whole subject. The

enforcement and preservation of charities has prevailed over all idiosyncracies of judges on all the benches of the West, and of all the other common-law States except Virginia and Maryland.

The counsel then commented on the following cases:

Brown *v.* Manning, 6 O. R. R., 298; decided in 1834.

Le Clerc *v.* Gallipolis, 7 O., 1st pt., 217; decided in 1835.

Lessee of Bryant *v.* McCandless, 7 O. R., 2d pt., 135.

Morgan *v.* Leslie, Wright's Supreme Court Reports, 144.

Webb *v.* Moler, 8 O. R., 548.

Trustees of McIntyre Poor School *v.* the Zanesville Canal and Manufacturing Company, 9 O. R., 203; decided in 1839.

Miles *v.* Fisher, 10 O. R., 1.

Ohio *v.* Guilford, 15 O. R., 593; 18 O. R., 500.

Zanesville Canal and Manufacturing Company *v.* the City of Zanesville, 20 O. R., 483.

Urmey's Executors *v.* Wooden, 1 O. S. R., 160; decided in 1853.

Williams *v.* the First Presbyterian Society of Cincinnati, 1 O. S. R., 378.

Mr. Justice WAYNE delivered the opinion of the court.

The appellants here were the complainants in the court below.

The object of their bill is to set aside the devises and bequests in the will of Charles McMicken to the city of Cincinnati, in trust for the foundation and maintenance of two colleges.

The testator says: "Having long cherished the desire to found an institution where white boys and girls may be taught, not only a knowledge of their duty to their Creator and their fellow men, but also receive the benefit of a sound, thorough, and practical English education, and such as might fit them for the active duties of life, as well as instruction in all the higher branches of knowledge, except denominational theology, to the extent that the same are now or may be hereafter taught in any of the secular colleges or universities

of the highest grade in the country, I feel grateful to God that through His kind providence I have been sufficiently favored to gratify the wish of my heart. I therefore give, devise, and bequeath to the city of Cincinnati, and its successors, for the purpose of building, establishing, and maintaining, as far as practicable, after my decease, two colleges for the education of boys and girls, all the following real and personal estate, in trust forever, to wit:" describing the property in nine clauses of the thirty-first article of the will.

He then proceeds to declare that none of the real estate devised, whether improved or otherwise, or which the city may purchase for the benefit of the colleges, should at any time be sold, but that the buildings upon any part of it should be kept in repair out of the revenues of his estate. In the event, however, of dilapidation, fire, or other cause, or if it shall be deemed expedient to have a larger income, he directs houses to be taken down, and that they are to be rebuilt out of the income of his estate. He further authorizes purchases to be made of other property, buildings to be put up on his vacant lots, and designates a part of the eastern boundary of the grounds devoted to the college for the boys for the erection of boarding houses for the accommodation of the students, from which a revenue may be derived. The testator then declares where the colleges shall be located, that there might be a separation between that for the boys and that for the girls. There are other particulars under this article of the will which we need not recite, as they have no bearing upon the controversy made by the bill. Passing over the 33d article of the will for the same reason, the next article in the will is a direction that the Holy Bible of the Protestant version, as contained in the Old and New Testaments, shall be used as a book of instruction in the colleges. Next, it is declared that in all applications for admission to the colleges, that preference should be given "to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Max McMicken and his descendants." Then he directs: "If, after the organization and establishment of the institution," and the admission of as many pupils as in the discretion of

the city have been received, there shall remain a *sufficient surplus of funds*, that the same shall be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents are living, &c., &c., preference to be given to my relations and collateral descendants, &c., &c.; that they were to receive a sound English education, &c., &c.; and afterwards, directions are given as to the mode of receiving such poor white male and female orphans, and the privileges to be allowed under certain circumstances. The testator, in the thirty-fourth article of his will, declares that "the establishment of the regulations *necessary to carry out the objects of my endowment I leave to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution.*" The last article of the will relates to the devises and bequests to the city, and directions as to paying the accounts of the trust. The testator then nominates executors, and they are the appellees in this appeal.

This statement has been made, that the devises and bequests of the testator may be fully disclosed, and the merit of them as a charitable use may be fully understood.

Our first observation is, that it was his intention to establish primarily two colleges for boys and girls, and then a third for the support of poor white male and female orphans, neither of whose parents were living, and who were without any means of support, who were to receive a sound English education. This third school was to be founded by applying to the purpose the surplus funds which might remain after the complete organization of the colleges. (36th article of the will.) The testator anticipated that there would be such a surplus, as he left it in the discretion of the city to determine the number of the pupils who were to be admitted to the colleges. We must then keep in mind the thirty-first and thirty-sixth articles of the will in considering it, though they are but contingently connected by the happening of a surplus in the way just mentioned. For, now, if the first is subject to a failure as a gift for charitable purposes, the devises and bequests may be good under the second. Our attention, however, will be

chiefly given to the thirty-first section and its clauses, as under that it was principally argued by counsel.

The learned sergeant, Sir Francis Moore, who drew the statute of 43 Elizabeth, chapter 4, says, in his exposition of it: "As in all other grants, so in a gift to a charitable use, four things are principally to be considered: 1. The ability of the donor. 2. The capacity of the donee. 3. The instrument or means whereby it is given. 4. The thing itself which is or may be given to a charitable use." And then, by way of caution to donors, he says: "There are five things which cannot be granted to such a use: 1. Things that yield no profit. 2. Things that are incident to others, and inseparable. 3. Possibilities of interest. 4. Conditions—meaning that such things are from their nature insusceptible of serving such a purpose;" and then he adds the 5th: "Copyholds, if in any way prejudicial to the lord." We shall not consider them numerically, but both seem to be the natural way to discuss such a gift, when its validity is disputed. We shall follow it in those particulars as briefly as we can.

No question is made, however, in this case, as to the execution of the will, nor as to the capacity of the devisor. It is insisted, though, that the devises and bequests to the donee, the city of Cincinnati, are void, because the city has not the capacity to take them, and also that they create a perpetuity from being inalienable, which is contrary to law.

Charity, in a legal sense, is rather a matter of description than of definition; and the word perpetuity in law is only determined by the circumstances of such cases. But for the purposes of this case, the objection to the validity of the charity on account of its perpetuity, we will place under Mr. Sander's definition in his Essay upon Uses and Trusts, 196: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." It is then a limitation upon the *jus disponendi* of property, *upon the common-law*

right of every man to dispose of his land "to any other private man at his own discretion." And one class of those limitations is technically termed alienation in mortmain, and to charitable uses. Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former times was, that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the *general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation.* The effect of these statutes deprived every corporation in England, spiritual or secular, from acquiring, either by purchase or gift, real property of any description, without a general license from the Crown enabling it to hold lands in mortmain, or a special license in reference to any particular acquisition. These restraints were subsequently relaxed in many particulars, including gifts to a corporation for purposes of education. But this case does not require us to particularize them; our only purpose for having alluded to statutes of mortmain being to show, from the view taken of them from an early day by the courts in England, that devises to corporations, which generally cannot take lands under a will, were held good when made in favor of charities, and that such gifts, from the purposes to which they were to be applied, and the ownership to which they are subjected, have had the protection of courts of equity to prevent any alienation of them on the part of the person or body interested with the offices of giving them effect; and that in all such cases land has been decreed by courts of equity to be practically inalienable, or that a perpetuity of them exists in corporations when they are charitable gifts. Hillam's case, Duke, 80, 375; Mayor of Bristol *v.* Whitton, 1633, Duke, 81, 377; Mayor of Reading *v.* Lane, 1601, Duke, 81, 361; Lewis on Perpetuity, 684; 1 Macnaghten and S. Gordon, 460; Chart. Hospital *v.* Granger; Griffin *v.* Graham, 1 Hawks, 130; State *v.* Girard, 2 Ired. Eq. R., 210. The objection that the devises and bequests create a perpetuity cannot be maintained

unless they are forbidden by the law of Ohio. And if a perpetuity was forbidden, the charitable trust would not fail, but would be held good and carried out in equity.

We were told that the first and second sections of the 13th article of the Constitution, in connection with the legislation of the State under them, prevent an estate in perpetuity from being made in Ohio. And for showing the bearing of them upon this case, we were referred to an act of Ohio to restrain the entailment of real estates. 2 Swan, secs. 355—6.

We are unable to see any fair connection between them. The first and second sections of the 13th article of the Constitution were, that the General Assembly shall pass no special act conferring corporate powers. Sec. 2. Corporations may be formed under general laws, but all such may from time to time *be altered or repealed*—that is, though they may be formed under general laws, that the Legislature may alter or repeal them. That by the provision they meant to retain their legislative powers to give larger powers than a corporation might have had, to reform them in any particular that might become necessary, that of the violation of a contract excepted. The act to restrict the entailment of real estates obviously applies to individuals exclusively, and not at all to corporations, and especially to such of them as may take and hold charitable gifts in perpetuity.

The first act passed under the Constitution of 1851, relating to corporations, was to enable the trustees of colleges, academies, universities, and other institutions for promoting education, to become bodies corporate. We will give it in its terms, for nothing in the legislation of that State can show more satisfactorily than it does that public spirit there is in harmony with, and fully up to, that of the age upon the subject of education. The language of the 1st section is, that any number of persons, not less than five, desiring to establish a college, university, or other institution for the purpose of promoting education, religion or morality, agriculture and the fine arts, may, by complying with the provisions of the act, become a body corporate and politic, with perpetual succession, and may assume a corporate name, by which they may sue and be sued, plead

and be impleaded, in all courts of law and equity; may have a corporate seal, and the same alter or break at pleasure; *may hold all kinds of estate, real, personal, and mixed,* which they may acquire by *purchase, donation, devise, or otherwise,* necessary to accomplish the *objects* of the corporation; and further, the trustees of any university, college, or academy may hold in trust any property devised, or bequeathed, "*or donated*" to such institution, upon any specific trust consistent with the objects of said corporation; also, when any number of persons shall have procured by subscription, donation, or devise, purchase, or otherwise, the sum of five hundred dollars, for the purpose of establishing an academy, they may become a body corporate, &c., &c., and do all acts and things necessary for the promotion of education and the general interests of such academy. Time and the occasion will not permit us to give more of this liberal and enlightened statute, and of the supplemental acts passed in August, 1852, and March, 1853. 2 Swan, secs. 195, 196.

There is nothing in either of them in any way interfering with the power of *before existing* corporations, to become the trustees of charitable devises and bequests for education, and to hold them in perpetuity. There is rather a disposition manifested to enlarge and confirm their power to do so, and to give to other corporations under the act certainty and security in the administration of such trusts. The Legislature has succeeded in giving to corporations, for the promotion of education, what the learned gentlemen who brought this bill said were the requisites of a corporation: lawful existence; artificial capacity and perpetuity of existence; and, we add, the unquestioned enjoyment of all these privileges, which courts of equity have said for more than two hundred years they were entitled to, in the construction of devises and gifts for charity, and for the administration of them.

It was conceded in the argument, that the trusts in this will fall within the description of public trusts or charitable uses, as recognised in England since the statute of 43 Elizabeth, c. 4, notwithstanding that statute is not in force in Ohio, *and, in our opinion, never was, as we shall show presently.*

Charities had their origin in the great command, to love thy neighbor as thyself. But when the Emperor Constantine permitted his subjects to bequeath their property to the church, it was soon abused; so much so, that afterwards, when it became too common to give land to religious uses, consistently with the free circulation of property, the supreme authority of every nation in Europe, where Christianity prevailed, found it necessary to limit such devises by statutes of mortmain.

In France, by the ancient constitutions of that kingdom, churches, communities, chapters, colleges, convents, &c., were not permitted to acquire or hold immoveable property. Dumoulin sur 1st art., 51 De la Cou., Paris. This incapacity after a long time was relaxed, and they were allowed to hold by license of the King.

In Spain, the communities mentioned before could neither acquire nor hold property, unless by authority of the Sovereign; but in *England, corporations had the capacity to take property by the common law.* Co. Litt., 99. They were rendered incapable of purchasing without the King's license by a succession of statutes from Magna Charta, 9 Henry 3, to 9 Geo. 2.

They are known as the statutes of mortmain; that is, as it was the privilege of any one, before such statute restrained it, to leave his property of every kind by testament to whom he pleased, and for such purposes, charitable or otherwise, as he chose; and the will was, in every particular, administered according to the testator's intentions, *sometimes by the courts of common law, and at others by a court in chancery*, as may be seen from the cases in Duke and other writers upon charities. The question, then, under such a condition of the law in Ohio, where there was no statute of mortmain, cannot be in this case, whether chancery had such a jurisdiction, or whether Ohio had adopted in whole or in part the common law, but whether Ohio, in the construction of her judicial system, did not mean to give to those courts which were to have equity jurisdiction cognizance of trusts made by wills for charitable uses, as well as of other trusts; and whether the judges in Ohio have not uniformly entertained it upon that principle. We cannot be mistaken in the conclusion that they have done

so from the cases cited on both sides in the argument of this case, the larger number of which we have verified by examination.

And we are more confirmed in what has just been said, for the English statutes of mortmain were never in England supposed to have been meant to extend to her colonies, and were never in force in those of them in America which became independent States, but by legislative adoption.

First, it will be observed in all commentaries upon those statutes they are termed local or political laws, meant to suppress a public mischief and abuse in England. The statute of 43 Elizabeth is entitled, "An act to redress the misemployment of lands, goods, and stocks of money, heretofore given to charitable uses." The mode and manner for the enforcement of it in any particular did not exist in any one of the English colonies. There was not in either of them a Lord Keeper or Lord Chancellor, or any corresponding officer to mature the regulations enjoined by the act for its enforcement. There were not in the colonies any abuses to redress for the misemployment of lands, goods, or money heretofore given to charitable uses; further, there were not then in any one of them those religious institutions which the monarchs of Europe deemed it politic to restrain from holding lands.

The statute, after beginning with a statement of the abuses to be controlled, declares that for the redress of them it shall be the duty of the Lord Chancellor or Lord Keeper of the great seal for the time being, and for the Chancellor of the Dutchy of Lancaster for the time being, to award commissions, &c., into all or any part of the realm, for the purpose of executing the, &c., statute, and the realm or *kingdom of England*, in statutory parlance, as well in the time of Elizabeth as now, "meant the kingdom over which her municipal laws or the common law had jurisdiction, and did not include either Wales, Scotland, or Ireland, or any other part of the King's dominions, except the territory of England only." 1 Blackstone's Commentaries, sec. 4, p. 93, Wendell.

And in the same section, after having enumerated those dominions which had been subjected by statute or otherwise

to the laws of England, and such as had not been, all being adjacent to England, Blackstone says, our more distant plantations in America or elsewhere are also in some respects subject to English law. But that must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. Pp. 107, 108 Marginal. But we are not left to inferences to establish the locality of the operation of the statutes of mortmain to England, and that they never had any force in the colonies. The whole subject in all its generality was ably discussed and decided in the high court of chancery in England some forty years since. In that case, 2 Merivale, 143, the Attorney General *v.* Stewart, the question being whether the statute of mortmain, 9 Geo. II, extended to the island of Grenada, in the West Indies, it was ruled that it did not, and that none of the English mortmain acts were of force in the colonies.

Without, then, a particular enactment for such purpose, the statute of 43 Elizabeth, c. 4, could never have been in force in Ohio. Nor do we think it to be a point of judicial uncertainty there, for we cannot find a decision in the courts of Ohio directly declaring that it ever was.

The law was adopted in terms from the statute of Virginia by the Governor and judges of the Territory. 1 Chase, 190. Whatever may have been its validity in other respects, it did not comprehend the statute of Elizabeth. For though it was a remedial statute to correct abuses, it was a restraining statute of the common-law right of every man to dispose of his property by will as he pleased. The law taken from Virginia for Ohio made statutes and acts of Parliament *in aid* of the common law, which were of a general nature, and not local to that kingdom, of force in Ohio. It was not in aid of the common law, but being restrictive of it, it should have, as to the places assigned for its operation, a strict interpretation.

But whether we are right or not so, in respect to the law adopted from Virginia, and passed in the Territorial Legisla-

ture of Ohio, it is certain that in the year 1806 it was repealed; and that since the statute of Elizabeth has had no force in Ohio as a statute, though the judges of that State, without any assumption, have applied its principles to all cases of charitable devises as a part of chancery jurisdiction. It certainly was right in them and a duty to carry out the charitable intentions of a testator by the same principles that his will was executed in every other respect, when the Legislature was silent in respect to such devises, or had given no other rule concerning them.

No more was done by them in Ohio than was done in every other State in this Union where the statute of Elizabeth had not been adopted by legislative enactment.

But in justice to the subject we cannot leave it without saying that original chancery jurisdiction over charities existed in England, and was exercised there, before the statute of Elizabeth was passed; also, that it has now become an established principle of American law, that courts of chancery will sustain and protect such a gift, devise, or bequest, or dedication of property to public charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor. In confirmation of this we refer to the cases collected in Angell and Ames upon Corporations, private and aggregate, 6th edition, 182, 177, and from pages 170 to 180, inclusive.

And this court, in Vidal et al. *v.* Mayor of Philadelphia et al., reviewed its opinion to the contrary of what has just been said in the case of the Baptist Association *v.* Hart's executors, and admitted, whatever doubts had been expressed in that opinion, that they had been removed by later and more satisfactory sources of information.

And in Vidal's case the court went on to say: It may, therefore, be considered as settled, that chancery has an original and necessary jurisdiction in respect to devises and bequests in trust to persons competent to take for charitable purposes, when the general object is specific and certain, and not contrary to any positive rule of law. 2 Kent's Comm., 287, 288,

4 edition; Gibson *v.* McCall, 1 Rich. S. C., 174; Att'y General *v.* Jolly, ibid., 176, N.; Sohun *v.* Wardens and Trustees of St. Paul's Church, 12 Met. Mass. R., 250; Beall *v.* Fox, Georgia R., 404; Miller *v.* Chittenden, 2 Clarke, Ia.; and Williams *v.* William, Opinion by Judge Denio, 4 Selden, 525. We also refer to the opinion of Mr. Justice Baldwin, which led the way upon this question of jurisdiction in the United States in the will of Sarah Zane in pamphlet; Cir. Co. in Pennsylvania, April term, 1833; and to Mr. Justice Story's Essay in the Appendix to 3 Peters's S. C. R., 481 to 502, inclusive.

The same results have been announced by the decisions in Ohio. The Trustees of the McIntyre Poor School *v.* the Zanesville Canal and Manufacturing Co., 9 Ohio R., 203, does so. Lane, C. J., avoiding the discussion of the extent of chancery jurisdiction over charities independently of the statute, says: But one of the earliest claims of every social community upon its law-givers is an adequate protection to its property and institutions, which subserve public uses, or are devoted to its elevation, &c.; and, in a proper case, the courts of one State might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth as a necessary element of our jurisprudence. But without reference to these considerations, where a trust is clearly defined, and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority, not derived from the statute, nor resulting from its functions as *parens patriæ*. The same ruling was made afterwards in 15 Ohio R., 593, and in 18 Ohio R., 500, and the main point in both of them could not have been decided without maintaining the jurisdiction in chancery over charitable uses, independently of the statute of Elizabeth. The same may be assumed of the case growing out of the will in 20 Ohio R., 483. Indeed, it was assumed that no case in Ohio of a charitable trust has been judicially maintained, or could have been valid under the universal admission that the statute of the 43 Elizabeth, c. 4, was not in force in Ohio, unless the courts

there had acted from the conviction that in such cases chancery had a jurisdiction over them by its own authority.

We shall now consider the objections which were made by the counsel for the appellants to the validity of the devises and bequests of Mr. McMicken, that the city of Cincinnati has not the capacity to take them and to execute the trusts of the will, and that no other trustee can be appointed.

In our view, the answers to them from the opposing counsel were decisive. No incapacity of the city of Cincinnati to take in this instance can be inferred from its charter. It has the power to acquire, to hold, and possess, real and personal property, &c., &c., and to exercise such other powers and to have such other privileges as are incident to municipal corporations of a like character and degree, not inconsistent with this act or the general laws of the State. Swan, 960. It was admitted in the argument, that the section just read confers power upon the city to acquire and hold real estate for the legitimate objects of the city. These objects are enumerated in many particulars directly connected with its powers to govern the city, and in the nineteen sections following that cited there is not a sentence or word from which an inference can be made that the Legislature meant to deprive the city of Cincinnati from taking and administering charitable trusts. Indeed, such a course would have been inconsistent with the Legislature's caution in its enactments under the Constitution of 1851. It would be doing great injustice to the Legislature even to suppose that it meant, in passing an act for the government of corporations, under the provisions of the Constitution, that it designed to encroach upon that of the judiciary, or to alter the whole power of chancery in respect to charitable uses, and the long-established practice of corporations, private and municipal, to receive them as trustees, and to administer them according to the intention of donors. So far from any intention to interfere with such a privilege in the city of Cincinnati, we infer from previous and subsequent legislation that it was to have an important agency in carrying out the 6th article of the Constitution in respect to education. We allude to the act for the better organization and classification

of the common schools in Cincinnati and Dayton, passed in the year 1846, (Ohio Local Laws, 91,) and to that of the 27th January, 1853, both now in force. In the first, the trustees and visiters of common schools in the city of Cincinnati, with the consent of the city council, have the power to establish and maintain out of any funds under the control of the trustees and visiters such other grades of schools than those already established as they may deem expedient for such purpose. Further, by the 68th section of the State School Law, Swan, 852, passed in January, 1856, power is given to township boards of education, and their successors in office, to take and hold in trust for the use of central or high schools, or subdistrict schools, in the township, any grant or donation, or bequests of money, or other personal property, to be applied to the support of such public schools. Again, in Ohio Laws, 33, March 26, 1856, it is declared that whenever any one gives lands or money for the endowment of a school or academy, not previously established, and shall not provide for the management of it, that the Court of Common Pleas shall appoint trustees with corporate powers. That act provides also for the management of charities when the founders have not given directions; and another act, Swan, 193, 1856, provides how colleges may be incorporated by their own act, and how trustees of an endowment may also become a corporation by their own act. These acts have been cited to show that Ohio, in her legislation, has made municipal corporations trustees for charity devises and bequests, and that the management of them is a duty. They also prove that the privilege to take them is one given and imposed by law.

After a close examination of all the legislation of Ohio relating to corporations, and its system of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the Constitution of 1851, in respect to a corporation receiving and taking, either by testament or donation, property for a charity, or to prevent them from having trustees for the execution of it according to the intention of the donor. To take such privileges from them can only be done by statute expressly, and

not by any implication by statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germain to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such trust in a State where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers. 2 How., 190. This court announced the same principle again in the case of McDonough *v.* Murdoch, 15 How., 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio statute of wills to prevent corporations from taking by devise. Much was also said in the argument denying the legality of the trusts, in consequence of the uncertainty of the beneficiaries, and because the relatives of the testator were to have the preference. As to the first, white boys and girls make as

distinctive a status of a class who are to be the first beneficiaries of the trust, and the words in the 36th section, that "if any surplus shall remain, &c., it shall be applied to the support of poor white male and female orphans, neither of whose parents are living, and who are without any means of support," make as certain a description as could have been expressed.

It seems to us, now, that the objection relative to the condition of the beneficiaries is at variance with the established primary rule in respect to a charity, not only with reference to the statute of 43 Elizabeth, c. 4, but to a charity under the common law. The answer is, that a charity is a gift to a general public use, which extends to the rich, as well as to the poor. Jones *v.* Williams, Amb., c. 651. Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses, under the statute of Elizabeth, Attorney General *v.* Earl of Lansdale; but that does not make a devise good to a college for purposes not of a collegiate character, intended chiefly to gratify the vanity of the testator. And we cannot be mistaken, that a devise to a corporation in trust for any person is good, and will be effectuated in equity. 1 Bro. Ch. Cas., 81. And *a fortiori*, a devise to a charitable corporation, in trust for any other charitable use, would be good. All property held for public purposes is held as a charitable use, in the legal sense of the term charity. Law Library, vol. 80, p. 116, Grant on Corporations.

We will not pursue the subject further; for, without having discussed either of the six objections made in the bill of the complainants, or the points made by counsel in support of the demurrer to the bill, numerically, both have been under our examination; for all were appropriately in the argument of the cause, and in this opinion we meant to decide all of them, and have done so.

We cannot announce them more expressively than they were urged in argument:

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations,

either municipal or private, have been adopted by the courts of equity in Ohio, *but not by express legislation; nor was that necessary to give courts of equity in Ohio that jurisdiction.*

2. The English statutes of mortmain were never in force in the English colonies; and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the Governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.

3. The city of Cincinnati as a corporation is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.

4. Those devises and bequests are charities, in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.

5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests.

7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.

8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

This cause was argued on both sides with such learning and ability, that we feel it to be only right to the profession to acknowledge the assistance given to us in forming our conclusions; and our only regret is, that it should necessarily have extended this opinion to a greater length than we wished it to be.

We shall direct the affirmance of the decree dismissing the bill by the court below.

WILLIAM H. BELCHER AND CHARLES BELCHER, PLAINTIFFS IN ERROR, *v.* WILLIAM A. LINN.

Where there was a controversy with respect to the amount of duties properly payable upon an importation, the collector and importers entered into an agreement to submit samples of the article to the board of general appraisers to be convened at New York, and to abide by their appraisement in the same manner and to the same extent as if it had been made by merchant appraisers, regularly appointed according to law.

The article imported was called in the invoice "concentrated molasses," which is syrup boiled down to a denser consistency, and thus evaporating the watery particles, until the point of crystalization is reached.

The appraisers decided that this article was, in point of fact, a species of green sugar, and that the invoice and entry were erroneous, not only with respect to the value affixed to the article, but also as to its description. Green sugar was subject to an export duty, but molasses was not. They therefore added, as appeared by their report, a sum equal to the amount of that duty, although none such had been paid. But the statement annexed to the report described the addition made thus, "to add export duty on."

Held:

1. That in the absence of fraud, the decision of the appraisers as to the character of the article and the dutiable value of the importations was final and conclusive.
2. That the report and statement must be construed together, and that by their true construction they showed, irrespective of the parol testimony, that the addition was made, not as an export duty, but to bring up the invoice valuation to the actual market value of the merchandise at the place of exportation.
3. That if the words "to add export duty on" were of doubtful signification, and must be separately considered, then the case would be one where parol testimony would be admissible, so that, in either point of view, there was no error in the action of the Circuit Court.
4. That the importer was not entitled to recover on account of the leakage while the merchandise was detained for the purpose of the appraisement.
5. That the assessment of duties is properly made upon the quantity of merchandise entered at the custom-house.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri.

The facts are stated in the opinion of the court.

It was argued by *Mr. Phillips*, upon a brief filed by himself and *Mr. Reverdy Johnson*, for the plaintiffs in error, and by *Mr. Stanton*, upon a brief filed by *Mr. Black* (Attorney General,) for the defendant.

Mr. Phillips, for the plaintiffs in error, made the following points:

By the act 3d March, 1851, (9 Stat., 630,) it is provided that the collector, in all importations subject to an *ad valorem* duty, shall cause the actual market value, or wholesale price thereof, at the place of exportation, to be appraised, and to such value or price shall be added all costs and charges, except insurance, including in every case a charge for commissions at the usual rates, as the true value at the port where the same may be entered, upon which the duties are to be assessed.

The rights of the importer are not submitted to the arbitrary exercise of power, either on the part of the collector or the appraisers, but are protected by the specific directions of the statute. If, therefore, any addition is made to the invoice not covered by its terms, it would constitute an illegal exaction, for which the defendant would have his right of action.

The board to which the appeal was taken was not one provided by law for this purpose, but, by agreement of the parties, their appraisement was to be made in "the same manner, and to the same extent, as if it had been made by merchant appraisers regularly appointed according to law."

It is shown by the evidence that the article of concentrated molasses was not subject to an export duty in Cuba, and that, in fact, the plaintiffs had paid no such duty on their exportations from Matanzas.

In their report, the board say: "The board assume that both the concentrated melado and concentrated molasses are sugar in a green state;" and they state the facts upon which this classification is made. It nowhere appears that the invoice price was not the fair market value at the place of exportation; but having determined that the concentrated molasses should be classed as sugar, they proceed, in the

words of the report itself, "to add export duty on —— pounds, at 87½ cents per 500 pounds." This was the export duty on sugar, and appears as a charge on the plaintiffs' invoices before them, properly added on all other articles than the concentrated molasses.

Whether the subject in controversy belonged to the class known as sugar, or to another, was a question to be decided alone by the Cuban authorities. It was not to be treated as a question of chemistry, but as one of political administration, and as such, the board had no jurisdiction whatever over it. If the Cuban authorities, with a full knowledge of the article, determined that it did not belong to the class of sugar, and therefore not subject to duty, the appraisers here could have no authority to revise that determination, and make it subject to a sugar duty. When, therefore, the board, acting upon the assumption that the article was to be classed as sugar, add, as a charge, an "export duty," which was not due, and never was paid, they exceeded the authority which the law confers upon appraisers.

The force of this proposition was sought to be avoided in the court below by the introduction of the evidence of one of the four appraisers who signed the award, to show that the meaning of the board was not to add an "export duty," but only such a sum as, in their opinion, would bring the article up to its market value at the place of exportation. In other words, that when they said "add for export duty 87½ cents per 500 pounds," they did not mean what the language used by them clearly imports, but something different.

This is, therefore, an attempt to contradict a solemn declaration of four persons, by the evidence of one of the number as to what was intended by them all.

If the plain meaning of the report or award could be contradicted, it is submitted, that all who made it should have been examined as to their intent.

But the rule of law is considered well settled, that no such evidence is admissible.

This extrinsic evidence was introduced, not for the purpose of applying the report to the subject-matter of the controversy,

for that fully appears in the report itself; nor of supplying any omission necessary to make it intelligible, nor to explain any doubtful word, for no such omission or doubt exists.

In the case of Van Buren *v.* Diggs, the contract provided that if the house was not completed at the day specified, there was to be a "forfeiture of 10 per cent. of the whole amount." The defendant sought to prove that the contractor intended this as stipulated damages; but this court held such evidence wholly inadmissible.

11 How., 463.

So in Kemble *v.* Lull, (3 McLean, 274,) it was offered to show what construction was intended by the parties in the use of the words "if in funds," contained in an order for the payment of money. This the court upheld as inadmissible, holding that the words were not ambiguous, and that it was the duty of the court to construe them.

So in Newland *v.* Douglas, (2 John. R., 62,) it was offered to show by the evidence of two of the arbitrators a mistake in the award in their subtraction of figures, but the evidence was rejected as illegal.

In the multiplicity of adjudications on this subject, the broad line of separation between simple interpretation of what is in the instrument, and direct evidence of intention independent of the instrument, has been kept steadily in view.

As the goods were detained by the collector, without fault on the part of the plaintiff, it is further contended that when the collector at New Orleans levied the duties, they should have been calculated only on such quantity as then remained in his possession. The law levies the duty upon the importer, because he is enabled to make it good from the consumer; but the importer ought not to be held responsible for duties upon goods which, though imported, by reason of the negligent or illegal acts of the Government agents, never came into his possession.

Mr. Stanton made the following points:

It should be remembered that the plaintiffs showed by parol testimony that, by the original appraisement at New Orleans, the

invoice valuation of their cargoes was increased one-half real per arroba, (6¼ cents per 25 pounds.) This is equivalent to $1.25 per 500 pounds. But the increased valuation made by the board of general appraisers was only 87½ cents per 500 pounds. It is obvious that the alleged excess of duties ($627.41) actually paid by the plaintiffs was less than they would have been required to pay upon the New Orleans appraisement. The excess of duties which that appraisement demanded over the amount due on the invoice valuation was $896.30. Unless, therefore, the original appraisement was superseded by some regular proceeding, the plaintiffs had no right to recover.

The first inquiry, therefore, is, whether the appraisement made at New Orleans was defeated by the subsequent proceedings. The plaintiffs appealed from the appraisement made at New Orleans. This appeal was taken under the provisions of the 17th section of the act of August 30, 1842, as modified by the 3d section of the act of March 3, 1851.

9 Stat., 629.

Regularly, this appeal should have been determined by a board composed of one merchant appraiser and one of the general appraisers. By the agreement, it was submitted to the board of general appraisers. The appraisement was made at New York upon samples, when, regularly, it should have been made at New Orleans on an inspection of the cargoes.

The first question, therefore, presented on this record, is whether, by the agreement to submit the appraisement to the board of general appraisers, the appeal was abandoned.

Where the importer, after demanding an appeal, withdraws or declines to prosecute it, the original appraisement stands.

Bartlett *v.* Kane, 16 How., 263.

Neither the Secretary of the Treasury nor the collector has the power, with the consent of an importer, to submit the appraisement of goods to any other tribunal than that designated by the law.

It is clear that, without such consent on the part of the importer, the appraisement cannot be made in any other manner than that directed by acts of Congress. The collector cannot

remove a merchant appraiser at pleasure after he has been chosen.

Greely *v.* Thompson, 10 How., 225.

The appraisement must in all respects be made in conformity with the law.

Burgess *v.* Converse, 2 Curtis, 221.

It is enough to set aside an appraisement that one of the appraisers did not inspect the goods.

10 Howard, 225.

The whole current of decisions establishes the position that the mode of appraisement pointed out in the tariff acts now in force must be observed, and that the Secretary of the Treasury has no power to change it. It is a legitimate conclusion from this, that want of power in that officer to alter the regular mode of appraisement must be alike fatal to any change, whether made with the consent of the importer or not.

2. But suppose the agreement of the 28th September, 1853, to have been valid. The position taken by the plaintiffs in their protest, and by the counsel on the argument, is, that the report of the appraisers conclusively shows that the sum of 87½ cents per 500 pounds was added to the invoice value of the sugar by the board of general appraisers, as an export duty. Let us concede, for argument's sake, this position to be correct; what is the consequence? The case, then, stands thus: The board of appraisers have decided that an export duty was, in fact, paid upon these cargoes. The plaintiffs claim the right to show before a jury that no such duty was paid. Can they do this? They certainly cannot, if the finding of that fact was within the jurisdiction of the board of appraisers.

Now it is plain, from the provisions of the act of March 3, 1851, (9 Stat., 629,) that the appraisers must not only ascertain the value of the goods, but also ascertain the charges upon them. Their business is not only to find the "actual market value or wholesale price," &c., but also to certify the dutiable value of the goods, which consists of the wholesale price of the goods added to all costs and charges. The case of Samson *v.* Peaslee, 20 How., 575, is not inconsistent with this view.

The appraised value of the goods added to the costs and charges constitutes the dutiable value, and the appraisers must ascertain both.

It was, then, the province of the board of general appraisers, under the agreement, to ascertain the charges to which these importations had been subjected. They found the fact to be, that an export duty was paid. Is not that finding conclusive? Can the plaintiffs be permitted to show that the fact was otherwise? Surely not; for it is certainly settled that the decision of the board upon a matter of fact within their jurisdiction is final.

Act of March 3, 1851, sec. 3.

16 Howard, 272.

4 Howard, 327.

Stairs et al. *v.* Peaslee, 18 How., 527.

3. But the report of the board of general appraisers does not show conclusively that the amount added as export duty to the invoice valuation was put on as a charge actually paid upon the goods; and it was proper to admit parol evidence to explain the principles upon which the addition was made.

The appraisers were not required by law to make a report. No statement of the details of their proceedings was necessary. Their certificate of the dutiable value of the goods was their appraisement.

Act of March 3, 1851, sec. 2, 9 Stat., 629.

The report in other respects is not the only legal evidence of the course of their proceedings.

The words "to add export duty" do not imply that such duty was assumed to have been paid. The evidence did not contradict the report, but explained what was obscure and ambiguous.

The following authorities seem to sustain the position that the evidence was properly admitted. An assistant appraiser proved the calculation upon which the appraisement was based, (in United States *v.* Southmayd, 9 How., 638;) evidence admitted that only one appraiser inspected the article, (10 How., 228;) to show that appraisement was made by sample, (Greely *v.* Burgess, 18 How., 413;) to show how examination of pack-

ages was made, (20 How., 574.) The principles applicable to awards are analogous. The appraisers are legislative referees.

4 How., 335.

10 How., 240.

Arbitrator may be examined concerning the grounds of his award, with his consent.

Johnson *v.* Durant, 4 Car. and Payne, 327, note.

Greenleaf's Rep., 87.

3 Espinasse, 113.

4 Espinasse, 180.

Zeigler *v.* Zeigler, 2 S. and R., 286.

In Alden *v.* Saville, 5 Taunt., 455, a reference to the arbitrator was ordered, requesting him to state upon what grounds he gave damages.

4. In the protest, one ground of objection to the payment of the duties was, that no charge for export duty was made by the Government appraisers at New Orleans. But when an appeal is taken to merchant appraisers, the whole appraisement is open for their consideration. It is totally immaterial to them what was done by the Government appraisers.

2 Curtis, 220.

5. The duties on imports are to be assessed on the quantity of goods actually entered at the custom-house.

Marriott *v.* Brune et al., 9 How., 619.

United States *v.* Southmayd, 9 How., 637.

Lawrence *v.* Caswell, 13 How., 488.

The importation is complete when the goods are entered. The duty is imposed on the goods "imported."

Act of 1846.

The appraisement being required by law, the detention of the goods gives no cause of action. It can make no difference whether the appraisement results in maintaining the invoice valuation or in diminishing it. The legality of the appraisement does not depend upon the result. In this case, however, the defendant contends that the result shows the invoice valuation to have been too low. The value of the barrels was properly added to the invoice valuation.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Missouri. The suit was commenced on the sixteenth day of September, 1854. It was an action of assumpsit, and the declaration contained a count for money had and received, together with three special counts, which are set forth at large in the transcript. Plaintiffs were merchants residing at St. Louis, in the State of Missouri, and the defendant was the surveyor of that port, appointed under the act of the second of March, 1831, upon whom, by that law, were devolved the duties of collector, and the suit was instituted by the present plaintiffs against the defendant as such collector, to recover an alleged excess of duties which they had previously paid under protest on six cargoes of merchandise invoiced, among other things, as concentrated molasses. Other causes of action were also set forth in some of the special counts, to which reference will hereafter be made. Defendant pleaded that he never undertook and promised in manner and form as the plaintiffs had declared against him, and upon that issue the parties went to trial. All of the merchandise on which the duties were exacted and paid was imported from Matanzas, in the island of Cuba, and was consigned to the plaintiffs, who were doing business at St. Louis. Under the laws of the United States, merchandise cannot be imported direct from a foreign port to the port of St. Louis, but all such importations are required to be first entered at the custom-house in New Orleans. Some brief reference to the usual course of proceeding in such cases, as required by law and the regulations of the Treasury Department, becomes indispensable, in order that the precise nature of the controversy may be fully understood. Upon the arrival at New Orleans of a vessel from a foreign port having on board merchandise exported from a foreign port, and consigned to a merchant at St. Louis, it is required, if the merchandise is subject to an import duty under the laws of the United States, that an entry of the same shall be made at the custom-house in New Orleans, in the same manner as required in case of entry for consumption, and the officers of the customs at that

port then proceed to ascertain and assess the duties to be paid to the United States, precisely in the same way as if the merchandise had been destined for that market; whereupon a bond, called a transportation bond, is given by the importer or his agent to the United States, conditioned that the packages described in the invoice, with marks corresponding thereto, shall, within a specified time, be delivered to the surveyor and acting collector of the port of St. Louis. Notice of the proceedings ought then to be given by the collector of the port where the duties were ascertained and assessed to the acting collector of the port to which the merchandise is destined; and when the packages are received at the port of destination, they are placed in the custody of the acting collector of that port, who receives the duties, giving notice of that fact to the collector of the port where they were ascertained and assessed, and the collector of the latter port is then authorized by law to cancel the transportation bond given by the importer. Six vessels arrived at New Orleans, from Matanzas, in May and June, 1853, having on board merchandise shipped from the latter port, and consigned to the plaintiffs, and it appeared that certain portions of their respective cargoes were invoiced as concentrated molasses. Pursuant to the usual course of proceedings in such cases, the plaintiffs, on the arrival of the vessels at New Orleans, made separate entries of the respective cargoes, as required by law, at the custom-house of that port, in order that the duties due to the United States might be ascertained and assessed. In making the entries, however, they followed the invoice, describing the merchandise in question as concentrated molasses, and carrying out the dutiable value accordingly, without making any addition in the entry to the cost and value of the article on account of its peculiar character. One of the entries was made on the tenth day of May, 1853, and the last two were made on the sixth day of June, in the same year. Conforming to the requirements of law, the collector of the port submitted the matter to the local appraisers to appraise, estimate, and ascertain, the dutiable value of the merchandise, and they added one-half real per arroba, equal to six and one-fourth

cents for every twenty-five pounds Spanish weight, to the invoice valuation of the merchandise. From that decision the plaintiffs appealed, and called for an appraisal of the actual value of the goods in the foreign market by merchant appraisers. They, the plaintiffs, informed the collector on the eleventh day of June, 1853, that they should appeal, and on the fourteenth day of the same month the collector notified them that the appeal was allowed, but stated that he should not appoint appraisers until he heard from the Department, as he desired the aid of a general appraiser. Considerable delay ensued; but on the 28th day of September, of the same year, the collector, acting under the instructions of the Secretary of the Treasury, and the plaintiffs, entered into a written agreement to the effect that they would substitute samples in the place of the merchandise, and submit the matters in dispute in all the cases to the determination of the board of general appraisers to be convened at the city of New York as soon as practicable, stipulating, at the same time, to abide by the appraisement of the board "in the same manner, and to the same extent, as if it had been made by merchant appraisers regularly appointed according to law." Accordingly, the general appraisers heard the several appeals, and on the nineteenth day of October, 1853, made a report in writing. Concentrated molasses constituted a portion of the cargo in five of the cases appealed, and it appeared by the report of the general appraisers that in all those cases they made an addition to the invoice value of that portion of the merchandise embraced in the entry. Of the five, it will be sufficient to give one as an example of the rest. It is as follows: "To add export duty on 522,338 lbs., at 87½ cts. per 500 lbs." Their reasons for making the addition are fully stated in their report. After stating that they had examined the samples, they say: "The board assume that both the concentrated melado and concentrated molasses are sugar in a green state, and they are borne out in this view of the case by the invoices themselves, the concentrated molasses in every case being invoiced per arroba as sugar, and not per keg as molasses; the casks are also charged as sugar casks. The concentrated molasses is

not susceptible of being guaged, which is another evidence that its proper classification is sugar."

Plaintiffs proved that the goods were assessed at New Orleans, according to that appraisement, and that they afterwards paid the duties under protest, to the defendant at St. Louis. They protested against the including in the computation of the dutiable value of the goods any sum whatever for export duty, averring in the protest that no such duty was paid by them, or demanded by the authorities at the place of exportation. Testimony was also introduced by the plaintiffs tending to show that concentrated molasses was well known in the foreign market; that it was not at that time regarded as sugar; that it was not subject to the sugar duty; that no such duty was demanded or paid; and that the invoice price represented the fair market value. Their witnesses were cross-examined by the defendant, and from the cross-examination it appeared that the plaintiffs, in 1852, set up a sugar-boiling establishment at Matanzas, and that among the products manufactured by them was the article invoiced as concentrated molasses, which it seems is melado, or syrup boiled down to a denser consistency, and is manufactured by boiling the melado, and thus evaporating the watery portions until the point of crystallization is reached. Concentrated molasses, as the witnesses state, is a recent manufacture, and was unknown in the foreign market until about the time plaintiffs commenced to produce it from their establishment. When the article first appeared, the authorities for a short time allowed it to be exported without exacting any duty; but it was soon classed with green sugars, and charged with an export duty of eighty-seven and a half cents for every twenty arrobas of twenty-five pounds Spanish weight. Like sugar, it is sold, invoiced, and valued by weight, and not by measure, like the ordinary article of molasses. On the other hand, the defendant called and examined one of the general appraisers. Among other things, he testified that—

"The board did make alterations from the invoice price or value by adding eighty-seven and a half cents for each five hundred pounds, invoice weight, and two reals or twenty-five

cents to each barrel, in order to raise the same to the actual market value, or wholesale price, at the period of exportation in the principal markets of the country from which the same had been imported.

"The sums in figures set out opposite these several entries were additions made by the board to the invoice value of the merchandise. The 87½ cents for each 500 pounds was added to make the market value of the sugars called 'concentrated molasses,' and 25 cents to each barrel was added to make the market value of the barrel.

"The term, 'to add export duty on,' was used as expressive of the principle upon which this sum was added, and not as conveying the supposition or belief that an export duty had been paid by the importers, or even that such an export duty was legally due to the Cuban Government; but it was added upon the principle that if the sum of 87½ cents per each 500 pounds was not payable for export duty, the value of the merchandise was thereby increased just that sum in the foreign market. Sugars being the basis of the appraisement, and 87½ cents per each 500 pounds being the export duty on the same, that sum was added to make the true foreign market value at the period of exportation."

To all this testimony the plaintiffs objected, but it was admitted by the court, and the plaintiffs excepted.

Thirteen points were then presented by the plaintiffs for instruction to the jury, all of which the court refused to give, and on the prayer of the defendant the jury were instructed, that "on the whole evidence the plaintiffs cannot recover." Under the rulings and instructions of the court the jury returned their verdict in favor of the defendant, and the plaintiffs excepted to the refusal of the court to instruct the jury as requested, and to the instruction given, that they, the plaintiffs, were not entitled to recover. On this branch of the case two questions are presented for decision: 1. Whether the addition was lawfully made to the invoice valuation of the merchandise described in the entry as concentrated molasses; 2. Whether the testimony of the general appraiser, as to the action of the board in making the appraisement, was properly admitted.

1. It is provided by the act of the third of March, 1851, to the effect that the collector, in all importations subject to an *ad valorem* duty, shall cause the actual market value or wholesale price of the importation at the period and place of exportation to be appraised, estimated, and ascertained, and to such value or price shall be added all costs and charges, except insurance, including in every case a charge for commissions at the usual rates; and by the true construction of the act, and, indeed, by its very words, that appraisement, estimamation, and ascertainment, when regularly made, becomes and is the true value of the importation at the place where the same was entered, "upon which the duties shall be assessed." By the eighth section of the act of the thirteenth of July, 1846, it is also provided, that it shall be the duty of the collector, within whose district dutiable goods may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws, and if the appraised value thereof shall exceed ten per cent. or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value. But a proviso is added, that under no circumstances, shall the duty be assessed upon an amount less than the invoice value; any law of Congress to the contrary, notwithstanding. Importers are required to make an entry of their respective importations, which should always be accompanied by the invoice; and when the invoice is received, the packages for appraisement are designated on the invoice by the collector, who orders one in ten of them to the public store for the purposes of the appraisal. Examination of the selected packages is then made by the local appraisers; and if, in their opinion, the invoice value is too low, they increase it, and notify their doings to the collector, and if no appeal is taken from their appraisement by the importer, their decision in the premises is final and conclusive as to the dutiable value of the importation. Every importer, however, under those circumstances, has the right to appeal to merchant appraisers.

Merchant appraisers formerly consisted of two merchants, one chosen by the importer and one by the collector; but, under existing provisions of law, the collector may select a Government appraiser, so that in the larger ports the board usually consists of a merchant selected by the importer, and a permanent appraiser selected by the collector. 9 Stat. at Large, 630. On the appeal, the merchant appraisers, so called, examine the packages ordered to the public store, appraise, estimate, and ascertain, the actual market value or wholesale value thereof, at the period of exportation to the United States, in the principal markets of the country from which the goods were imported, and certify the value so appraised, estimated, and ascertained, to the collector; and in the absence of fraud, their decision is final and conclusive, and their appraisement in contemplation of law becomes, for the purposes of calculating and assessing the duties due to the United States, the true dutiable value of the importation. Act August 30, 1842, sec. 17, 5 Stat. at Large, 564; appraisement act, March 3, 1851, sec. 1, 9 Stat. at Large, 631. As was said by this court, in Bartlett *v.* Kane, 16 How., 272, the appraisers are appointed with powers, by all reasonable ways and means, to appraise, estimate, and ascertain, the true and actual market value and wholesale price of the importation. The exercise of these powers involves knowledge, judgment, and discretion. We hold, as was held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject-matter. The only questions which can arise between an individual and the public, or any person, denying their validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal or other revision is provided for by some appellate or supervisory tribunal prescribed by law. United States *v.* Arredondo, 6 Pet., 691; Rankin *v.* Hoyt, 4 How., 327; Stairs *v.* Peaslee, 18 How., 524. One of the questions presented in the case last cited was, whether, in

estimating the dutiable value of a certain article called cutch, the appraisers should have taken the value at the market of Calcutta, or London and Liverpool, or Halifax, at the period of exportation from the latter port; and the Chief Justice, speaking for the whole court, held, that in estimating the value of the cutch, it was the duty of the appraiser to determine what were the principal markets of the country from which it was exported into the United States, and that their decision that London and Liverpool were the principal markets for the article was conclusive. Applying these principles to the present case, it follows, we think, wholly irrespective of the parol testimony, that the value of the importations certified to the collector constituted the true and actual dutiable value of the merchandise embraced in the respective entries made by the importers, and there is nothing in the statement accompanying the report, when considered in connection with the report itself, that is in any manner inconsistent with the view here taken as to the legal effect of their action in the premises. On the contrary, it is difficult to misconstrue their report. They determine, in the first place, that the article described in the invoice and entry as concentrated molasses was in point of fact a species of green sugar, and that the invoice and entry were erroneous, not only with respect to the value affixed to the article, but also as to its description. Payment of duties cannot be avoided because the importation is misdescribed either in the invoice or the entry, or in both, at the same time. Appraisers are required to appraise, estimate, and ascertain, the true market value of the importation, no matter what name may be affixed to it by the importer, and he cannot be benefited in the estimation of the duties here by the fact that, by accident or otherwise, he succeeded in exporting the packages from the foreign country without being subjected to the usual and lawful exactions there imposed. New manufactures naturally and constantly give rise to new questions in regard to revenue; but it cannot operate to benefit the plaintiffs in this controversy, that the subordinate authorities, at the place of exportation, were for a time misled or deceived as to the real character of the product in question, or that they

mistook the true nature of their duty. Green sugar was subject to the export duty, but molasses was not; still, if the importations in question ought in fact to have been classed with the former, then it is clear that the importer, as matter of legal obligation, ought to have paid the export duty, and the determination of the appraisers was not an unreasonable one; that it was necessary to add a sum to the invoice valuation equal to the export duty to which it would have been subjected, if it had been correctly invoiced, in order to bring the dutiable value up to the actual market value or wholesale price in the foreign market. Both the report and the statement annexed to it must be taken *in pari materia*, and considered together; and when so construed, they do not appear to differ in any respect from the explanations given of them in the testimony of the general appraiser. Without regard to that testimony, it is not possible to hold that the board added the export duty to the several importations, regarding the article as molasses, because they expressly state in the outset that they assume that concentrated molasses is sugar in a green state, and proceed to give their reasons for the conclusion, deducing the reasons given from the various invoices, which, as they affirm, bear them out in that view of the case. It is clear, therefore, that the appraisers did not add the eighty-seven and a half cents to the invoice valuation as an export duty on molasses, and it is conceded that sugar in a green state was by law subject to the export duty; so that putting the parol testimony in question out of the case, still the plaintiffs are not entitled to recover.

2. But suppose it to be otherwise, and that the words, "to add export duty on," as contained in the statement annexed to the report, are to be separately considered; still, it is difficult to see how the admission can be of any service to the plaintiffs. They must still maintain that the importations were in fact molasses, and that the export duty was added by the appraisers to the invoice valuation of molasses, as such, else they have no standing in court, for they do not deny that if the produce in question was really sugar in a green state, that it was competent for the appraisers to correct the misde-

scription in the invoice and entry, or disregard it, so as to perform their duty as required by law. Unless they have that right, then the grossest frauds may be committed by an importer with perfect impunity; and if they have that right, as clearly they must, then it follows that any dispute as to the nature of the produce imported, and its consequent classification in the invoice and entry, were questions of fact within the jurisdiction of the appraisers, and their decision is final and conclusive. On the other hand, if it be admitted that the words "to add export duty on" are ambiguous and of doubtful signification, then the case would be one where parol testimony would be admissible to explain the ambiguity, by showing what was done by the appraisers, and the manner in which the value of the importations was appraised, estimated, and ascertained. U. S. *v.* Southmayd, 9 How., 638; Greeley *v.* Thompson et al., 10 How., 228; Greeley *v.* Burgess, 18 How., 413; Samson *v.* Peaslee, 20 How., 574; Rankin et al. *v.* Hoyt, 4 How., 335.

3. Plaintiffs also claimed in some of the counts of the declaration to recover back certain duties alleged to have been illegally exacted of them by the defendant, on certain barrels exported empty by them from the United States to Matanzas, and brought back filled with concentrated molasses. That claim, however, is not pressed in the case, because the same claim is embraced in another case, which is also before the court.

4. Another claim is to recover damage on account of the delay which ensued in completing the appraisement, and the consequent leakage and loss of the concentrated molasses; but we are not able to see any just ground for the claim, on the facts disclosed in the record. Appraisement of the goods is required by law, and as the detention of the goods is the necessary consequence of that requirement, it cannot be held, under the circumstances of this case, that it affords any ground of action against the defendant. Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the custom-house, without any allowance whatever for ordinary leakage and deteriora-

tion. Marriott *v.* Brune et al., 9 How., 619; Lawrence *v.* Caswell, 13 How., 438. For these reasons we are of the opinion that there is no error in the record, and the judgment of the Circuit Court is therefore affirmed, with costs.

JAMES KNIGHT, JAMES H. WEST, AND ROBERT SARGEANT, PLAINTIFFS IN ERROR, *v.* AUGUSTUS SCHELL.

When barrels are manufactured in the United States and shipped empty to Cuba, there filled with molasses, and brought back to the United States, the duty must be levied upon the value of the barrels, as well as upon the molasses. This conclusion rests upon the following reasons: Molasses barrels, under such circumstances, have been applied to the commercial use for which they were manufactured, and on their re-importation here, even if fit for a second voyage, seldom or never have the same value as when new. When filled in the foreign market, re-imported here, and offered at the custom-house for entry, they have then acquired a new character within the meaning of the revenue laws. With their contents they are then denominated packages, from which one in ten must be selected and ordered to the public stores for appraisement, and as such constitute a part of the charges of importation.

The acts of Congress, and the uniform interpretation placed on them by the Treasury Department, require this to be done.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court for the southern district of New York.

The question was, whether barrels manufactured in the United States and exported empty to Cuba, and afterwards brought back to the United States filled with molasses purchased in Cuba, were brought back "in the same condition as when exported," according to the true intent and meaning of the acts of Congress in that behalf.

On which question the opinions of the judges were opposed.

Wherefore, on motion of the plaintiffs' counsel, at the same term, it is ordered that the point on which the disagreement hath happened be stated, under the direction of the judges, and certified under the seal of this court to the Supreme Court to be finally decided, and that the foregoing state of the plead-

ings, and the following statement of facts, which is made under the direction of the judges, be certified according to the request of the defendant, by his counsel, and the law in that case made and provided.

It was proved on the trial that the plaintiffs, in the year 1859, imported from Matanzas 728 barrels of molasses by the brig Irene; 301 barrels of molasses by a vessel called the Yumuri; and 120 barrels of molasses by a vessel called the Trovatore; that the barrels containing the molasses were manufactured by the plaintiffs at Newburg, in the State of New York, and shipped from the port of New York empty to Matanzas, where they were filled with molasses, and returned in the three vessels above named to the port of New York; that said barrels were made up and completed in every respect before they were shipped to Cuba. They were returned, most of them, in the same vessels that carried them out from New York, and all of them in the same condition in which they were shipped or carried out from New York, except being filled with molasses.

They were filled with molasses at Cuba. When these barrels were brought back from Cuba filled with molasses, in the vessels above referred to, the collector claimed that the barrels themselves were dutiable, and that they were not entitled to entry duty free. He claimed a duty upon them at the rate of 24 per centum of their value at Cuba, and refused to allow them to be entered unless such duty was paid; that the plaintiffs paid to the defendant that portion of the said duties which was upon the separate value of said barrels under protest, claiming that said barrels were not legally subject to the payment of any duty, but were exempt from duty by virtue of the provisions of the 47th section of the act of Congress of March 2, 1799, and of Schedule I of the existing tariff.

The plaintiffs thereupon, having complied in all respects with the provisions of section fifth of the act of March 3, 1857, entitled "An act reducing the duties on imports, and for other purposes," brought this action to recover back the sum so paid under protest, as duties upon said separate value of said bar-

rels, within the time prescribed in said act for bringing the same.

It was submitted on printed arguments by *Mr. Williams* for the plaintiffs, and *Mr. Black* (Attorney General) for the defendant.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court on a certificate of division of opinion from the Circuit Court of the United States for the southern district of New York. It was an action of assumpsit, brought by the present plaintiffs against the defendant, as the collector of the port of New York, to recover back certain duties paid by the plaintiffs under protest, upon certain barrels, in which molasses was imported into the United States from Matanzas.

It was proved, on the trial, that the plaintiffs, in the year 1859, imported from Matanzas 728 barrels of molasses by the brig Irene, 301 barrels of molasses by a vessel called the Yumuri, and 120 barrels of molasses by a vessel called the Trovatore; that the barrels containing the molasses were manufactured by the plaintiffs at Newburg, in the State of New York, and shipped from the port of New York empty to Matanzas, where they were filled with molasses, and returned in the three vessels above named to the port of New York; that the barrels were made up and completed in every respect before they were shipped to Cuba. They were returned, most of them, in the same vessels that carried them out from New York, and all of them in the same condition in which they were shipped or carried out from New York, except being filled with molasses.

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plaintiffs paid to the defendant that portion of the duties which was upon the separate value of the barrels under protest, claiming that the barrels were not legally subject to the payment of any duty, but were exempt from duty by virtue of the provisions of the 47th section of the act of Congress of March 2, 1799, and of Schedule I of the existing tariff.

The plaintiffs thereupon, having complied in all respects with the provisions of section fifth of the act of March 3, 1857, entitled "An act reducing the duties on imports, and for other purposes," brought this action to recover back the sum so paid under protest, as duties upon the separate value of the barrels, within the time prescribed in said act for bringing the same.

Upon the foregoing facts, the question arose whether barrels manufactured in the United States, and exported empty, and afterwards brought back to the United States filled with molasses purchased in Cuba, were brought back "in the same condition as when exported," according to the true intent and meaning of the acts of Congress in that behalf; and the opinion of the judges being opposed on that question, it was certified to this court for decision. By the act of the second of March, 1799, it is provided, that on any goods, wares, or merchandise, of the growth or manufacture of the United States, which may have been exported to some foreign port or place, and brought back to the United States, and upon which no drawback bounty or allowance has been made, no duty shall be demanded. 1 Stat. at Large, 662. Among other things, the ninth section of the act of the 30th of August, 1842, provides that all goods, wares, and merchandise, the growth, produce, or manufacture of the United States, exported to a foreign country, and brought back to the United States, shall be exempt from duty. 5 Stat. at Large, 560. Dutiable articles, and those exempt from duty, are arranged in schedules by the act of the 30th of July, 1846, and the schedule of the latter class embraces goods, wares, and merchandise, the growth, produce, or manufacture of the United States, exported to a foreign country, and brought back to the United States *in the same condition as when exported.* 9 Stat. at Large, 49. To entitle the article to entry free

of duty, it must also appear that it is one on which no drawback or bounty has been allowed. It will be observed, that the prior acts of Congress did not require that the goods should be brought back in the same condition as when exported, in order to entitle the importer to claim that they should be admitted to entry as included in the free list. That language is retained in the act of the third of March 1857, without any alteration or amendment; so that although it may appear that the goods were the growth, produce, or manufacture of the United States; that they were exported to a foreign country, and brought back to the United States; still, unless it also appears they were so brought back in the same condition as when exported, the collector of the port is not authorized to admit them to entry free of duty.

Molasses barrels exported empty, when new, to Matanzas, and there filled, and, with their contents, brought back to the United States, cannot truly be said to be in the same condition as when they were exported. Oftentimes, when emptied of their contents, they are unfit for a second voyage, and seldom or never afterwards have the same market value as when they were new. When filled in the foreign port, the barrels have been applied to the commercial use for which they were manufactured; and when shipped with their contents, brought back to the United States, and are offered with their contents by the importer for entry at the custom-house, they have then, in respect to the revenue laws of the United States, acquired a new character. For all the purposes of appraisement, with a view to ascertain the dutiable value of the importation, the barrels, if filled, are regarded with their contents as packages; and it is the duty of the collector, by the express words of the statute, to order one in ten of the packages to the public store. Examination of the selected packages is then made by the local appraisers; and in case of appeal, the same packages are required to remain in the public store, and frequently constitute the only attainable basis of the subsequent adjudication by the merchant appraisers. Such packages are ordered to the public store in the same condition as when imported, and it is not possible to doubt

that Congress intended to include, in the words one in ten of the packages, the covering of the importation, if belonging to the merchant, as well as the contents within it. Confirmation of these views, if any be needed, may be found in the almost unbroken practice of the Treasury Department. Take, for example, the Treasury circular of the twenty-sixth of November, 1846, and it will be found that it fully justifies the conclusion to which we have come.

By that circular the several collectors were informed that—

"The principle upon which the appraisement is based is this: That the actual value of articles on shipboard at the last place of shipment to the United States, including all preceding expenses, duties, costs, charges, and transportation, is the foreign value upon which the duty is to be assessed. The costs and charges that are to be embraced in fixing the valuation, over and above the value of the article at the place of growth, production, or manufacture, are—

"The transportation, shipment, and transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water carriage, to the vessel in which shipment is made to the United States. Included in these estimates is the value of the sack, *package*, *box*, *crate*, *hogshead*, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels, and demijohns." Mayo Comp., 350, 351.

Casks, including barrels, as well as hogsheads, exported from the United States empty, and returned filled, have almost invariably, since the passage of the tariff act of the twentieth of July, 1846, been included among the dutiable charges, although of American manufacture, on the ground that, when so filled and brought back, they were not in the same condition as when exported, within the meaning of the provision of that act. Mayo Comp., 407. That construction has been affirmed by the Treasury Department, since the passage of the appraisement act of the third of March, 1851, as will appear by reference to the Treasury circular adopted shortly after its passage. By that circular the Department declares that—

"The law enjoins that there shall be added 'all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates.' These charges are as follows, to wit:

"They must include 'purchasing, carriages, dyeing, bleaching, dressing, finishing, putting up, and packing,' *together with the value of the sack, package, box, crate, hogshead, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels, and demijohns.*"

Without pursuing the discussion further, suffice it to say, that we are all of the opinion that the question under consideration must be answered in the negative, and we accordingly direct that it be certified to the court below, as the opinion of this court, that barrels manufactured in the United States, and exported empty to Cuba, and afterwards brought back to the United States filled with molasses purchased in Cuba, were not brought back "in the same condition as when exported," within the true intent and meaning of the acts of Congress in that behalf.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and on the point or question upon which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that barrels manufactured in the United States, and exported empty to Cuba, and afterwards brought back to the United States filled with molasses purchased in Cuba, are not brought back in the same condition as when exported, according to the true intent and meaning of the acts of Congress in that behalf. Therefore it is now here ordered by the court that it be so certified to the said Circuit Court.

WILLIAM H. BELCHER AND CHARLES BELCHER, PLAINTIFFS IN ERROR, *v.* WILLIAM A. LINN.

The decision in the preceding case, with respect to the duty upon barrels when made in the United States, and brought back from Cuba filled with molasses, again affirmed.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri.

It was a part of the case between the same parties reported two cases back, and was argued by the same counsel who argued that case.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Missouri. The suit in the court below was brought by the present plaintiffs against the defendant as the surveyor and acting collector of the customs at St. Louis, to recover the amount of certain duties alleged to have been illegally exacted of the plaintiff, and paid by him to the defendant under protest. As alleged in the declaration, the duties were assessed on the value of a large number of barrels, manufactured by the plaintiffs in the United States, exported empty to Matanzas, in the island of Cuba, and brought back in 1853, filled with concentrated molasses or sugar. It was an action of assumpsit, and the declaration contained the usual counts for money had and received, together with a special count detailing all the circumstances on which the claim was founded. Defendant appeared, and the parties went to trial upon the general issue. At the close of the evidence, five prayers for instructions to the jury were presented by the plaintiffs, but the court refused to give any one of them; and at the request of the defendant, instructed the jury that on the whole evidence in the case the plaintiffs could not recover against the defendant. Whereupon the jury returned their verdict in favor of the defendant, and the plaintiffs excepted, and sued out this writ of error to reverse

the judgment rendered on the verdict. Under the circumstances of this case, as exhibited in the transcript, it will not be necessary to refer with much particularity to the evidence, as the sole question raised in the record is, whether the duties imposed upon the barrels by the appraisers were lawfully exacted. Satisfactory proof was introduced by the plaintiffs, showing that all the barrels were manufactured by the plaintiffs in the United States, and that they were exported empty to the foreign market, and there filled with concentrated molasses, or sugar in a green state, which was destined for the market of St. Louis. One of the plaintiffs' witnesses testified that the barrels, when they were received at the sugar-boiling factory of the plaintiffs in Matanzas, were empty, but when sent from thence to the United States, they were filled with the different products of that establishment. Such of the barrels as were designated to receive molasses were filled at the bung without being unheaded, but it was necessary to take out one head from those which were to be filled with concentrated molasses, and all such of course had to be recoopered. And the same witness states, that in some instances it was necessary, after the barrels were placed in the sugar-boiling factory, to add new hoops, but in all other respects the barrels were filled and sent back in the same condition in which they were received. Unless the barrels were brought back in the same condition in which they were when exported, then it is clear that they could not be admitted to entry free of duty; and so, if the value of the barrel in which a dutiable article or product is imported is one of the proper charges which are required by law to be added to the actual market value or wholesale price of the importation, then it is equally clear that the same conclusion must follow. In the case of James Knight and others *v.* Augustus Schell, decided at the present term, both of those questions were determined against the plaintiffs in this suit. That case was determined upon full consideration, and we are all satisfied that the decision of the question was correct, and that the reasons given for the decision are all applicable to this case, and therefore they need not be repeated. It is impossible to hold that mo-

lasses barrels, manufactured here and exported to a foreign port, and there filled with molasses, whether it be the ordinary article or that denominated concentrated, and then reimported with their contents to this country, were brought back in the same condition as when exported, within the true intent and meaning of the acts of Congress. Contrary to the views of the plaintiffs, we think the words, "the same condition," mean not only that the identity of the article exported is preserved, but that its utility for its original purpose is unchanged. On this point, we adopt the view taken by the defendant, because it appears to be more consonant with the language of the provision under consideration, and with the obvious intent of Congress in passing it. Suppose it be so; then it almost necessarily follows, even within the principle assumed by the plaintiffs, that barrels filled with molasses and imported here formed a part of the charges of importation. They admit that such is the general rule, but seek to establish an exception which would include the present case. Now, unless the barrels were brought back in the same condition as when exported, then the reason on which the supposed exception is founded fails; and it is difficult to see why the present case does not fall within the admitted general rule. Outside packages belonging to the merchant were required to be estimated and their value added to the actual cost of importation at a very early period; and without referring to the subsequent acts of Congress and the regulations of the Department, which were cited in the briefs of the counsel, the better opinion is, we think, that charges include in general the value of the sack, package, box, crate, barrel, hogshead, bale, cask, all outside coverings belonging to the merchant, or, so to speak, the integument of the importation, and that the value of the same, to be estimated at the usual cost to the importer, should properly be added to the actual market value or wholesale price of the importation, in order to ascertain the true basis on which to assess the duty. For these reasons we are of the opinion that the rulings and instruction of the Circuit Court were correct, and the judgment is accordingly affirmed, with costs.

Pierre A. Berthold, Alfred C. Bernondy, and Marklat Thompson, Plaintiffs in Error, *v.* Edward Goldsmith.

To enlarge his business, Goldsmith, the original plaintiff, authorized a third person to go to St. Louis to negotiate an arrangement with some commission house there to accept consignments of cigars from him and to sell the same on his account, agreeing with the person so authorized to give him half the profits, with a guaranty that his compensation should amount to eighteen hundred dollars *per annum*. He made the arrangement with the defendants, stipulating as to their commissions and that the cigars should be shipped at Baltimore, in bond, subject to duties and charges, and notified the plaintiff of the terms and conditions; whereupon the plaintiff wrote the defendants a letter, concluding with these words: "All shipped to your house. I will hold you responsible;" and sent two invoices of cigars, which were duly received. Afterwards, the person who negotiated the arrangement wrote an order to the defendants to deliver all the cigars, not sold, to another firm, upon receiving whatever sums they had advanced. That firm paid the advances, received the cigars and sold them, but no portion of the proceeds ever came to the hands of the plaintiff. The defence was, that the person who gave the order was either a partner or an agent of the plaintiff, and in either capacity had a right to direct a transfer of the cigars, and thus exonerate the defendants from all liability.

Held:

1. Actual participation in the profits, as principals in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm, but the rule has no application to a case of mere service or special agency, where the employee has no power in the firm and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same or to compel an account. Unless such employee is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor. Cases may arise, on one side and the other of the line, where the difference between them is so slight that it may appear to be unsubstantial; yet the distinction itself is well founded in reason, and the only difficulty is in the application of the principle on which it rests. No such difficulty, however, occurs in this case, for the defendants were a party to the arrangement and knew the relation which the person who negotiated it sustained to them and to the plaintiff, and they also knew that the goods had been sent by the plaintiff and received by them on the terms and conditions specified in the plaintiff's letter. He was not, therefore, a partner in fact, or as between the plaintiff and defendants.
2. He was not an agent of the plaintiff, authorized to withdraw the consignments, or to exonerate the defendants from their obligation to account for the sales.

On the contrary, the arrangement was that the cigars should remain in their custody and control, and that they should stand responsible for the proceeds, and the case shows that it was never changed. The court below were right in instructing the jury that there was no evidence to sustain the second ground of defence.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri.

The facts are stated in the opinion of the court.

It was argued by *Mr. Blair* for the plaintiffs in error, and by *Mr. Carlisle*, upon a brief filed by *Mr. Badger* and himself, for the defendant.

The reader can see from the head note and opinion that the arguments were closely connected with the facts of the case, without relating to any general principle of law.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Missouri. The declaration in this case was filed on the second day of September, 1858, by the present defendant, who was the plaintiff in the court below. It was an action of assumpsit, and the declaration contained five counts. Without attempting to give any very precise analysis of the declaration, it will be sufficient to say, that the plaintiff alleged, that on the twenty-ninth day of August, 1857, at the special instance and request of the defendants, he sent and consigned to them sundry cases and boxes of cigars of great value, in order that they might sell and dispose of the same for him, on their guaranty of sales, for a certain commission or reward, and that the defendants, in consideration thereof, undertook, and then and there promised to sell and dispose of the cigars on his account, and to be answerable to him for the due payment of the sums for which the same should be sold, and pay over the proceeds to him. And the complaint is, that they not only neglected and refused to perform their promises in that behalf, but that they disposed of the consignment to their own use. Defendants appeared and

demurred to the declaration, but the court overruled the demurrer, and the parties subsequently went to trial upon the general issue. Testimony was introduced on both sides, and after the arguments were closed, the defendants presented to the court certain prayers for instruction, which were refused. And under the instructions given by the court, the jury returned their verdict in favor of the plaintiff for the sum of three thousand dollars. Exceptions were duly taken by the defendants, not only to the refusal of the court to instruct the jury as requested, but also to the instructions given, and the question to be decided is, whether, upon the facts disclosed in the record, there was any error in the action of the court. It appears from the evidence that the plaintiff was a merchant, residing at Baltimore, in the State of Maryland, and that the defendants were commission merchants, doing business at St. Louis, in the State of Missouri. For the purposes of this investigation, it is conceded that the cigars were sent by the plaintiff, and that they were duly received by the defendants, and there is no dispute as to the quantity or their value. Some of the cigars were forwarded by railroad, but the largest invoice was shipped, in bond, with the understanding that the defendants would make the necessary advances for the duties and other charges. Accordingly they received the cases and boxes containing the cigars at the custom-house, and paid the duties and freight. All of the cigars were sent and received under the terms and conditions specified in a certain letter from the plaintiff to the defendants, to which more particular reference will presently be made. Prior to the date of that letter, it had been agreed between the plaintiff and one H. F. Hook, that the latter should go to St. Louis, and if practicable, make an arrangement there with some responsible commission house to accept consignments of cigars from the plaintiff, and sell and dispose of them on his account. It seems that Hook wanted employment, and the plaintiff wanted to extend his business. They accordingly agreed to make an effort of that kind, and if successful, that Hook should have half the profits, with a guaranty from the plaintiff that his compensation should amount to eighteen hundred dollars. Pursuant to that under-

standing Hook went to St. Louis and made an arrangement with the defendants, and communicated the terms and conditions of it to the plaintiff. By the terms of this arrangement the defendants were to sell for a commission of two and a half per cent., and were to guaranty the sales for a like commission. They were to receive the goods in bond, at the custom-house, make the necessary advances for duties and charges, and accept drafts drawn by the plaintiff against the consignments. Having learned the nature of the proffered terms, the plaintiff, on the twenty-eighth day of August, 1857, wrote to the defendants the letter to which reference has already been made. Referring in express terms to that arrangement, he informed the defendants by that letter that he had consigned to them an invoice of cigars, and requested them to render to him, when the cigars were sold, an account of the sales; and what is more, he therein stated to the defendants that if they were willing to make advances on such goods, he would consign to them, in a short time, additional invoices to a large amount; and in conclusion, employed the following language: "All shipped to your house by me; I will hold you responsible." Full proof is exhibited in the record, that all the cigars in controversy were sent and received under the arrangement referred to in that letter, and the person who made the arrangement with the defendants testified that it was never changed. He remained in St. Louis to negotiate sales, and he also testified that he managed the whole business and conducted the correspondence with the plaintiff. Defendants dissolved their partnership on the first day of January, 1858, so that it became desirable for them to get rid of their consignments; and on the fifteenth day of the same month, all of the cigars not previously sold were turned over to another firm, pursuant to an order drawn on them by the person who negotiated the arrangement. That step was taken without consulting the plaintiff, and without his knowledge, and ten days later the defendants wrote to the plaintiff and declined to render an account of sales, affirming that they had made none, and assuming, in effect, that the person who negotiated the arrangement was the general agent of the plaintiff with respect to the cigars;

and they informed the plaintiff in the same letter, that he, the supposed agent, on withdrawing the consignment, had paid back to them what money they had advanced on the same. Much other testimony was introduced on the one side or the other, but the statement already given exhibits the material facts necessary to be considered in this stage of the investigation.

Two theories were assumed by the defendants at the trial, and the prayers for instruction were all based upon the one or the other of those theories. It was insisted, in the first place, that the person who negotiated the arrangement and finally withdrew the consignment was a partner with the plaintiff in the whole transaction; and if not, then, secondly, that he was the agent of the plaintiff, and, as such, had authority to withdraw the consignment and acquit the defendants from all further responsibility. But the presiding justices instructed the jury, in substance and effect, that the defendants were responsible for the cigars consigned under the letter of instructions, whether sold directly by themselves as factors of the plaintiff, or by Hook, as authorized to negotiate sales, provided the cigars were received into their possession; that the defendants were authorized by the letter to sell the cigars in the usual course of business, and if they found that Hook was also authorized to negotiate sales, then the sales by him in the usual way were also valid, and that the defendants, by the letter, were to make the advances, have two and a half per cent. commissions on sales, and two and a half per cent. on guaranty of sales, and were to account to the plaintiff. Among other things, they also instructed the jury, that there was no evidence to show any authority from the plaintiff to turn the cigars over to an auctioneer to be sold, and that the plaintiff, therefore, was entitled to recover the net proceeds of the cigars sold, either by the defendant or Hook, if the latter was authorized to negotiate sales, and the market value at St. Louis of the residue, less the charges paid for freight, storage, insurance, drayage, and duties. Both of the defences set up in the court below are still insisted upon in this court, but we think neither of them can be sustained, and that the instructions given to the jury were correct.

1. Partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. But partnership and community of interest, independently considered, are not always the same thing; for the first, as between the partners themselves, is founded upon the copartnership agreement which prescribes the relation they bear to each other, and of itself creates the community of interest; but the last may exist, notwithstanding there has been no agreement between the parties. Part owners of a ship, for example, are uniformly treated as tenants in common, and not as partners, although it cannot be denied that there is a community of interest between them in every part of the vessel, and each is entitled to a share of her earnings in proportion to his undivided interest, and must also share the loss. Joint owners of merchandise may consign it for sale abroad to the same consignee; and if each gives separate instructions for his own share, it is well-settled law that these interests are several, and that they are not to be treated as partners in the adventure. Numerous illustrations of the principle are to be found in the decisions of the courts, of which we will give but one more at the present time. Where a broker or other agent purchases goods for several persons, each agreeing to take a certain portion of the entire parcel, it is clear, if there is no arrangement that the goods shall be sold on joint account, that the transaction does not amount to a partnership, although there is undeniably a community of interest in the goods so purchased. These examples will be sufficient to show that while every partnership is founded on a community of interest, it is, nevertheless, incorrect to suppose that every community of interest necessarily constitutes the relation of partnership within the meaning of the commercial law. Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is

so as to third persons. All of the decided cases, however, agree that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties. On the other hand, it is equally clear that there may be such a community of interest in the profits without regard to loss, and without any community of interest whatever in the property as will establish that relation. Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention. But merchants and traders are often justly held to be partners as to third persons, where they are not to be deemed such, expressly or impliedly, as between themselves. Judge Story distributes the cases in which such a liability exists as to third persons into five classes, and it is obvious that the present case does not fall within any principle of that classification. Story on Part., section 542; Greenl. Ev., section 482. He admits, however, that the pressure of the general doctrine is most severely felt in that class of cases where all the parties charged, as partners, are to share the profits between them, but the losses are to be borne exclusively by one of their number. Actual participation in the profits as principal, we think, creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason, that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment. Grace *v.* Smith, 2 W. Black., 998; Waugh *v.* Carver, 2 H. Black., 235. Actual partnership, as between a creditor and the dormant partner, is considered by the law to subsist

where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to that relation. Pond *v.* Pittard, 3 Mee. and Wels., 357. That rule, however, has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.

Merchants are obliged to have clerks, and oftentimes find it necessary to employ brokers or special agents to effect sales, and it is no more detrimental to their creditors that such employees should be paid out of the profits of their trade than from any other source of income within their disposal. Unless the supposed dormant partner is in some way interested in the profits of the business, as principal, it is plain that he cannot bring suit as a partner, and go into equity and compel an account; nor can it be held that he has any such lien on the profits as a court of equity may enforce; and if not, then his condition is the same as that of an ordinary creditor, and he must pursue his remedy against his employer. Denny et al. *v.* Cabot et al., 6 Met., 90; Vanderburg *v.* Hull, 20 Wen., 70. Repeated decisions have recognised this distinction, and although it may happen, as heretofore, that cases will arise on the one side or the other of the line, approaching in their facts so near to each other that the difference between them may appear to be unsubstantial, yet the distinction itself, we think, is well founded in reason, and that the only difficulty is in the application of the principle on which it rests. Hallet *v.* Desban, 14 Lou. An., 529.

No such difficulty, however, arises in this case. Defendants knew the exact relation which Hook sustained to them, and to the plaintiff, and they had the letter of the plaintiff in their possession, informing them that he should hold them responsible for the cigars. They knew what the arrangement was, and that the goods had been sent by the plaintiff and received by them, on the terms and conditions specified in that letter.

Irrespective of the guaranty, it is difficult to see how Hook could have any interest in the profits as a partner with the plaintiff. He had no interest in the property, and by the arrangement which he himself negotiated, the cigars were to remain for sale in the custody and control of the defendants, as commission merchants, and they stood responsible to the plaintiff for the proceeds. But he did not rely upon the profits for his compensation, for unless one-half the profits exceeded eighteen hundred dollars a year, he would neither be benefited nor injured by the success or failure of the adventure, except so far as the latter result might have a tendency to induce his employer to dispense with his services. Little or nothing was ever realized from the enterprise, and of course no excess of profits over the amount of the guaranty was ever earned. It is quite obvious, therefore, that the theory of the defendants on this branch of the case cannot be sustained.

2. It is insisted by the defendants that Hook was the agent of the plaintiff, and as such that he had authority to withdraw the cigars from their custody and control, and turn them over to the other firm. On that point, the presiding justice instructed the jury that there was no evidence in the case to support that theory, and, after a careful examination of the evidence exhibited in the transcript, we entirely concur in that view of the case; and the judgment of the Circuit Court is therefore affirmed, with costs.

JOHN J. WHEELER, PLAINTIFF IN ERROR, *v.* ANDREW J. NESBITT, JEROME CARDING, FREDERICK M. BINKLEY, JAMES D. TRIMBLE, WILSON J. MATHIS, AND ROBERT MCNEELY.

When the general issue is pleaded to an action on the case for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of the prosecution, that the defendant was himself the prosecutor, or instigated the proceeding, and that it finally terminated in favor of the party accused.

He must also prove that the charge against him was unfounded, that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice.

Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

Where the court told the jury that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty, it was not error in the court to add, in the same connection, that if, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable and dispassionate man to believe that he was guilty of the charge preferred against him, then the jury ought to infer malice, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff.

Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction; but the error, if it be one, forms no ground of exception by the plaintiff, because it was in his favor.

As the magistrate who issued the warrant was one of the parties sued in this case, it was proper for the court below to instruct the jury that if there was probable cause for the arrest of the party, he could lawfully be detained for a reasonable time, owing to the neglect on his part to offer any satisfactory security for his appearance at the time appointed for examination.

THIS case was brought up by writ of error from the Circuit Court of the United States for the middle district of Tennessee.

In September, 1856, John J. Wheeler arrived at the small town of Charlotte, in Tennessee, about eight o'clock at night, in company with two Irishmen, the whole three being indifferently clad. Wheeler had four fine horses; each of the Irishmen was riding one of the horses, with a sack and blanket to sit upon instead of a saddle. The defendants in error (except Trimble) arrested the whole three, on suspicion of having stolen the horses, and carried them before Trimble, who was a justice of the peace, and who sent them to jail for a week. At the end of that time they procured satisfactory evidence of character, and were discharged. Wheeler then brought an action on the case for a malicious criminal prosecution. The rulings of the court below are given in the opinion of this court.

It was submitted on printed argument by *Mr. Underwood* for the plaintiff in error, and argued by *Mr. Phillips* for the defendants.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the middle district of Tennessee. John J. Wheeler, the plaintiff in error, complained in the court below against the present defendants in a plea of trespass on the case, as will more fully appear by reference to the declaration which is set forth at large in the transcript. It alleged three distinct causes of action, and each cause of action was set forth in two separate counts. All of the counts, however, were founded upon the same transaction, so that a brief reference to the first, third, and fifth of the series will be sufficient to exhibit the substance of the declaration, and the nature of the supposed grievances for which the suit was instituted. First, the plaintiff alleged that the defendants, falsely and maliciously contriving and intending to injure him in his good name and reputation, on the eighteenth day of September, 1856, at a certain place within the jurisdiction of the court below, went before a certain justice of the peace for that county, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen four horses, which he then and there had in his possession, and caused and procured the magistrate to grant a warrant, under his hand and seal, for the apprehension of the plaintiff, upon that false, malicious, and groundless charge; and that he, the plaintiff, was accordingly arrested by virtue of the warrant so procured, and falsely and maliciously, and without any reasonable or probable cause, imprisoned in the prison-house of the State there situate for the space of seven days; and that at the expiration of that period he was fully acquitted and discharged of the supposed offence, and that the prosecution for the same was wholly ended and determined. Secondly, the plaintiff alleged that the defendants, on the same day and at the same place, with force and arms assaulted him, the plaintiff, and forced and compelled him to go to the prison-house of the State there

situate, and then and there falsely and maliciously, and without any reasonable or probable cause, imprisoned him for the space of seven days, contrary to the laws and customs of the State. Thirdly, the plaintiff alleged that the defendants, on the same day and at the same place, did unlawfully and falsely conspire, combine, and agree among themselves and with others, that the first-named defendant, with a view to procure a warrant for the arrest and imprisonment of the plaintiff, should go before a certain magistrate of the county, and make oath, according to law, that he, the complainant, verily believed that the plaintiff, with two other persons, had committed the aforesaid offence, and that the other defendants in this suit should attend the preliminary examination of the plaintiff before the magistrate, and then and there aid, abet, and assist the complainant, by their testimony, influence, and advice, in prosecuting the charge; and the plaintiff averred that the defendants so far carried their corrupt and evil conspiracy and agreement into effect, that they procured the warrant from the magistrate by the means contemplated, and that he, the plaintiff, was then and there arrested by virtue of the same, and imprisoned upon that false, malicious, and groundless accusation for the space of seven days, and that at the expiration of that period he was fully acquitted and discharged of the supposed offence. Such is the substance of the declaration, so far as it is deemed material to reproduce it at the present time. Testimony was introduced by the plaintiff tending to show that he was the lawful owner of the four horses described in the warrant on which he was arrested; and he also proved, without objection, that he had always sustained a good character in the neighborhood where he resided. He also introduced a duly-certified copy of the complaint made against him by the first-named defendant, and a duly-certified copy of the warrant issued by the magistrate. Those copies show that the complainant, on the eighteenth day of August, 1856, made the accusation under oath, as required by the law of the State, and that the magistrate thereupon granted the warrant for the apprehension of the plaintiff, together with two other persons, who were jointly accused with him of the same offence. Both

the complaint and warrant were in regular form, and the latter contained the usual directions, that the persons accused should forthwith be brought before the magistrate who issued it, or some other justice of the peace for the county, to answer to the charge, and be dealt with as the law directed. Whether the officer made any formal return on the precept or not does not appear; but it is stated in the bill of exceptions that the warrant was placed in the hands of the sheriff, and that the persons accused of the offence, including the plaintiff, were on the same day brought before the magistrate for trial. When brought into court they were not prepared for the examination, and at their request the trial was postponed for twelve days, or until they should have sufficient time to procure the attendance of certain witnesses, whose testimony was necessary, as they represented, to establish their defence; and the minutes of the proceedings before the magistrate state, in effect, that the accused, "not being able to give any security for their appearance" at the time appointed for the trial, "or not offering to give any, the sheriff was directed to hold them in custody to answer to the charge." Pursuant to that order the plaintiff, as well as the other persons accused, remained in the custody of the sheriff, and were kept by him in the prison-house of the State there situate until the witnesses of the plaintiff appeared; and on the twenty-fifth day of September, 1856, they were again brought before the magistrate, and after the witnesses on both sides were examined, all of the accused were fully acquitted and discharged of the alleged offence. To show that the prosecution was groundless, and without any reasonable or probable cause, the plaintiff examined several witnesses to prove the circumstances under which he was arrested, and the substance of the evidence adduced against him at the trial before the magistrate. One of the defendants is the magistrate who granted the warrant, and the other defendants were witnesses for the State in the criminal prosecution. All of the defendants were citizens of the State of Tennessee, and the plaintiff was a citizen of the State of Kentucky, and it did not appear that the parties had any acquaintance with each other prior to this transaction. No attempt was made

on the part of the plaintiff to prove express malice, and there was no direct evidence of any kind to support the allegation of conspiracy. On the other hand, the defendants insisted that there was no evidence to support the charge of conspiracy or of false imprisonment, and that the prosecution was instituted in good faith, and conducted throughout upon reasonable and probable cause; and to establish that defence they called and examined several witnesses to prove what the evidence was which was given against the plaintiff at the trial before the magistrate. Without entering into particulars, it will be sufficient to say that the evidence adduced by the defendants had some tendency to maintain the defence. Under the rulings and instructions of the court the jury returned their verdict in favor of the defendants, and the plaintiff excepted to the charge of the court. Unaided by the assignment of errors, it would be difficult to ascertain, with any degree of certainty, to what particular part of the charge of the court the exceptions were intended to apply. But that difficulty is so far obviated by the specifications contained in the printed argument filed for the plaintiff, that with some hesitation we have concluded that the case, as presented in the transcript, is one which may be re-examined in this court.

1. Among other things, the presiding justice instructed the jury that in order to excuse the defendants on the first two counts in the declaration, it must appear that they had probable cause for the prosecution of the plaintiff for the offence described in the complaint and warrant, or that they acted *bona fide* without malice. Objection is made by the counsel of the plaintiff to this part of the charge of the court; but we think it was quite as favorable to him as the well-settled rules of law upon the subject would possibly allow. To support an action for a malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it

was actuated by malice. Proof of these several facts is indispensable to support the declaration, and clearly the burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars, the defendant has no occasion to offer any evidence in his defence. Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation. Malice alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation; and though the averment is a negative one in its form and character, it is nevertheless a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. Morris *v.* Corson, 7 Cow., 281. Either of these allegations may be proved by circumstances, and it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description. Add. on W. and R. Accordingly, it was held in Foshay *v.* Ferguson, 4 Den., 619, that even proof of express malice was not enough without showing also the want of probable cause; and the court go on to say, that however innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. Similar views were also expressed in Stone *v.* Crocker, 24 Pick., 83. There are two things, say the court in that case,

which are not only indispensable to the support of the action, but lie at the foundation of it. The plaintiff must show that the defendant acted from *malicious motives* in prosecuting him, and that he had *no sufficient reason* to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities from a very early period to the present time. Golding *v.* Crowle, Sayer, 1; Farmer *v* Darling, 4 Burr, 1,974; 1 Hillard on T., 460.

It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. Purcell *v.* McNamara, 9 East., 361; Willans *v.* Taylor, 6 Bing., 184; Johnstone *v.* Sutton, 1 Term, 544; Add. on W. and R., 435; Turner *v.* Ambler, 10 Q. B., 257.

Applying these principles to the present case, it necessarily follows that so much of the charge of the court as is now under consideration furnishes no just ground of complaint on the part of the plaintiff. On the contrary, it is quite obvious that unless it was accompanied by prior explanations, not stated in the bill of exceptions, it was even more favorable to the plaintiff than he had a right to expect. He was bound to make out his case; and if it did not appear that the prosecution had been commenced with malicious motives, and without reasonable and probable cause, then the plaintiff was not entitled to a verdict. Mitchel *v.* Jenkins, 5 Barn. and Adol., 594.

2. With these remarks as to the first ground of complaint, we will proceed to the examination of the second, which is also based upon a detached portion of the charge of the court. After stating the alternative proposition already recited, the presiding justice proceeded to define the term, probable cause. He substantially told the jury that probable cause was the

existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

Having thus defined the meaning of the term probable cause, he then proceeded to say that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence, showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty; and then gave the instruction to which the second objection applies. It is as follows: "If, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable, dispassionate man to believe that the defendant was guilty of having stolen the horses he had in his possession, then the jury ought to infer malice." Clearly, this part of the charge must be taken in connection with what preceded it, and when so read and understood, it is impossible to hold that it is incorrect, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction. Be that as it may, it is quite certain that it furnishes no ground of exception to the plaintiff, and in all other respects we hold the instruction to be correct.

3. One other objection only remains to be considered. After stating the fact that the magistrate who issued the warrant was sued as a joint defendant, the presiding justice told the jury that the warrant, as given in evidence, was in due form, and that the presumption was, from the statements found therein, that there was sufficient evidence before the magistrate to authorize him to issue it; and then follows that portion of the instructions to which the third objection applies. He then told the jury that if there was probable cause for the arrest of the defendant, he could be lawfully detained a reasonable time till the warrant was issued and executed. It is insisted by the plaintiff that this instruction was both abstract

and misleading. But that theory is wholly without support from anything that appears in the record, and, in point of fact, is directly contradicted by what does appear. To sustain that remark it is only necessary to refer to the declaration, where it is alleged that the plaintiff was detained in prison for the space of seven days, and the minutes of the proceedings before the magistrate show that he was so detained as the necessary consequence of his own request for delay, and the neglect on his part to offer any satisfactory security for his appearance at the time appointed for the examination. Those minutes were introduced by the plaintiff; and in the absence of any proof to the contrary, it must be assumed that they speak the truth. In view of the whole case, we think the charge of the court to the jury was correct, and that there was no error in the record. The judgment of the Circuit Court is therefore affirmed, with costs.

MYRA CLARK GAINES, APPELLANT, *v.* DUNCAN N. HENNEN.

Since the case of Mrs. Gaines was before this court, as reported in 12 Howard, 537, the olographic will made by Daniel Clark, in 1813, was ordered by the Supreme Court of Louisiana to be admitted to probate, notwithstanding its loss.

The judgment of the Supreme Court of that State is coincident with the conclusions of this court upon the testimony which related to the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death.

This will declared Mrs. Gaines to be his legitimate and only daughter, and universal legatee.

In the bill filed by Mrs. Gaines to recover the property sold by the executors appointed by a former will of 1811, it was not necessary to make these executors parties. The reasons stated.

It was not necessary formally to set aside the will of 1811 before proceeding under that of 1813. Any one who desired to contest this latter will in a direct action was not concluded from doing so.

The title of Mrs. Gaines is not barred by prescription, as defined by the law of Louisiana. The reasons explained.

The decision of this court in 12 Howard, 473, did not overrule the decision in 6 Howard, 550. The two cases explained.

The case in 12 Howard cannot be set up as a defence in the present case as

being *res judicata.* They are dissimilar as to parties and things sued for, or what is called the object of the judgment.

The paper misnamed the ecclesiastical record, purporting to be an acquittal of Des Grange of bigamy, is not admissible evidence in this case. But if it was so, it would neither of itself, nor in connection with all that is evidence in the record, serve to prove the adulterous bastardy of the complainant, as the rule of evidence requires that to be done, in opposition to the testamentary declaration of her father, in his own handwriting, that she was his legitimate and only daughter, and, as such, by him constituted his universal legatee.

The charge of adulterous bastardy, as made by the defendant, is not in response to the complainant's bill, but is an affirmative allegation of a fact by them, and the burthen of proof is upon them to establish it in contradiction to the declaration of her father, in his written will, that she was his legitimate child.

The paper or record, as called, is not that of a legally-constituted tribunal, according to either the ecclesiastical usages or the laws of Spain, as they prevailed in Louisiana at any time when that province was a part of the dominion of Spain. And neither the Canon Hasset, the Alcalde Caisergues, nor the Notary Franco Bermudez, had either individual or conjoined authority to take cognizance of a charge of bigamy in the way it was done.

The difference explained between the case now before the court and that which was heretofore presented. If it had been proved, which it never was, that Mrs. Gaines was the offspring of an illicit intercourse, still she could take as universal legatee, from her father's testamentary declaration of her legitimacy.

The code of Louisiana makes a distinction between acknowledged natural children and adulterine children; allowing the former to take as legatees, but not allowing the latter to do so, except to a small amount.

But the legal relations of adulterous bastardy do not arise in this case. The law examined relative to putative marriages, which are where, in cases of bigamy, both parents, or either of them, contracted the second marriage in good faith. The issue of such a marriage is legitimate.

The Louisiana cases, the Spanish law, and the Code Napoleon, examined as bearing upon this point, and the principles established by them applied to the present case.

Clark, the father, was capable of contracting marriage; the consequence examined of his testamentary recognition of his child's legitimacy.

The evidence examined which is supposed to sustain the position that the connection between Clark and Zulime Carriere was adulterous, so as to bar the offspring from taking as a legatee under her father's will. The evidence declared to be sufficient in a civil suit to establish the fact that Des Grange committed bigamy when he married Zulime.

The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution.

The evidence of Coxe and Bellechasse examined, and also that relating to the parentage of Caroline Barnes.

The effect examined of the record from the County Court of New Orleans, in which Zulime prayed for a divorce from Des Grange; and also of the testimony to prove her marriage with Clark.

Whether she married in good faith or not, the weight of testimony is that Clark did so; and therefore Mrs. Gaines is entitled to inherit her father's estate under the olographic will of 1813.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana.

The case had been frequently before this court in various aspects; first, in 13 Peters, 404, then in 15 Peters, 9, 2 Howard, 619, 6 Howard, 552, 15 Howard, 473. In some of these reports large extracts are made from the record, illustrating the points of law and fact then under consideration, and also the evidence in support of them. All of this past history was brought again to the notice of the court in the argument of the present case, which cannot be again recited in the present report. The reader who wishes to understand all the points which are discussed in the opinion of the court must turn back to the preceding volumes above cited, and follow the case through its successive developments. He will then be able to appreciate the concluding remark in the opinion of the court, which is as follows:

"When hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its courts."

It was argued by *Mr. Cushing* and *Mr. Perin* for the appellant, and *Mr. Janin* and *Mr. Hennen* for the appellee.

The record in this case consisted of a thousand printed pages, and the records in the preceding cases were introduced, also, into this. The reporter is saved from the almost hopeless task of following the counsel through this wide range of inquiry by the minute examination of the points of the case contained in the opinion of the court and dissenting opinion of Mr. Justice CATRON.

Mr. Justice WAYNE delivered the opinion of the court.

We will first give some of the facts of this case, that the litigation which has grown out of the wills of Daniel Clark may be correctly understood. Without them it could not be.

They have been the subject of five appeals to this court. This is the sixth. It presents the controversy differently from what it has been before. It also presents points for decision which were not raised in either of the preceding cases. Some of those that were, however, will necessarily be mentioned in this opinion to illustrate their connection with this case. They may be so considered without our coming at all into conflict with any judgment heretofore given concerning the rights of the parties in any antecedent appeal. Our conclusion will differ from one of them on account of testimony in this case which was not in that, but they will not be contradictory; and because we have information in this, concerning a piece of testimony then relied upon, which we shall exclude in this, as inadmissible for any purpose.

Four of the five appeals were decided by this court substantially in favor of Mrs. Gaines. The fifth was adverse, not in anywise excluding the re-examination of the only point then ruled by the use of the same testimony, and that which is new. Considered in connection, both have impressed us with a different impression of the status of Mrs. Gaines's legitimacy from that which this court did not then think was sufficiently proved, as we now think it has been. Now she is here with a support which her cases have not had before. She comes with a decision of the Supreme Court of Louisiana, directing, upon her application, that the will of Daniel Clark, dated at New Orleans, July 13, 1813, as set forth in her petition, should be recognised as his last will and testament, and that it should be recorded and executed as such. In that will her father acknowledges that his beloved Myra, then living in the family of Samuel B. Davis, is his legitimate and only daughter, and bequeaths to her all the estate, real and personal, of which he might die possessed, subject only to the payment of certain legacies named in the will.

Her petition for the probate of that will was first addressed

to the second district court of New Orleans, in which Judge J. N. Lea presided.

After asserting that such a will had been made by her father, its contents were set out as they were recollected by witnesses who had read it, and by other persons to whom it had been shown by the testator, with whom he spoke of it in the last moments of his life, as his last will and testament, in favor of his legitimate daughter, Myra, charging them to take care of it, and telling them it would be found locked up in a trunk, describing it, which he had placed in a certain room in his house.

The will is then stated in the petition to have been olographic; that is, altogether written and signed in her father's handwriting, with his seal attached to the same; that immediately after his death diligent searches were made for it; that it could not then be found; that it has not been since, and that it had been mislaid, lost, or destroyed.

She then declares, that when her father died she was a minor, absent from New Orleans, and living with Samuel B. Davis, to whom and whose lady she had been confided in the year 1812. Judge Lea took cognizance of her petition, proceeded throughout its pendency with great judicial exactness and caution, and, as the whole record shows, with official liberality to every one concerned in resisting the application, without in any particular having denied to the petitioner her rights.

The Judge, however, finally decided against the sufficiency of the proof to establish the will according to the requirements of the Civil Code of Louisiana, but without prejudice to the right of the petitioner to renew her application, with such proofs as might be sufficient to establish an olographic will. She applied for a new trial, and upon that being denied, solicited an appeal to the Supreme Court, and that was allowed.

The Supreme Court tried the case. It differed with Judge Lea as to the proof which was required by the Code to establish a lost or destroyed olographic will. It reversed the judgment of the court below, and decreed that the will of Daniel

Clark, dated on the 13th July, 1813, should be recognised as his last will and testament, and ordered it to be recorded and to be executed as such, it being posterior to the will of May, 1811, which Relf and Chew had presented for probate, under which they had taken possession of the property of Daniel Clark, and had disposed of it to the entire exclusion of Mrs. Gaines from any part of it—an estate shown by the proof in the cause introduced by the defendants, which had been registered or inventoried a short time before Clark's death, at more than seven hundred thousand dollars, in which Clark and Coxe were interested, and an estate exclusively belonging to Clark of two hundred and ninety-six thousand dollars.

But to return to the decree of the Supreme Court establishing the will of 1813; it must be understood, that its admission of the will to probate does not exclude any one who may desire to contest the will with Mrs. Gaines from doing it in a direct proceeding, or from using any means of defence by way of answer or exception, whenever she shall use the probate as a muniment of title. And the probate does not conclude Relf and Chew, or any other parties having any interest to do so, to oppose the will, when it shall be set up against them, by such defences as the law will permit in like cases. It was with those qualifications of the probate of the will of 1813 that the case was tried in the court below, and they have been constantly in our minds in the trial of the appeal here.

Upon the rendition of the probate by the Supreme Court, Mrs. Gaines filed her bill in this case. It shall be fully stated hereafter, with the defences made against it.

Before doing so, it is due to the merits of the controversy to advert to the decisions of the probate court of the second district of New Orleans, and to that of the Supreme Court reversing it, more minutely than has been done. Especially, too, as they are coincident with our conclusions upon the testimony regarding the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death.

The Supreme Court adopts the prepared statement of the facts of the case as it was made by Judge Lea in the court

below. Its accuracy has never been denied by any one of the parties interested in this suit, nor by any one else.

It is as follows: "The petitioner alleges, that on the 16th of August, 1813, the late Daniel Clark, her father, departed this life, having previously, on the 13th of July, executed an olgraphic will and testament, by which he recognised her as his legitimate and only daughter, and constituted her universal legatee. That the will was wholly written, dated, and signed, in the handwriting of the testator, and was left among his papers at his residence; that after his death search had been made for it, but that it was not found, and that it had been mislaid, lost, or destroyed."

The learned Judge then proceeds: "To entitle the petitioner to a judgment recognising the existence and validity of the will, it is necessary that she should establish affirmatively, by such testimony as the law deems requisite, that Daniel Clark did execute a last will containing testamentary dispositions as set forth in the petition, and that he died without having destroyed or revoked it." "That looking for the testimony which might solve the question, whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most intimate with the deceased in the latter part of his life, and especially, if they could be found, to those who were with him in the last moments of his existence, when the hand of death was upon him, if they had no interest in directing his property into any particular channel, as they might be considered as the best and most reliable witnesses that could be produced; *and it appears to be precisely testimony of that character that the petitioner presents in support of her application.*" Judge Lea then says: "Boisfontaine had business relations with the deceased which brought them into frequent intercourse; and that for the two last days of his life, up to the moment of his death, he was with him. That De la Croix and Bellechasse were intimate personal friends of Clark, and were with him shortly before his death. All of these witnesses concur in stating that Clark said he had made a will posterior to that of 1811, and De la Croix says, that Clark presented to him in his cabinet a sealed parcel,

which he declared to be his last will, and that it would be found in a small black trunk. De la Croix also had sworn, shortly after Relf had presented the will of 1811 for probate, that Clark had made a will posterior to that; that the existence of it was known to several persons, and he applied for an order of the court and obtained it, commanding every notary in New Orleans to report if such a document had not been deposited with one of them. Bellechasse and Mrs. Harper swore that they had read the will. The Judge then expresses his conclusion to be, *that the legal presumption of the existence of such a paper had been made out, and that its having been destroyed or revoked by the testator had been satisfactorily rebutted*, and that there was nothing in the record to impeach the credibility of Bellechasse or Mrs. Harper. In these rulings of the district judge the Supreme Court concurred, and then said, in delivering its opinion, all that they had to do was to inquire whether the will of 1813 had been proved in conformity with the article No. 169 of the old Code or 1648 of the new."

Those articles require the testimony of two witnesses when the will shall be presented for probate, who shall declare their recognition of it as having been written wholly by the testator, that it had been signed and sealed by him, and their declaration that they had often seen him write and sign in his lifetime. It was from such a requirement of proof, rejecting secondary testimony altogether, that the District Court refused the petition for a probate of the will. Upon such refusal, Mrs. Gaines appealed to the Supreme Court.

That court said: "That the question of the alleged insufficiency of the proof in the case could only be determined by an inquiry, whether the article was to be pursued *at all times and in all cases*, or whether they were not merely directions when the will itself was presented for probate, and were inapplicable to restrain the court in certain cases, when by reason of the loss or destruction of such an instrument, from taking secondary proof of its contents, as the best which the nature of the case was susceptible."

The court then, by a course of reasoning, supported by several cases from the Louisiana Reports, determined that in the

event of a will having been destroyed, secondary proof is admissible in Louisiana to prove its contents, and to carry it to probate; that the articles 169 and 1648 contemplate that the will itself should be presented, with the proofs of its execution, to the judge of probate, *when that can be done;* that no one would seriously contend that the calamity of its destruction should deprive the legatee of the right to establish it by secondary evidence; "for was such the law, a reward would be offered to villainy, and it would always be in the power of an unscrupulous heir to prevent the execution of a will." It then meets the assertion directly, that articles 1648 and 1649 of the Code *require the production of the will in order that it might be identified by witnesses who recognise it; denies that position*, and affirms that in the absence of such witnesses the evidence concerning an unproduced, destroyed olographic will might be complete. The articles are not negative laws, declaring that no other kind of proof shall be admitted. "And it is doubted very much if an olographic will made here had by some accident been destroyed before being legally proved, whether a copy of it, identified by two witnesses, who were able to swear to the genuineness of the original in the manner pointed out by law, would not be considered a sufficient compliance with the provisions of the Code." Such, in fact, was the petitioner's case they were considering. Such is the law in analogous cases. The law cannot have been intended to require an impossibility, and to leave a party so circumstanced without a remedy.

The doctrine of the common law is in accordance with the view taken by the Supreme Court of Louisiana concerning lost deeds and wills. It has been judicially acted upon in English and American cases. It was so in the case of Dove *v.* Brown, 4 Carver, 469. That was a suit upon a lost will devising real estate. By the statute of New York it was necessary to prove the will by three credible witnesses. The will of Brown, as to its execution, was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, James Mallory, and another person whose name he did not remember, but that he had no doubt of his being a

credible witness. That, the court said, was all the evidence which could be expected under the circumstances. There are several other cases to the same effect in our American Reports. Jarman, on the Probate of Wills, 1 vol., Perkins's edition, p. 223, says, upon the authority of many cases, note 4: "That if a will, duly executed and not revoked, is lost, destroyed, or mislaid, either in the lifetime of the testator, without his knowledge, or after his death, it may be admitted to probate upon satisfactory proof being given of its having been so lost, destroyed, or mislaid, and also of its contents." But to entitle a party to give parol evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found, if in existence. Under its reasoning, the Supreme Court of Louisiana, sustained by the authorities in England and in the United States, admitted the olographic will of 1813 of Daniel Clark to probate, declaring also such was the law in Louisiana, and reversed the judgment of the lower court dismissing the petition of Mrs. Gaines.

In virtue of that decision of the Supreme Court, Mrs. Gaines presents herself to this court, declared by her father to be his legitimate and only daughter, and universal legatee. *We will in another part of this opinion show the legal effect of her father's testamentary declaration.*

We will now state, as briefly as it may be done in such a case, the essential allegations of the bill; the responses of the defendants and their averments; the proofs in support of the complainant's rights, and such of them as are relied upon to defeat them; the legal issues made by the bill and answers, and the points relied upon by both parties in their arguments in this case.

The bill was brought against several defendants, Duncan N. Hennen being one of them. They separated in their answers. Hennen, after giving the claim of title to the property for which he is sued, admits that it was a part of the estate of Daniel Clark, and adopts the answers filed by the other defendants as a part of his defence. The cause was tried with

respect to him only, and the bill was dismissed by the court below. From that decree Mrs. Gaines appealed to this court.

After specific declarations as to the character in which she sues, and her legal right to do so as the legitimate child of her father and his universal legatee, she acknowledges that he had made a provisional will in the year 1811. That he then made his mother, Mary Clark, his universal legatee, and named Richard Relf and Beverly Chew his executors. That they had presented it to the court for probate, that it had been allowed, and that they, as executors, had taken possession of the entire separate estate of Daniel Clark, and of all such as he claimed in his life in copartnership with Daniel W. Coxe. It is then assumed that the will of 1811 had been revoked by the will of the 13th July, 1813. That Chew was dead; that all the legal power which the probate of the will of 1811 had given to Relf and Chew had expired; that Mary Clark was dead, and that her heirs and legatees reside beyond the jurisdiction of the court.

Mrs. Gaines then states, in the language of equity pleading, the pretences of the defendants in opposition to her claims. Such as, that Relf and Chew sold them the property as testamentary executors of Daniel Clark under the will of 1811; that they bought for a full consideration, without any notice of the revocation of the will of 1811, or that any other person was interested in the property than Mary Clark; that the titles they had from Relf and Chew could not be invalidated by the revocation of that will, and that the right of action against them for the property in their possession, if complainant had ever had any, were barred by prescription—that is, by the acts of limitation of Louisiana. It is then charged by the complainant that Relf and Chew had no authority to sell the property of Daniel Clark when the sales were made by them. That they had never made an inventory of the decedent's property for the probate court before the sales were made; that the sales were made without any legal notice, and for an inadequate consideration. That if Relf and Chew had sold under a power of attorney from Mary Clark, and not as executors, that Mary Clark's power was insufficient in its terms for such pur-

pose; that she had no power or rights in the estate of Daniel Clark to give such a power, and that Relf and Chew had not caused themselves to be recognised in a proper court as Mary Clark's attorneys, as they ought to have done, before they could acquire any right to sell any part of the estate of Clark. She then charges that the defendants knew, when they bought the property sued for, that she had applied as early as in the year 1834 to have her father's olographic will of 1813 probated by the proper court at New Orleans; that the defendants knew of all the irregular proceedings and assumptions of Chew and Relf in respect to the estate of her father, and of their sales of it without authority; that the defendants knew, when they bought, of the suits which she had brought to recover her rights in her father's estate; and that her present suit was brought under the probate of the will of 1813 by the Supreme Court of Louisiana.

Hennen, the defendant, answers for himself, and adopting the answers of the other defendants, states that the property for which he was sued is designated according to a plan made in 1844, as lots 9, 10, 11, on the square comprised between Phillippi, Circus, and Poydras streets; each lot, by English measure, containing 23 feet 11 inches and 2 lines between parallel lines.

The answers of the other defendants make the same admissions as to their titles having been derived from or through Relf and Chew and Mary Clark; admit the property separately claimed by them to have been a part of the estate of Clark; and finally make an averment that Mrs. Gaines has not that civil status by her birth which, under the law of Louisiana, can entitle her to take the property of her father under the will of 1813, though it had been admitted to probate, and that she had been declared in it his legitimate and only daughter. In other words, the defendants have declared that she is an adulterous bastard.

It is proper to state the books and documents which are in evidence in this case.

1. The present record of Gaines *v.* Hennen.
2. The printed record of the suit No. 188, of December

term, 1851, in this court, Gaines *v.* Relf and Chew, 12 Howard, 472.

3. The proceedings in the courts of probate entitled Probate Record.

4. The commercial account-books kept by Relf and Chew, professing to relate to their transactions concerning the estate of Daniel Clark.

This testimony, as it has been enumerated, was brought into the case by agreement of the parties for as much as it might be worth, subject to exceptions by both sides as to its admissibility upon the trial of the cause.

Several immaterial or formal points were made in the argument to defeat the claims set out in this bill. Such as, that the case was not one for equity jurisdiction, but was, *ratione materiæ*, exclusively cognizable before the probate court of the 2d district of New Orleans. Next, that Chew and Relf, and Mary Clark, or her heirs, should have been made parties; that the sources of Daniel Clark's title to the property sued for had not been set out in the bill in addition to the manner it had been enumerated. Again: that the probate proceedings in the second district court of New Orleans in 1856 are yet pending and undetermined, and on that account that the same court has exclusive jurisdiction over the estate of Daniel Clark. We have examined these formal objections, and find them to be unsustained by the cases cited in support of them. They are inapplicable to the actual state of the case, and are insufficient to arrest the trial of it upon its merits. The same objections were also urged in the Circuit Court, but were disregarded, we presume, by the judge, as unsubstantial points of defence. As to the objection that Relf and Chew, and the heirs of Mary Clark, had not been made parties to the bill, we observe it was not necessary to make either of them so. The present is a suit for the recovery of property admitted by the defendants to have been a part of the estate of Daniel Clark. Nothing is sought to be recovered from Chew and Relf. Their executorial functions under the will of 1811 have long since been at an end. Had the bill involved directly their transactions as executors with the complainant, as universal legatee, upon a

proper showing of that, with a prayer to be made parties, the court might have allowed it. But not having done that, the defendants cannot urge, because Relf and Chew have not been made defendants with them, that they should escape from a trial on the rightfulness of their possession of a part of the estate of Clark, as they have admitted it to be; or that they had not acquired it under circumstances from which the law presumes that they had notice of the irregularity of the sale as it was made by Relf and Chew. Nor was it necessary for the heirs of Mary Clark to be made parties; for Mary Clark herself never had any pecuniary responsibilities for the sales of the property of the estate of her son by Relf and Chew, as her power of attorney to them upon its face was irregularly executed, and was of itself notice to the defendants that when they bought, the sales had not been made in conformity with the law of Louisiana regulating the sales of the property of a testamentary decedent.

But it was also said in the argument that no claim could be set up by Mrs. Gaines under the will of 1813 until the will of 1811 shall be set aside. Neither the language used by this court in 2 Howard, 651, nor in the decision in 12 Howard, will bear such an interpretation, or admit of such a conclusion. The rulings of courts must be considered always in reference to the subject-matter of litigation and the attitude of parties in relation to the point under discussion. And it will often be the case, as it is now, that counsel will use an illustration for a judicial ruling, or words correctly used when they were written as applicable to a different state of things. When this court said, in 12 Howard, 651, that the will of 1813 cannot be set up without the destruction of the will of 1811, it was with reference to the existing fact that the latter had been duly proved, and that it stood as a title to the succession of the estate of Daniel Clark, and that the will of 1813 had not then been proved before a court of probate, and on that account could not be set up in chancery as an inconsistent and opposing succession to the estate while the probate of the will of 1811 was standing in full force. And when Mr. Justice McLean, speaking for the court, 2 Howard, 647, says, "she (mean-

ing Mrs. Gaines, then the complainant) must ask for the probate of the will of 1813, and a revocation of the other will of 1811," adding "for no probate can stand while a previous one is unrevoked," it is plain that the meaning was, as we now say it is, when a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, that the former becomes inoperative, and that the second is that under which the estate is to be administered, without any formal declaration by the court that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the second. Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills; though they may and often have declared that a posterior will of a testator shall be recognised in the place of a prior will which had been proved, when it was not known to the court that the testator had revoked it. Such is exactly this case. The Supreme Court decreed that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in the plaintiff's petition, should be recognised as his last will and testament, and the same was ordered to be recorded and executed as such, *with the declaration*, that admitting the will to probate does not conclude any one who may desire to contest the will with the applicant in a direct action. The decree of the court in that particular is the law of the case.

It was also urged that the defendant and those under whom he claims were purchasers for a valuable consideration without notice, and are therefore in equity protected against the claims of the complainant. It is a good defence when it shall be proved as a matter of fact. But in this instance it is not only disproved by testimony introduced by the defendants, but by admissions in their answers, as shall be shown hereafter in this opinion. In our opinion the objection has no standing in this case, though the argument from which the counsel admitted he had borrowed it is a very good one in its proper place.

We shall now examine the case upon the more serious points

made in opposition to Mrs. Gaines by the learned counsel, Mr. Janin.

The first was, that her claim was barred by prescription. The prescription relied upon by the defendants is that of ten years against one *claiming a vacant estate*, twenty years to prescribe a title, and thirty years to bar the faculty of accepting a succession or the estate of a deceased person. There being no vacant succession in this case, the ten years' prescription does not apply, and the prescription of twenty years does not exist; for Mrs. Gaines did not attain her majority until June or July, eighteen hundred and twenty-six, and her suit for the probate of the will made by her father on the 13th of July, 1813, *was instituted in* 1834. When her petition for that purpose was *dismissed in* 1836, her first bill was filed in a month or two afterwards. From that time there was a legal interruption of the prescription of twenty years, which the defendants have pleaded and now rely upon. In fact, they recognise the interruption in their answers. In their averment of their having had peaceable possession of the property sued for since they bought it, they add, "that they had never been disturbed in respect to it," *except by an abortive attempt of the complainant and her husband to recover* it by their bill filed in 1836. New Record, 47. We find them also in their answer (New Record, 54) admitting that such a suit as complainant refers to in her present bill had been instituted by her and her husband in 1836, and that the object of it *was the recovery of the "identical property" now in controversy.* New Record, 56, 57. It is also admitted in the answer, that the suit of the complainant in the probate court to annul the probate of the will of 1811, and to set up that of 1813, was brought *on the 18th June*, 1834. These admissions are decisive that the complainant claimed the inheritance as early as that date, and that the prescription which had begun to run had been legally interrupted on the 28th July, 1836, the date of her first bill.

By the article of the Code, 3484, a legal interruption of a prescription takes place where the possessor has been called to appear before a court of justice, either on account of the property or the possession, and the prescription is interrupted by

such demand, whether the suit has been brought before a court of competent jurisdiction or not.

The weight of authority upon the construction of that article of the Code is, that it contemplates a voluntary, intentional, and active abandonment of the suit, in order to restore the running of a right of prescription. In the case of Wilson *v.* Marshall, 10th Annual, 331, the court said the plaintiff did not dismiss the suit, or consent to the dismissal. She lived in a remote part of the State, and the mere absence of herself and counsel at a term of the court when her case was called is insufficient, without other evidence, to convict her of having abandoned her demand. Pratt *v.* Peck, curator, 3 Lea R., 282; Dunn *v.* Kenney, 11 Rob., 250; Roswood *v.* Duvall, 7 Annual, 528; Mechanic and Traders' Bank *v.* Theatt, 8 Annual, 469.

After the interruption of the prescription by the filing of the bill by the complainant, the defendants could no longer claim to be in possession *in good faith*, as that is defined in the Civil Code. In article 3415 the possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, *or that his title is vicious and defective.* The possessor must not only not be in bad faith, but in the positive belief that he is the true owner, and if he doubts the validity of his title, his possession is not the basis of prescription. Troplong Prescription, vol. 2, p. 451, No. 927; Ib., p. 444, No. 918; Ib., p. 442, No. 915. The plea of prescription is not available in this case.

But the defendants go further, and insinuate that their possession of the property, though beginning with the executors, Relf and Chew, continued afterwards under Mary Clark, whose power of attorney to them authorized them to sell the estate of Clark.

When Relf and Chew proved the will of 1811, they received the estate of Clark as executors, with a right of detainer for one year, and for as long afterwards as the court of probate might permit upon their application, showing cause for the delay or the extension of a longer time. They did receive such an extension for three years upon their representation

that the nature of the estate, the difficulty of the time, and the ample sufficiency of the estate to pay all of its debts, would enable them by the delay to accomplish that result. The creditors were called upon to meet to consider the proposition. They assented to it. But the executors never fulfilled the arrangement, either for the benefit of the creditors or for the legatees under the will of 1811. Nor did they ever make any return to the court of probates of their transactions relative to Clark's estate until 1836, after the complainant had sued them, and then without vouchers to homologate their receipts, expenditures, and payments, except for a small part. Shortly after the application for an extension of time, in the year 1813, they applied for a power of attorney from Mary Clark, who had been named in the will of 1811 as universal legatee, to authorize them to sell the estate in her behalf. The power was given; and under it, without any notice to the court of probate, which ought to have been given, and the power filed in it, they continued, as the testimony in this case shows, to act as executors, and to dispose of the estate of Clark, both real and personal, property in copartnership, and other property separately belonging to Clark, without ever having received any permission to do so from the court of probate, and that should have been obtained, as Mary Clark had not been acknowledged by that court as the universal legatee of Clark. It may be that they mistook their powers in doing so; but they received the estate of Clark in a fiduciary character, to be accounted for to the legatees and creditors, according to their rights under the law of Louisiana, and for that they are responsible. Besides, the power from Mary Clark was given to them as executors, that she might have the benefit of those responsibilities for the faithful execution of the trust that they were under by the law of Louisiana as executors. They paid debts, received moneys, sold property, and acted throughout as if they were not responsible to the court from which they derived their testamentary letters or to Mary Clark, and, as the record in this case shows, without sustaining their transactions by vouchers of any kind.

Nothing is better settled by the decisions of its courts in

Louisiana than "that an extra judicial statement by an executor, that he believes the debt to be due by the estate, does not bind the heir, nor is the heir bound by the approval of a court as to such a claim, if it be made *ex parte.*" 4 Lou. R., 382. Again: that the admission of the genuineness of the signature to vouchers, filed by the curator of a succession in support of his account, dispenses with any other proof of the payment claimed; but when such payments are made *without an order of the court*, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. Miller *v.* Miller, 12 R. A receipt given to an administrator for the payment of an account is not evidence that the account was due, if the fact of being due is disputed. Moore *v.* Thebadeaux, 4th Annual, 74. So an administrator who renders an account is bound to establish the items of it by evidence, and may be held to strict proof by the parties interested without a formal opposition on their part. Succession of Lea, 4th Annual, 579. The accounts of Relf and Chew were put in evidence by the defendants, and they were used to show, among other things, that they were authorized to sell the estate of Clark as they did, and that they were auxiliary for the establishment of the defendant's plea of prescription. Such, however, is not our opinion, and but for the use made of them, we should not have noticed them at all, not thinking that they are put in issue by the bill of the complainant, or the answer of the defendants, particularly as Relf and Chew are not parties to this proceeding.

We will now proceed to the consideration of that point made in the argument by the counsel of the defendant, but more particularly representing the city of New Orleans, as he said he did.

It was that complainant's suit could not be maintained, because it was *res adjudicata* by this court in its judgment in the case of Gaines *v.* Relf and Chew, in 12 Howard, 506.

We do not think so. That case is misunderstood by the learned counsel. Then the parties went to trial upon the demand of Mrs. Gaines for one-half of her father's estate, as the donee of her mother, his widow, and as *forced heir of her father*

by the law of Louisiana *for four-fifths of another half of his estate.*

Her bill then was brought in consequence of this court having decided, in 6 Howard, 550, that there had been a lawful marriage solemnized in good faith between them in Philadelphia. That case was tried upon the same evidence upon which the appeal was determined in 12 Howard, with the exception of what is miscalled an ecclesiastical record from the Cathedral church in New Orleans, of which we shall have much to say hereafter. Besides having decided, in 6 Howard, that there had been a lawful marriage between the complainant's father and mother, this court decreed that Mrs. Gaines was the lawful and only issue of the marriage; that at the time of her father's death she was his only legitimate child, and was exclusively invested with *the character of his forced heir*, and as such was entitled to its rights in his estate.

The judgment in that case has never been overruled or impaired by this court. It certainly was not intended to be by the case in 12 Howard, for the report in that case shows, from the number of the justices who sat upon its trial, and their decision as to the judgment then to be rendered, that the majority of them did not intend to overrule the decree in 6 Howard. It was recognised again as still in force by a majority of the judges who sat in this case in our consultation. The defendant in the case of 1851, 12 Howard, 537, admitted that such a decree was rendered, denying, however, that it was conclusive upon or that it ought to affect their right; and if it could do so, it ought not to have such an effect in that instance, averring the same as a matter of defence, that the decree was brought about and procured by imposition, combination, and fraud, between the complainants and Charles Patterson. That it should not be regarded in a court of justice for any purpose whatever, and that it had been consented to by Patterson to enable the complainant to plead the same as *res judicata* upon points in litigation not honestly contested. Mr. Janin was mistaken when he said that the decree in 6 Howard, 583, had been reviewed in the case of 12 Howard, 537, meaning thereby that it had been overruled. It was not only not so, but one of

the justices who assented to the judgment in 6 Howard, which declares that there had been a valid marriage between Daniel Clark and Zulime Carriere, and that she was the legitimate child of that marriage, would not assent to its being done when he concurred in the decree in 12 Howard.

The decision in 12 Howard does not, either in terms or inferentially, assert that no marriage had ever taken place between Daniel Clark and the complainant's mother. The issue in that case was, that at the time of the complainant's birth, her mother was the lawful wife of another man, namely, of Jerome Des Grange.

It was, therefore, essential to the defendants to get rid of the decree which had affirmed the legitimacy of Mrs. Gaines and of the marriage of her father and mother, and it was attempted by a contrivance as extraordinary in its beginning as it was abortive in its result. We will show what it was from the record, not only on account of its anomalous character, but because it is unexampled in jurisprudence.

After having asserted that the decree in 6 Howard had been obtained by the fraud of Patterson and General Gaines, thus impeaching the credibility of Patterson in advance, the defendants, Relf and Chew, introduced him as their witness, (Old Record, pp. 590, 591, 592, 593, 594,) and he was examined by their counsel, first as to a suit in which Mrs. Gaines had recovered a house and lot from him. After stating his age to be about seventy, his answer was: "It was for a house and lot on which I resided when the suit was brought; I still reside in that house and lot, and have done so ever since the suit was brought. Mrs. Gaines succeeded in the suit, according to the judgment of the court. That house and lot belongs to her, but they told me they would not take it from me. General Gaines and his wife gave me in writing under their hands that they would not take the property from me; that he would make my title good. The property has always been assessed as mine, and I have always paid the taxes on it. I paid most of the costs, but they paid me again—that is, General and Mrs. Gaines. There was an understanding between us that they would pay the costs, even should the suit be deci-

ded against me. They made the same offer to Judge Martin." In his cross-examination, witness said he had made the best effort in his power, with the aid of able counsel, to defeat Mrs. Gaines in her suit. The cross-examination was resumed the next day, 20th June, 1849. Patterson was asked to look upon a document marked A, and to state if he knew the handwriting of the late General Gaines; whether the signature to it was not his; whether he had received that, or a communication of which that was a copy, prior to withdrawing his dilatory pleading in the case of Gaines *v.* Relf and Chew et al., and filing your answer to the merits of that case. The defendants, by counsel, protested against the paper being put into the record, on the ground that it contained false, malicious, and gratuitous imputations against parties in no wise connected with the suit. Witness then answered, that was the signature of General Gaines; he had often received letters from him, and seen him write, and that he had received two or three communications, of which that was a copy, before he withdrew his dilatory pleadings in that case, and answering to the merits. A letter was then handed to witness, marked B. He answered, the body of it was the handwriting of General Gaines; was present when he wrote it, and saw both General and Mrs. Gaines sign it. Then the following question was put to the witness: "At the trial of your cause with Gaines and wife, did not your counsel make a request of the counsel of Mrs. Gaines to be permitted to introduce the record from the probate court of New Orleans of all the proceedings of Mrs. Gaines in the prosecution of her rights in that court?" Witness answers: "Yes, sir; her counsel objected to that, and I applied to General and Mrs. Gaines to introduce the record. They replied to me to get all the evidence possible, the stronger the better. General Gaines remarked, it would be more glorious to have it as strong as possible. I then caused it to be introduced." Here the cross-examination of the witness was closed. The counsel for the defendants objected to the foregoing testimony, and especially to that part which relates the conversations of the complainants with the witness, and that part which details what was done in *a judicial proceeding*,

on the grounds, among others, that it is incompetent for the complainants to make evidence for themselves, and *that what had been done in judicial proceedings should be shown by the record.* And from that gentleman's accurate knowledge of his profession, indicated as it has been by the two lines just underscored, may we not say in the zeal of professional advocacy that the best of us may forget it? for what has been his interrogation of Patterson but an attempt to invalidate a judgment against him by the testimony of the most interested party to have it annulled, without having made any appeal to the record of that judgment? And Patterson was the defendant's witness.

But we have not yet done with this attempt to prejudice the rights of Mrs. Gaines by suggestions that her suit with Patterson was pretensive and fraudulent, and to extract from him some proof or confession of his own infamy.

After the examination in chief and the cross-examination had been completed and signed by the witness, and both counsel had announced that they had concluded their examination, the counsel for the defendant made another objection to the cross-examination of Mr. Patterson, insisting that it should be considered as his examination in chief by the complainant, to which the defendants had the right of cross-examination; and the witness was recalled on the following day for that purpose. Every effort was then made by many questions to extract from him some inconsistency with his first examination without success. But fortunately for his own character he removes the imputation of fraud and combination between himself and General Gaines, to give to the latter the benefit of a collusive judgment in the circuit court against himself, by having, in his answer to one of the questions, alluded again to the documents A and B, which are now presented as conclusive against the charge that there was ever any combination between them, by trick or by contrivance, or by any deceitful agreement or compact, for a suit to be brought by one against the other to defraud any third person of his right. See Old Record, pages 1018 for Document A, and 819 for letter B. And when the witness was asked if

he had not been particularly requested by the General and Mrs. Gaines to use his best exertions, with the aid of the best counsel he could employ, to make every defence in his power to this suit of which it was susceptible, he answered: Yes, and I did so; and I considered the agreement with General and Mrs. Gaines as an act of liberality on their part, growing out of a desire to come to a speedy trial with some one or more of the defendants on the merits of the case.

It was an indiscreet arrangement between General Gaines and Mr. Patterson, not to be tolerated in a court of justice, but not one of intentional deception in contemplation of any undue advantage. And it would never have been made by Relf and Chew, in their answer to the subsequent bill of the complainant against them, had they not been erroneously advised that the decree in sixth Howard, establishing the marriage of Clark and Zulime Carriere, and the legitimacy of Mrs. Gaines, might be used as *res judicata* against the defendants in the suit of the 20th January, 1849, and as they now attempt to make the decision in that case a *res judicata* against the claims of Mrs. Gaines in this which we are now deciding.

But what was decided in the case in 12 Howard? It is stated, in the language of the decision, "that the first and most important of the issues presented is that of the legitimacy of Mrs. Gaines." Then are stated the pleadings under which the issue was made. It shall be given in the language of the decision: "She (Mrs. Gaines) alleges that her father, Daniel Clark, was married to Zulime Nee Carriere, in the city of Philadelphia, in the year 1802 or 1803, and that she is the legitimate and only legitimate offspring of that marriage. The defendants deny that Daniel Clark was married to Zulime at the time and place alleged, or at any other time and place. And they further *aver* that, at the time the marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome des Grange. If the mother of the complainant was the lawful wife of Jerome des Grange at the time Zulime is alleged to have married with Clark, then the marriage is merely void, and it is immaterial whether it did or did not take place. *And the first question we propose to examine is, as to the*

fact whether Zulime was Des Grange's lawful wife in 1802 *or* 1803." Then follows the recital of the marriage between Des Grange and Zulime, with the record of it, on the 2d December, 1794, admitted on the part of Mrs. Gaines. To rebut and overcome the established and admitted fact of that marriage, the complainant introduced witnesses to prove, "that previous to Des Grange's marriage with Zulime he had lawfully married another woman, who was living when he married Zulime, and was still his wife, and therefore the second marriage was void, *and this issue we are called on to try.*"

Then it is said that "the marriage with Des Grange having been proved, it was established as *prima facie* true that Zulime was not the lawful wife of Clark, and the onus of proving that Des Grange had a former wife living when he married Zulime was imposed on the complainant; she was bound to prove the affirmative fact that Des Grange had committed bigamy." Then follows the recital of the testimony of the complainant to prove that Des Grange became a bigamist by his marriage with her mother. And then, to "meet and rebut this evidence, the defendants introduced from the records of the Cathedral church of the diocese, to which New Orleans belonged at that period, an ecclesiastical proceeding against Des Grange for bigamy, which respondents insist is the same to which complainants refer." It is set out in full in the decision, beginning at page 513 in 12 Howard, extending to 519, inclusive. Then the rebutting testimony of Daniel W. Coxe, for a long time a copartner in business with Clark, was introduced. He states an antecedent connection between Clark and Zulime to the time of their alleged marriage, with a confidential letter to him, which was delivered by Zulime, in which it was stated that she was pregnant, and that he, Clark, was the father of the child; further, requesting that he would put her under the care of a respectable physician, and furnish her with money during her confinement and stay in Philadelphia; and further, that she gave birth to a child, who was Caroline Barnes, who before her marriage went by the name of Caroline Clark, and that what has been related happened in 1802; and he further states that Clark was not in Philadelphia in 1803, having

gone to Europe in August, 1802, and having returned to New Orleans early in 1803. A letter from Des Grange was introduced, dated at Bordeaux, July, 1801; also a suit for alimony brought by Zulime against Des Grange in 1805, which will be further noticed in the opinion. Then it is said: "This is substantially the evidence on both sides on which the question depends, *whether Des Grange was or was not guilty of bigamy* in marrying Maria Julia Nee Carriere in 1794. Objections are taken to several portions of this evidence, and especially as respects the record of the suit against Des Grange for bigamy in the ecclesiastical court." And though this is followed in the decision by a suggestive, able, and searching commentary upon the objections made to the testimony of the defendants, and upon that of the complainant, by connection and comparison of the two, and upon what was deemed the law of the case, all of it relates exclusively to disprove that Des Grange was married, and had a wife alive when he married Zulime.

The announced conclusions in that case, which were seven in number, 12 Howard, 539, show it to have been so. It was "the question decided," and was said "concludes this controversy." The factum of marriage between Clark and Zulime, and the legitimacy of Mrs. Gaines, as both had been decreed by this court, were not then disaffirmed, either directly or inferentially, and all that was said about it is, "that the decree of this court in Patterson's case does not affect these defendants, for two reasons: 1. Because they were no parties to it; and, 2d, because it was no earnest controversy."

It is our opinion that the decision made in the case in 12 Howard was not intended to reverse the decree in 6 Howard, and that it cannot be so applied as *res judicata* to the case we are now trying.

We will now show the difference as to the character in which Mrs. Gaines then sued and that in which she now does, in connection with the law of Louisiana, as to what constitutes a *res adjudicata*, and what does not.

In the first, her demand was for one-half, and four-fifths of another half of the property owned by her father when he died. She then claimed as the donee of her mother to the one-half,

and as *forced heir of her father* to four-fifths of another half of his estate. Now she claims as universal legatee and legitimate child of her father, under his will of the 13th July, 1813, which has been admitted to probate by the Supreme Court of Louisiana, and ordered to be executed as such.

The difference between the two cases is just that which the law of Louisiana will not permit the decision in the first to be pleaded against her in this case as a *res judicata.*

It is declared in the article 2265 of the Louisiana Code, "that the authority of the thing adjudged takes place only with respect to what was *the object of the judgment.* The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and formed by them against each *other in the same quality.*"

The case in 12 Howard and that now under our consideration are dissimilar as to parties and things sued for, or what is called "the object of the judgment." The suit now is not between Mrs. Gaines and Relf and Chew, but between herself as complainant, and Duncan N. Hennen as defendant. Nothing was said in the first suit of the claim of Mrs. Gaines under the will upon which she now sues, as in every particular detailed in the article 2265. There are differences between her present cause of action and that formerly made, and the demand now made is not between the same parties, or formed against each in the same quality. And, therefore, upon well-settled principles coincident with the article 2265, and also independent of it, nothing that was said or done in the case in 12 Howard can prejudice her claim as she now makes it. We give the authorities for that position, that they may be consulted, without being able, for want of time, to show their application by extracts. 24 Wend., 585; 14 Peters, 406; 1 Dana, 109; 3 Wend., 27; 2 Sim. and Stuart, 464; 6 Wheaton, 109; 7 Cranch, 565; 3 East., 346; 4 Gill and Johnson, 360; Preston *v.* Slocomb, 10 Reports, (Louisiana,) 361; 1 Annual, 42; 3 Annual, 530; 10 Annual, 682; 3 Martin, 465; 7 Martin, 727; 7 Reports, 46. And the precise point was ruled in Burt *v.* Steinberger, 4 Cowen, 563—4, "that the defendant might have

shown, if he could, that he had acquired a title since the former trial, or any title other than that which had been passed upon in the former trial."

We are fully satisfied from the article 2265, and the cases cited from the Louisiana courts, and from the English and American reports, that the objection of *res judicata*, as made against the recovery of the complainant in this case, is without any foundation in law.

We have now reached the last and most important objection made against the complainant's recovery. But before discussing it directly, we must dispose of the ecclesiastical record, which was much relied upon in the argument to repel the evidence of her legitimacy, and to establish the fact that the marriage between her father and mother was unlawful, from her having been then the lawful wife of Jerome Des Grange; in other words, that Des Grange did not commit bigamy when he married her, by which she was not released from her conjugal relations with him, and had not the right to marry any other man who was free to contract marriage.

We have seen that exceptions were taken to the admissibility of that record as evidence when it was first presented by the defendant's counsel in the case before the Circuit Court. They were renewed upon the appeal here. They were continued when the defendants introduced it again into this case, and it is necessarily before us to be determined as a question of law, whatever may have been thought of it heretofore, either by judges or by counsel.

Our first remark concerning it is, admitting that the canon law, as sanctioned by the church of Rome, was in force in Louisiana at the time of this procedure, it was a mere assumption, without authority in its beginning, tyrannous against the object of it, and irregular in its action. It was a nullity, *coram non judice*, before the canon who issued it. The presbyter canon who assumed to do so was not vicar general or governor of the bishoprick of Louisiana and the two Floridas. He was only the presbyter canon of a vacant see, without delegation by commission or deputation from a bishop to represent him in his spiritual offices and powers. He had no canonical power

in his pastoral charge of a particular church and congregation to originate a prosecution for bigamy. Nor would either archbishop or bishop, had there been either then in Louisiana, have ventured to do so in the condition at that time of the ecclesiastical practice and royal ordinances of Spain, especially in their application to its foreign possessions. And such a procedure was a direct violation of the Instituciones de derecho canonico Americano por El Rev. Sr. D. Justo Donoso.

The inquisition, as it had existed for more than a hundred years in France and Italy, was introduced into Spain by Gregory IX, about the middle of the 13th century. It encountered no opposition there. It at first attained a prevalence and extension of power larger than it had exercised before, and was on the increase when Spain became an united kingdom under Ferdinand and Isabella. They were authorized by the bull of Sextus IV to establish the inquisition in their States. And then it was invested with jurisdiction of heresies of all kinds, and also of sorcery, Judaism, Mahomedanism, offences against nature, and polygamy, with power to punish them, from temporary confinement and severe penances to the san benito and the auto de fé. Before that time the inquisition had exercised a capricious jurisdiction, both as to persons and creeds. Encyclopædia Britannica, 8 edition, 11 vol., art. Inqui., page 386. In its new form it met with opposition. Attempts were made in Castile and Arragon to repulse its authority and to restrain the holy office, as it encroached upon government and deprived the people of many of their ancient rights and privileges. Its power, however, became triumphant, and so aggressive upon the royal authority that it was resisted by the Kings of Spain, as well in the kingdom as in its foreign possessions.

It cannot be expected that we shall enter chronologically into such a detail. We will verify what has just been said by distinct citations from the laws of Spain and royal ordinances.

The first of these ordinances which we shall cite is that of Charles I of Spain, (5 of Germany,) issued at Madrid on the 21st September, 1530; Leyes de Indias, tom. 1, livre 1, titulo 10, page 48.

Charles had been about twelve years in Spain The mines

of the West had begun to throw their treasures into Spain. They were essential to the accomplishment of the political and military designs of the King, and to his necessities also. Complaints were constantly being made of the rigors of the inquisition upon the Indians in his western dominions, and upon his subjects who had emigrated to them in large numbers in pursuit of gold. It was said but for such causes that the yield of gold would have been larger. The King determined to restrain the holy office in its jurisdiction, and issued his decree of September 21, 1530. We give Judge Foulhouse's translation of it: "We order the attorneys, police officers, sheriffs, and other ministerial officers *of the prelates and ecclesiastical judges of our West Indies, islands, and continents along the ocean,* not to arrest any layman, or issue any execution against him or his property, for any reason whatever; and we order all clerks and notaries not to sign, seal, or take any deposition with regard to the same, or for any reason thereto relating; and whenever ecclesiastical judges shall judge necessary to have a person imprisoned or an execution issued, they shall pray for the royal aid of our secular justices, who shall grant it according to law. And all vicars and ecclesiastical judges shall observe this order and comply with it, as is prescribed by this law, under penalty of losing the status and privileges which they enjoy in the Indies, and of being there held as foreigners and strangers to the same. And any of said attorneys, police officers, sheriffs, clerks, and notaries, and any other who do the contrary, shall be forever exiled from all of our Indies, and all of their goods shall be confiscated for the profit of our royal treasures; and we hereby direct and empower all of our justices, and all of our subjects and settlers, not to consent thereto, and let the attorneys or executing officers do so, too; and we order that this ordinance be observed, any contrary custom notwithstanding."

The ordinance of Charles was followed by another of his son, Philip 2, which declared, "that whenever in our royal courts of the Indies the aid of the secular arm shall be asked by the prelates and ecclesiastical judges, either for an arrest or for execution, the demand shall be by petition, and not by

requisition." These royal ordinances will be found in the recopilacion in the Indies. They were declared by a law of Don Carlos 2, one hundred and thirty years after they were promulgated, to be existing laws, on the 18th May, 1680. See the law to that effect preceding the Titulo Primero in Libro Primero, fo. 1, Recopilacion Leyes de Indies. They have had their places in every edition of the recopilacion since. Indeed, they were never abrogated, and were in practical operation in all of the dominions of Spain in America until she lost them.

They establish satisfactorily that the presbyter canon, Hasset, when he issued his prosecution against Jerome Des Grange for bigamy and imprisoned him, that he did so contrary to law, and that his whole proceeding in the matter was a nullity, and, as such, inadmissible as record evidence in a secular or ecclesiastical court. Recopilacion de leyes de los reynos de las Indies; En Madrid, por Andres, Ortega, ano. de 1774; Tercera Edicion, page 48.

But there are other royal ordinances establishing what has just been said in respect to the nullity of that procedure, because they bear directly upon the incapacity of the ecclesiastical power to originate a prosecution for bigamy.

The first of them which we shall cite is a cedule of March 19, 1754, in which it was declared that polygamy was a crime of a mixed nature, in which the royal tribunals may take cognizance in the first instance, with this qualification, that if the inquisition wishes to punish the accused for suspicion of heresy, he shall be remitted to it after having suffered the legal penalties. Leyes de Indies, c. 1, tit. 19, not. 2.

But this cedule was modified in 1761 by Charles 3, leaving to the inquisition cognizance of this crime, and reserving only to the secular courts the power to take informations, and to arrest the accused in order to deliver him to the inquisition. This concession was made by the King, who ascended the throne at a period peculiarly critical, requiring the conciliation of every agency in his new kingdom to meet the pressure of political difficulties, and to allay discontents and suspicions against himself, which subsequently became a revolt. He was

charged with being opposed to the inquisition, from having been on the throne of Naples for several years, where it had never been introduced, the people having always resisted its establishment over them.

But the prudence of the King did not restrain the inquisition from the assertion of its jurisdiction in that and in other particulars offensively to the ancient usages and rights of Spain. In its eagerness to extend its power, it invaded the royal authority, and stretched its jurisdiction to every cause in the slightest degree connected with ecclesiastical discipline or punishment. The King resisted it, and he was soon furnished with a cause for doing so. The inquisition having taken from the auditor of the army a process instituted against an old veteran who was accused of bigamy, the jealousy which the King in fact entertained against the inquisition was revived. His vigilant minister, d'Aranda, used it to obtain a royal decree, ordering the process against bigamy to be restored to the civil or secular courts. It also enjoined upon the inquisition to abstain from interfering with the proceedings of the secular courts; required it to confine itself to its proper functions in the prosecution of apostacy and heresy; forbade it to "defame with imprisonment his vassals before they were *previously and publicly convicted*," and commands the inquisitor general to require the inquisitors to observe the laws of the kingdom in cases of that kind; and further, all the King's royal tribunals, judges, and justices, were ordered to keep and obey the decree, and to punish those who should violate it in any manner whatever. This was the decree of Charles 3, of the fifth of February, 1770, cited by Judge Foulhouse in his opinion upon the nullity of the proceedings against Jerome Des Grange, by the assumption of the presbyter canon, Hasset, of the Cathedral church of New Orleans. For the royal decree of the 5th February, 1770, see original, the Novissima Recopilacion, vol. 5, p. 425; Coxe's Memoirs of the Kings of Spain, 3 vol., ch. 57, page 367.

Thus stood the jurisdiction of the inquisition in respect to the crime of bigamy restrained by royal authority for six years. Complaints were then made of the uncertainty of the royal

cedule of the 5th February, 1770, especially in respect to the extent of its interference with the power of the holy office to inquire for discipline and for punishment into cases of polygamy. The King was induced to call a toro or council, to discuss the different relations and boundaries between the secular and ecclesiastical cognizances of the crime of bigamy. The result of that council was communicated to the King on the 6th September, 1777. It was that a majority of it had come to a conclusion, that by the act of marrying a second time whilst the first wife was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession, and of the legitimacy established by the laws, *inasmuch as his fraud makes the children of the second matrimony, though truly adulterine, legitimate, and capable to inherit from their parents* on account of the good faith of their mother in contracting that marriage; further, that the kingdoms of Spain assembled in Cortes had established penalties against the crime of bigamy, commanding that they should be imposed by the royal courts, and declaring that they should not be embarrassed in their cognizance of the offence; also, that he who marries a second time, his first wife being living, offends the ordinary jurisdiction in maliciously deceiving the curate to assist at a null marriage, and that on that account there is ecclesiastical jurisdiction to inquire into the validity or nullity of marriages; but that it was to be done without embarrassing the royal courts in their cognizance of the offence. It was then said that such persons may also incur the crime of a false profession of the sacraments, which was exclusively within the jurisdiction of the holy office; which was, however, to be exercised reciprocally by it and the secular courts, to prevent the repetition of the offence by the imposition of penalties which belong to each, and by the delivery of prisoners from one to the other to be tried. Upon the foregoing report being made to the King, he gave a royal order to be communicated to the inquisitor general, that by his cedule of the 5th February, 1770, the holy office was not impeded in the cognizance of the crimes of heresy and apostacy, and of persons declared subject to

suspicion of bad conscience by the violation of apostolic bulls which had been received and enforced in Spain with royal consent, in those cases in which the jurisdiction of them was in the holy office. This royal resolution was followed by another decree, remitted to the Alcaldro and to the chancery and audiences of the kingdom on the 20th February, 1782. Novissima Recopilacion, page 425 of vol. 5, Ley., 10; Note 1, Tercera Edicion, Madrid, por Andres, Ortega, 1774.

The result of the council, however, of which we have just given the particulars, did not satisfy the grand inquisitor. Attempts were made to reassert his assumed jurisdiction in all its plenitude, both in Spain and its foreign dominions. The holy office was on its decline. This was its last great struggle for existence. The King had long resided in Naples, where the inquisition was regarded with the same horror as among Protestants. Though partaking of the same feeling, he was too prudent to trample on the prejudices and opinions of his Spanish subjects, or to make a direct attack against that great engine of ecclesiastical authority. He had witnessed the danger of precipitate reforms and of shocking national prejudices in matters however beneficial. He adopted in his long reign the only maxim which could be pursued with safety, and perhaps the only means to produce the intended effect. He endeavored to check the oppressions, to soften the rigors, and to circumscribe the authority of the inquisition, and thus prepared the way for time and circumstances to produce its total abolition. In the pursuit of this design he was seconded by the energy and liberal principles of his minister, Florida Blanca. The principal restrictions of de Aranda were gradually revived; and in 1784 the celebrated decree was issued, which partially subjected the proceedings of the holy office to the cognizance of the Sovereign. It was ordered that no grandee, minister, or any person in civil or military service of the Crown, should be subjected to a process without the approbation of the King. Thenceforth this formidable tribunal became feeble in its operations, and was suffered only to give such displays of its authority as were calculated to weaken the public veneration. Coxe's Memoirs of the Kings of Spain, vol. 3,

pages 526, 527, &c. Under the reign of the son of Charles, the Prince of Asturias, his successor in Spain and the Indies, "the inquisition received a still heavier shock, and before the late revolution it had become a mere tribunal of police, to arrest the progress of political, rather than of religious heresy." It was finally abolished in Spain in 1808.

It appears, then, from the royal ordinances which have been cited, that from the time of the introduction of the inquisition into Spain the extent and manner for the exercise of its jurisdiction were subject to the regulations of royal ordinances; that it had been so restrained in polygamous cases, its jurisdiction in them having been confined to inquiries connected with the validity or nullity of marriages, and to the infliction of penances for the violation of the ecclesiastical law in respect to them. It had not the power to initiate a process in a case of bigamy for the punishment of it but in subjection to the royal ordinances, or to institute in the Indies, after those ordinances were passed, an inquisitorial tribunal concerning it before the accused had been convicted in the secular courts.

Such was the law of Spain in respect to prosecution for bigamy, and the sunken condition of the inquisition, when no ecclesiastic, however high may have been his dignity, would have ventured to make such a decree as was issued by the presbyter canon of the Cathedral church of New Orleans against Jerome Des Grange for bigamy. It had all the form and more than the vigor of the holy office. It was entitled "Criminal proceedings instituted against Geronimo Des Grange for bigamy by the Vicar General and Governor of the Bishoprick of this Province, and attested by the notary, Franco Bermudez." The canon subsequently styles himself canonical presbyter of this Holy Cathedral church, which he was; but adds that he was Provisory Vicar General and Governor of the Bishoprick of the Province, which he was not. This assumption was either ignorance, or was intended to give consideration to himself or to the prosecution. He was neither Provisor nor Vicar General. For the manner in which those functions were deputed by the bishop, we refer to the 3d volume of the Instituciones de Derecho Canonico Americano;

Appendice Primero, pages 394, 395, 396, 398. The decree purports to have been issued on the 4th of September, 1802. It begins by saying that it had been publicly stated in this city that Geronimo Des Grange, who had been married in 1794 to Maria Julia Carriere, was at that time married before the Church to Barbara Jeanbelle, and is so now, who has just arrived; and also, that Des Grange, having just arrived from France a few months since, has caused another woman to come here, whose name will be obtained. It is also reported in all the city, publicly and notoriously, that Des Grange has three wives, and not being able to keep it a secret, &c., &c., his excellency has ordered, in order to proceed in the investigation and the infliction of the corresponding penalty, that testimony be produced to substantiate his being a single man, which Des Grange presented in order to consummate the marriage, and that all should appear who can give any information in the matter, &c., &c. And as it has been ascertained that Des Grange is about to leave the city with the last of his three wives, let him be placed in the public prison during these proceedings, with the aid of one of the alcaldes, this decree serving as an order, which his excellency has approved, and as such it is signed by me, notary. Before me,

FRANCO BERMUDEZ.

(Signed,) THOMAS HASSETT.

It is not necessary to cite any of the proceedings upon that paper, or to speak of the frequently-occurring notarial certificates of Francisco Bermudez. The whole of it, however, shows that what was done was so under his contrivance and auspices. The canon, Hassett, is made to begin as an ecclesiastic in authority, and signs the decree, but places the execution of it and the imprisonment of Des Grange upon an order of his excellency. It is twice referred to in the paper as a part of it. It should have been produced with the other proceedings. Without that being done, no part of it can be received in evidence as the record of an authentic judicial tribunal. The whole paper is a novelty in the proceeding of an ecclesiastical court. His excellency means the chief alcalde of the city, who had no legal authority under the law of Spain to sanction such

a prosecution, or to order the execution of it, either by the introduction of testimony or the imprisonment of the accused. The paper signed by Franco Cassiergues is insufficient for that purpose.

The procedure of the holy office in such cases will be found in the article Inquisition, in the 8th edition of the Encyclopædia Britannica, volume 12, page 389. It establishes the fact that the canon, Hassett, and Bermudez, intended to proceed against Des Grange according to the forms of the holy office, and that at a time when its functions in such particulars had ceased in Spain and in the Indies. Those who are curious may also find directions for such a procedure in Burns's Ecclesiastical Law, and in Ougton's Ordo Judiciorum sive Methodus Procedendo in Negotiis et Litibus in foro Ecclesiastico Civili Britannico et Hibernico, 2d volume. Mr. Bentham, also, in his Rationale of Judicial Evidence, specially applied to English practice, volume 2, book 3, chapter 17, pages 380 to 403, exposes with cogent reasoning and admirable satire the artifices of the early English ecclesiastics, and their success in getting up a similar initiation of a prosecution in contravention of English statutes.

Before leaving the paper we have been examining, it is proper for us to allude to the testimony of Judge Foulhouse given in this case, and to his opinion given afterwards in confirmation of its invalidity.

When he was examined as a witness, it was distinctly understood between the parties, and agreed to, that the defendants might make a motion to suppress his testimony. That was not done. We cannot infer from it that the counsel of the defendants acquiesced in the witness's conclusion that the paper from the Cathedral church was inadmissible as evidence, but it is certainly good cause for the reliance placed by counsel in their argument of the cause upon the learned judge's declarations, and his support of them by his researches. He cites from the Partida, 7 tit., law 16; Novissima Recopilacion, book 12, tit. 28, law 16; Novissima R., book 12, tit. 28, law 10; the last being the cedule of Charles 3 in a case of imputed bigamy, ordering the inquisitor general to direct the inquisitors to take cognizance of the crimes of heresy and apostacy,

bigamy being considered by the canon law as a kind of heresy, without assuming to do so "*by defaming the accused with imprisonment* before they had been previously and publicly convicted."

For the reasons given, supported by the royal ordinances of Spain, we have been brought to the conclusion that the paper from the Cathedral church of New Orleans, introduced by the defendants as a part of their evidence in this case, is inadmissible as such, and that all which it contains must be disregarded by us in the judgment we shall give.

We finally remark, that our extended examination of that paper has not been made because of its essential bearing upon the merits of the case of the complainant. It was to disabuse the record of what did not legally belong to it, and to correct misapprehensions which might arise unless its character and import had been legally shown. Give to it, however, the fullest credence, and it will be seen that it can have no effect upon the law of adulterine bastardy, upon which this case must be decided, which we are now to consider.

This brings us to the chief objection which was made in the argument, and most relied upon to defeat the recovery of the complainant. It is that her status of adulterine illegitimacy incapacitates her from taking as legatee under the olographic will of her father, though admitted to probate, as it has been, by the Supreme Court of Louisiana.

It is an averment of the defendant in his answer to the complainant's bill, but not in response to any allegation in it. It changes the attitude of the litigants from what it was in the case of Gaines *v.* Relf and Chew, in 12 Howard. Then Mrs. Gaines had the burden of proof to establish affirmatively the fact, that she was the forced heir of her father, and the donee of her mother, his widow. This court at that time did not think that had been satisfactorily done, and dismissed her suit, without affirming for or against the factum of marriage between her father and mother. Indeed, such a point could not have been made, or be supposed to have been intended to be decided by the court in the case then in hand, without expressly overruling its decision in 6th Howard, that there had

been a lawful marriage between Daniel Clark and Zulime Carriere, her father and mother, and that Mrs. Gaines was their lawful child. To get rid of the force and effect of that decision, the defendants, having only charged before that she was the offspring of an illicit intercourse between her father and mother, invoked the church papers of which we have spoken so much, in the hope of establishing from it that she was an adulterous bastard. And again, with the aid of that which is not evidence in the case, *and with much that is so*, they now rely to establish that charge. Mrs. Gaines meets the charge with new evidence, relying upon the old also, and with the declaration of her father in his last will, that "I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies, hereinafter named." And with this presentation of herself, of which she had never had the proof before, asked that the case might be judged according to the evidence *and the laws applicable to it.* What that proof is will be arrayed hereafter in its proper place. Now, we only remark that the burden of proof is upon the defendant, and that the law applicable to such a declaration in a will, concerning a child, requires that there shall be full proof to the contrary of it, and will not be satisfied with *semi plena probatio.*

But the law regulating the sufficiency of proof for the disaffirmance of such a declaration in a will cannot be fully understood and appreciated, unless our recollection shall be revived of the differences made by the ecclesiastical law and that of Louisiana as to the kinds of illegitimacy, and the disabilities and privileges attending them. In fact and in law they differ. The rights and capacities of illegitimates depend upon the distinctions being preserved.

If one be a bastard, from having been born, as the Code expresses it in article 27, of an illicit connection, though they cannot claim the rights of legitimate children, yet, if they have been duly acknowledged by their fathers and mothers, *leaving*

no lawful children or descendants, they, as natural children, will be called to the legal estate or succession of *the mother*, to the exclusion of her father and mother, and other ascendants and collaterals of lawful kindred. And in the case of their father's succession or estate, they may be called to the inheritance of it when he has acknowledged them, and has left no descendants, no ascendant, no collateral relations nor surviving wife, and to the exclusion only of the State. But though natural children, and known to be so, they can take by testament or will from their father, if born before their father's will were made. And here we have the reason, in the differences of their right of succession to their fathers and mothers, why Clark made his olographic will in favor of his legitimate daughter Myra; fearing from the claudestinity of his marriage, and other circumstances attending it, that her legitimacy would be denied, notwithstanding his habitual and daily acknowledgment of it, unless it was proclaimed and avowed in his will. They take or inherit by wills of their fathers, if born before the wills were made. As of a devise that B shall stand seized of land to the use of Jane, his daughter. This would be a good devise to her, if she were reputed to be so, though she were a bastard, and not so called in the will. Dyer, 323, pl. 29; S. C. Jenk, p. 239; 41 E., 3—13. But this does not extend to a bastard born after will made. Sid., 149; 39 E., 3—24; 3 Leon, 48. Rivers's case, 1 Atk., 410. Hardin *v.* Stardin, 2 Ves. Jun., 589. 2 Blood *v.* Edwards; Cro. Eliz., 509, 510. Coke Litt., 123, B. Ex parte Wallop, 4 Brown C. C., 90. Kinnel and Abbott, 4 Vesey, 502.

A bastard in *esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate. The only question in such a case is, whether, when in *esse*, the bastard is sufficiently designated as the object of the bequest. Gordon *v.* Gordon, 1 Merivale, 141. Bayley *v.* Snelham, Sim. and Stu., 78. 2 Powel on Devises, by Jarman, p. 260. Co. Litt., 3—6, and note 1. Dyer, 313. Noy, 35. Park, 26. 3 Leon, 48—49. But we ought to mention in this connection whether a gift can be made to a bastard not procreated is vexata questio. The early authorities certainly lean to the negative. The

reason assigned is, "that the law does not favor such a generation, nor except that such shall be." Bloodwell and Edwards, Cro. Eliz., 509. Co. Litt., 3—6.

So that we see by the foregoing authorities, had it been proved in this case, or in any of the cases which the complainant has brought for her rights in her father's estate, that she was the offspring of an illicit intercourse, which we affirm it never has been, she would now be in the condition, from her father's testamentary declaration of her legitimacy, to take as his universal legatee. And if the case was made to turn upon that now, the complainant would be entitled to a decree; but it does not.

It is said, as an adulterous bastard, produced by an unlawful connection between two persons, who at the time when the child was conceived were either of them or both connected by marriage with some other person, the complainant cannot take under the olographic will of her father, because the Code forbids it. The articles 217, 222, do forbid the legitimation or acknowledgment by their fathers and mothers of adulterine children. The article, 914, does say that in no case can adulterine children inherit the estates of their fathers and mothers—that is, as acknowledged natural children may do, by the articles 912 and 913 of the Code. And it is declared by the 1475 article of the Code, "that natural fathers and mothers can in no case dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or possession by which to support themselves." This is the prohibition upon which the defendants rely to defeat the complainant.

The application of it, however, to the case in hand, was not as fully considered by the learned counsel for the defendant as it might have been. We will make it, with a decided Louisiana case for everything that shall be said, and by authorities for every general proposition cited, akin to the subject-matter.

The article containing the prohibition necessarily intends that the relation of the parties shall be such as it mentions, before it can have an effect upon either of them.

Now, we say, first, that the legal relations of adulterous bastardy do not arise in this case; for, independently of the declaration of the will, that the complainant is the legitimate child of Daniel Clark, this court having decided in 6th Howard that the marriage of Clark to Zulime was valid by reason of the invalidity of her previous marriage with Jerome Des Grange, that of course makes the complainant legitimate. But if it be assumed, as it was in the argument, that by the decision in 12 Howard, the marriage of Clark to Zulime was invalid on account of the validity of her marriage with Des Grange, then still Myra is legitimate *by the law*, as the offspring of a *putative marriage.*

The cases from the Louisiana Reports are conclusive. The articles in the old Code, 119, 120, are to this effect, that if both parents, or either of them, contracted the second marriage *in good faith, the issue of it will be legitimate.* So it was ruled in the case of Clendening *v.* Clendening, (3 New Series, 438.) The language of that case is, "that the plaintiff resists the claim on the succession of his father by a woman he married in the lifetime of his wife, the plaintiff's mother, and of the children, if born of that woman. The defendants contend that notwithstanding the plaintiff's father had a lawful wife at the time of his second marriage, that as the woman he last married was in good faith at the time of the marriage, and ever since, at least till after the birth of the last child she had by him, her marriage has its civil effects; and that she and her children, the present defendants, are entitled to all the advantages the law gives to a lawful wife and children. There seems to be no dispute on the question of law. The woman who was deceived by a man who represents himself single, and the children begot while the deception lasted, are bona fide wife and children, and as such are entitled to all the rights of a legitimate wife and issue." The plaintiff then urged, that four of the children were born after the good faith of the woman ceased, as she had been advised of the illegality of her marriage by a communication made to her that her husband had another wife living in Tennessee. The court, however, said the proof of this knowledge was insufficient to deprive herself

and her children of their rights, though one witness swore he communicated that fact to her.

The next case came up before the new court organized in Louisiana under the constitution of 1845. It is that of Patton *v.* the Cities of Philadelphia and New Orleans. 1 Ann., 100. The facts were, that in 1799 A. Morehouse married Abigail Townes in the State of New York, and had two children by her. He subsequently came to the Spanish colony of Louisiana, and gave out that he was a widower, and married Elenore Hook. In the act of marriage, he declared himself the widower of Abigail Townes. By the second wife he had children, and both wives survived him. It was said, "the decision of the late Supreme Court in the case of Clendening *v.* Clendening et al., 3 M. N. S., 438, in relation to the good faith of the second wife, is a correct application of the Spanish law, which regulated the subject-matter at the time of the marriage of the plaintiff's ancestor. By the law, 1 title, 13, part 4, it is ordained, that if, after both parties know with certainty the existence of the impediment to the marriage, they beget children, these children will not be legitimate; yet if, during the existence of such impediment, and while *one or both of them* was ignorant of it, they should be accused before the judges of Holy Church, and before the impediment, as proved in the sentence pronounced, they should have children, those begotten during the existence of the doubt will all be legitimate. We agree with the plaintiff's counsel, that the second wife, and all the children conceived during her good faith, have all the rights which a lawful marriage gives." In this case, also, it was said that the second wife was informed of the existence of her husband's first wife; "but the court answered, the evidence establishes nothing more than the existence of a doubt."

We now give the case of Olive Abston et al. *v.* Rebecca Abston et al., decided in 1860, by the Supreme Court of Louisiana. Its ruling is coincident with the two previous cases cited, upon a statement of facts concurring with them, but more particular in detail.

Olive Abston sued to have herself recognised as the lawful

surviving wife of John Abston, deceased, late of the parish of Carroll, claiming she was entitled to a portion of the property of his succession. Her son, John N. Abston, the issue of her marriage with John Abston, deceased, joined in the action, for the purpose of having himself recognised as the legitimate son and lawful heir to the estate of his deceased father. John N. Abston is the exact case of Mrs. Gaines. The suit is against Rebecca Wright, the third wife of John Abston, deceased, and *the administrator of his succession or estate.* He intervened in his capacity of tutor of Nancy Nix Abston, the minor child of the defendant, the issue of her marriage with the deceased, claiming in behalf of the minor the rights of legitimate and forced heir in the succession of John Abston, her father. Rebecca Wright pleads in general denial, and avers that she was lawfully married to John Abston, deceased, in Warren county, in the State of Mississippi, and that if the plaintiff's alleged prior marriage was ever consecrated, it was unknown to her, and to all other persons residing in the State of Mississippi. She filed, also, a supplemental answer, averring that her husband, John Abston, had made in the State of Mississippi his will, leaving to her his whole estate, after the payment of his debts, and that the will had been admitted to probate in the parish of Carroll, in Louisiana.

The facts of the case were these: John Abston married with Olive Hart, his first wife, and plaintiff in this suit, in the State of Alabama. John N. Abston, the co-plaintiff in the suit, and other children, were the issue of that marriage. John Abston abandoned his family in the State of Alabama without having been divorced, *a vinculo matrimonii*, from his first wife, contracted a second marriage with one Susan Bell, and she died. After her death, and being still undivorced from his first wife, he intermarried in Mississippi with Rebecca Wright. In a short time after this last marriage he removed from Mississippi into Carroll county, in the State of Louisiana, where he acquired a new domicil, and where he died, in which was situated the whole property of his succession, moveable and immoveable, at the time of his death.

This narrative, and the relations as they have been given

of the parties to the suit, raised two questions, which it became necessary for the court to decide before it gave its opinion upon the question of the legitimacy of the two sets of children of John Abston, the bigamist, and father of them, and the rights of his two wives in his estate: First, as to the effect of the probate of the will, it being contended, as that had been done by a court of competent jurisdiction, that it could not be questioned collaterally, nor its validity be inquired into in the suit. The court declared that the decree of a probate court ordering a will to be executed does not amount to a judgment binding on those who are not concerned in it, and that when the will is offered as the title in virtue of which property is claimed or withheld, that its validity may be inquired into. Sophie *v.* Duplessies, 2 Annual, 724; Succession of Dupuy, 4 Annual, 570. The other question raised was, whether the rights of the parties in the suit should be determined by the law of Mississippi, where the marriage of the defendant and the deceased had been contracted, or by the law of Louisiana, where John Abston had his domicil at the time of his death, where his succession was opened, and where all his property was situated. The answer to that question was, that the laws of Louisiana which regulate the right of succession make no distinction between persons who have contracted marriage in or out of the State, nor the issue of such marriages, whether born in or out of the State. If they have the qualities required by the law in matters of inheritance, they will be recognised as legal heirs without regard to the places of marriage or birth.

The court, then, with a proper regard to the fact that the will which had been made by John Abston *was invalid on account of its not having been attested by three witnesses, and that the succession was an intestacy*, determines that it could not be regulated by the law of Mississippi, as the plaintiff contended it should be, the basis of which is the common law, but that it must be by the law of Louisiana. We prefer to cite its own language as to the similitude and the differences between them: "The prior marriage of the deceased with the plaintiff, which remained undissolved, was a legal disability under the

common law, which made the marriage with the defendant, Rebecca Wright, not merely voidable, but void *ab initio*, and made their issue illegitimate, and incapable of succeeding by inheritance to the estate of any one. By the law of this State, the disability of a prior marriage undissolved also renders the second marriage null and void; *but the legal consequences of a marriage void* ab initio *under our law are very different from those under the common law.* The Civil Code declares, that "the marriage which has been null nevertheless has its civil effects in respect to the parties and their children, *if it has been contracted in good faith. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.*" "In two cases, somewhat similar to the present, it has been held that each wife was entitled at the death of the husband to one-half, as the community property, after the payment of debts; and this rule will govern our decision in this case." Patton *v.* Philadelphia, 1 Annual, 98; Hubbett *v.* Inksleon, 7 Annual, 25. The mandate of the court was accordingly given, with this further decree, that John N. Abston, the co-plaintiff, and that *Nancy Nix Abston, the minor, represented by the intervenor*, are entitled as heirs-at-law to the separate property or estate of their deceased father, John Abston, and the costs of the appeal were directed to be paid; one-half by the plaintiff, Oliver Abston, and the other half by Rebecca Wright, the defendant.

But in further confirmation of what has been the Spanish law, and, of course, that of Louisiana, in legitimating the children of those who marry in good faith, believing upon good ground that there was not a precedent marriage to prevent it, we cite from the Novissima Recopilacion, 5 vol., 425, N. Ley., 10, what was said in the Council allowed to be held by Charles 3, King of Spain, in the year 1777, for the purpose of giving to the Inquisitor General a better understanding than he professed to have concerning the King's royal ordinance of 1770, concerning the jurisdiction of the holy office in bigamy and polygamous cases generally.

The result of that Council, and so recognised by the King, was: "That by the act of marrying a second time, whilst the

first wife was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession and of the legitimacy established by the laws, inasmuch as his fraud makes the children of the second marriage, *though truly adulterine, legitimate, and capable to inherit from their parents on account of the good faith of their mother in contracting that marriage.*"

To the same effect is the Code Napoleon. C. Cer., art. 201, 202. The law of France was so before the Code. Pothier, Contrat du Mariage, vol. 3, pp. 172, 107; Toullier, tome 1, 598; Marcadi Explication du Code, tome 1, 520; Law of Spain, Partida, 4 Lex, tit. 13, v. 1; Dalton's Dic., tome 2, 372; Tit. Mariage, 372.

Thus we see, though a child may be adulterine in fact, it may be legitimate for all the purposes of inheriting from its parents, if one or either of them intermarried in good faith.

Such is the law for others in Louisiana, and it must be administered accordingly for the complainant, if she stands in the position, by the evidence which the law requires and has determined to be sufficient to establish a marriage *in good faith* between her father and mother, *or as to either of them*, to entitle her to inherit from either or both of them *as legitimate by the law.*

On such a question good faith is first to be presumed. Marcadi Explication, tom. 1, pp. 522, 698. As to what constitutes good faith, it is adjudged that to marry a second time, supposing the previous marriage invalid, is one of the cases of good faith. Dalton's Dic., tom. 2, p. 371; Tit. Spain, No. 578. The two last citations have been given to show the inaccuracy of the conclusion of the learned counsel of defendant, that if the invalidity of the marriage between Des Grange and the complainant's mother was not proved, that she was necessarily an adulterine illegitimate.

She was heir-at-law if procreated by Clark in good faith, or if conceived by her mother in good faith—that is, she supposing her capacity to become the wife of the former.

Nor was a sentence of the nullity of the marriage between Des Grange and the complainant's mother necessary to pro-

tect the legitimacy of the offspring. Marcadi Explication, tome 1, p. 495; Ibid, p. 519; 2 Phillemore's Reports, 19; Shelford on Marriage, Law Library, vol. 31, p. 275.

The good faith of Clark and Zulime is proved by the evidence of Madame Despau (Old Rec., 580) and Madame Calliant, (Old Rec., 309,) and by the contemporaneous facts relating to the marriage, as well as by the testimony of Caviliere (Old Rec., 546) as to the bigamy of Des Grange, by the testimony of Bellechasse, by that of Madame Benguerel. Old Rec., p. 349. The good faith of Clark in marrying is proved by his own declarations in the last years of his life. By Bellechasse's testimony, Probate Record, 173, Boisfontaine, Ibid, 162, Mrs. Smyth's, Ibid, 152. Again: the good faith of the marriage is proved by the authentic declaration of Clark in his will that the complainant was his legitimate daughter and only child. See, also, the opinion of the Supreme Court of Louisiana, Charles Succession, 11 Annual Reports.

But we now say, if we are to consider the question of adulterine bastardy to be properly before us in this case, it cannot affect the rights of the complainant under the will of Clark of 1813. If the complainant, by reason of the matrimonial character of her mother, shall be deemed adulterine on that side, she is not so on the side of her father, he having been as a single man free to marry; and if he did marry in good faith, she is not incapacitated, as respects him, to be, under his will, his universal legatee. Journal Du Palais, vol. 60, p. 45, January 7, 1852.

There is no pretence that Clark was incapable to contract marriage; and it matters not whether, as to the mother of the complainant, any impediment existed under the Spanish law; the complainant stands as the declared issue of her father by a woman to whom he supposed himself lawfully married. Not only the bill itself, but the evidence upon which it is established, shows that Daniel Clark had no other legitimate issue. No one exists who has any right to contest his acknowledgment of the legitimacy of his child, or to set up the adulterous source of her origin. See C. N., art. 335, 2 Marcadi, pp. 51, 31, 52, Nos. 60, 61, 62; Journal du Palais, vol. 60, p. 45; Jo-

bert et al. *v.* Pitot ex'ors, 4 Annual, 305; Judge Foulhouse's Opin., 57, 58; 2 Toulliers, 960.

The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration. Matthews on Pres. Ev., pp. 284, 286; Gaines *v.* Chew, 12 Howard, 593; Miller *v.* Andrews, 2 Louisiana Annual, 767; Jarman on Wills, vol. 1, p. 188; 5th Phillip's Note, 284, 287. And authorities cited. 1 Greenl. Ev., 134. And we now cite, in confirmation of all that has been said upon this point, the 117 Nouvelle of Justinian. It gives the rule of evidence in such cases, and it prevails in every ecclesiastical court in Europe, where the Roman law is the basis of its jurisprudence, in respect to the legitimacy of persons. It is also, in cases of that kind, the law of Louisiana.

We give it in the original Latin: "Ad hoc autem et illud sancire perspeximus, ut si quis filium aut filiam habens de libera muliere cum qua nuptiæ consistere possunt, dicat in instrumento, sive publica, sive manu conscripto et habente subscriptionem trium testium fide dignorum, sive in testamento, sive in gestis monumentorum, hunc aut hanc filium suum esse, *et non adjecerit naturalem, hujusmodi filios, esse legitimos, et nullam aliam probationem ab iis quæri*, sed omni frui eos ure quod legitimis filii nostræ conferunt leges." Translation: "We have determined to ordain, that if any one having a son or daughter of a free woman, with whom he might have been married, shall say in a written act, either before a public officer or under his own hand, sustained by three credible witnesses, *or in his last will*, or in public acts, that this son or this daughter is his child, and that he does not call them natural children, they shall be *reputed legitimate*, and no other proof shall be demanded of them, and they shall enjoy the rights of legitimate children." This Nouvelle has been the subject of much criticism and learned interpretation by the most distinguished civilians. By no one more so than the Chancellor d'Aguesseau, in his declaration or ordinance of 1736, which had for its object, as he himself says, to explain and affirm the proofs of the legal condition of men. The declaration consists of forty-two articles. Several of them relate to the form in which baptismal

acts ought to be registered to give verity to legitimates; but whether they are so or not, this ordinance of Justinian secures to children legitimacy, if they shall be placed by their fathers or mothers within its predicament. And we may add, that the interpretation of it by all who have been skilled in the civil law is, that it attaches legitimacy to the son or daughter of a man and woman who are both free, but that it does not demand that the word legitimate should be applied to them to make them so. On the contrary, the Nouvelle means that if the child is not called a natural child, he is of right to be reputed legitimate, and the commentator's remark is: "Mark well, that this is not a Roman law made when paganism reigned in Rome, but a law made by a Christian Emperor." Merlin Repertoire de Jurisprudence, 17 vol.; Tit. Legitime, secs. 1 and 11, pp. 348, 349; Ed. Bruxelles, 1827; Question d'Etat; On la previe testimoniale ne ful point admise, tome 8; Causes Celebres Filiation Reclamée, Sans acte de baptime, sans une Veritable Possession d'Etat, sur le fondement de plusieurs forte consectures; tome 19, Causes Celebres, 204.

Such as we have stated it to be is the law relating to the children of a *putative* marriage, though it be adulterine in fact, if it was contracted in good faith by the parties, or by either of them. Their children are legitimated to inherit from their parents, either in a case of intestacy or to take by testament. In the latter, a declaration by either father or mother that they are their children, without the addition that they are natural children, will make them legitimate, and no other proof can be demanded of them to enable them to enjoy all the rights of legitimate children. But the case in hand is even stronger than that, for here the father in his will "acknowledges his beloved Myra to be his legitimate and only daughter," and makes her the universal legatee of his estate after the payment of certain legacies.

But the defendants aver that the connection between her father and mother was adulterine, even though they may have been married, and on that account that she is barred from taking as legatee under her father's will.

We will now give the proofs upon which they rely to sub-

stantiate their allegation, in connection with the voluntary rebutting testimony of the complainant, as we find it in the record.

The paper from the Cathedral church in New Orleans is first invoked by the defendants. Now, though that paper has been shown to be an unauthorized attempt by a canonical prebendary, without jurisdiction of any kind in such a matter, upon a public report, to try Des Grange for bigamy, for having three wives at the same time, and to make him answer by imprisonment, whether such an irresponsible accusation was true or not true, the defendants in our consideration of their averment shall have the full benefit of that paper as evidence, though we have declared it to be inadmissible as such.

Des Grange, it appears from the paper, was put in the public prison and kept there until the canon, Hassett, after having examined several witnesses, decreed: That not being able to prove the public report, he directed the proceeding to be suspended, to be resumed thereafter if it should become necessary, and that Des Grange should be set at large, on condition that he paid the costs. This he did, and fled from New Orleans, without ever having again any conjugal relations with the mother of the complainant, though as it will directly appear from the paper that he was indebted to her for his enlargement from the canon's usurped authority. Nor did Des Grange reappear in New Orleans until after the cession of Louisiana to the United States.

In the course of the proceedings against Des Grange, both himself and the complainant's mother were examined as witnesses. Both of them reply to questions concerning his bigamy in respect to his marriage in 1794 with her; acknowledge that they were aware of the report prevailing against him in that regard; and she says that about a year since (in 1801) it was stated in the city that her husband had been married at the North, and wishing to ascertain whether it was true or not, that she had gone to Philadelphia and New York, where she used every exertion to find out the truth of the report, and that she learned only that he had ccurted a woman, whose father not consenting to the match it did not take place, and

she married another man shortly afterwards; and she adds, that she had recently heard that her husband was married to three women, but she did not believe it, nor had she any doubt about the matter which rendered her unquiet or unhappy. All of this Des Grange confirms; for being asked why his wife, Maria Julia Carriere, went to the North last year, he answers: "That the principal reason was, that a report had been circulated in this city that he was married to another woman; she wished to ascertain whether it was true, and she went.

Thus the defendants, by the introduction of the paper from the Cathedral, show the existence and currency of the report of Des Grange's guilt of bigamy in marrying the mother of the complainant, and the aggravation of it in the public mind by the prosecution of him, and from the canon not having dismissed it altogether, but having retained it for further inquiry. Upon his enlargement, as has been proved by unimpeachable testimony, Des Grange fled.

Now, in this connection, it is appropriate to state the evidence which the law will receive and pronounce to be sufficient to determine that he did commit bigamy when he married the mother of the complainant. It so happens, excluding all admission of it to the family of the mother of the complainant, the fact is proved by a witness, the truthfulness of whose testimony has not been assailed, and could not have been.

Madame Benguerel has no connection with the family of the complainant, and her standing and character were such that the defendants could not impeach her credit by even an insinuation against either; but she was subjected to their cross-interrogation. It brought out neither difference nor contradiction of herself, nor was there anything in the way in which she gave her testimony to subject her to any suspicion of friendship to the complainant, or of any want of memory or uncertainty in her narrative.

Madame Benguerel says: "My husband and myself were very intimate with Des Grange, and when we reproached him for his baseness in imposing himself upon Zulime, he endeavored to excuse himself by saying, that at the time he married her he had abandoned his lawful wife, and never intended to

see her again." In answer to a cross-interrogatory put upon the point, she says: "I am not related to the defendants, nor with either of them, nor am I with the mother of Myra; nor am I at all interested in this suit." She adds: "It will be seen by my answers how I know the facts; I was well acquainted with Des Grange, and I know the lawful wife of Des Grange, who he married before imposing himself in marriage upon Zulime."

The paper then discloses the following facts: That Des Grange was notoriously charged with bigamy in marrying Zulime; that she left New Orleans "for the North" in 1801 to get proof of it; that he says that her principal reason for going was for that purpose; that he was prosecuted for bigamy by the canon in 1802, and was temporarily released from prison after Zulime had sworn that she did not believe the report about him. It is in proof, also, that he then fled from New Orleans, and did not return to it until the year 1805. Her interference or testimony before the canon negatives every suspicion that she had any agency in instigating the prosecution against him. His own oath upon the occasion confirms it, for he speaks of his wife being satisfied with his innocence, and there is not a word in the paper nor in any of the evidence to show that her friends had provoked or abetted in any way the public accusation of his bigamy. Nor is Clark, the father of the complainant, at all associated with that procedure. Indeed, he was in Europe at that time. With all these facts and obvious inferences from them, taken in connection with the testimony of Madame Benguerel, the only question concerning the bigamy of Des Grange in marrying the mother of the complainant when he did, is whether the law determines the evidence to be sufficient in a civil suit to establish the fact.

We think that the law requires us to pronounce that it is sufficient.

A charge of bigamy in a criminal prosecution cannot be proved by any reputation of marriage. There must be proof of actual marriage before the accused can be convicted. But in a civil suit the confession of a bigamist will be sufficient,

when made under circumstances from which no objection to it as a confession can be implied. There are none such in this case. The first legal consequence of such a state of the evidence is, that it released the mother of the complainant from all conjugal obligations with Des Grange, making her free to contract marriage with any other man who was free to intermarry with her. But that conclusion is not the purpose for which we have used, as the defendant wishes it, what the church paper discloses. The object has been to show that the defendants have introduced that paper in support of the charge of adulterine bastardy, when in fact it discloses a condition of things from which it may well be inferred that both the father and mother of Mrs. Gaines intermarried in good faith. It is far short of the evidence in the record to prove that they did so, which will be seen presently. Then the next testimony which the defendants rely upon to aid in proving the adulterine status of the complainant is that of Daniel W. Coxe, the friend and co-partner in business with Daniel Clark. His testimony was originally taken in a previous case to invalidate the marriage between Clark and the mother of the complainant. In 12 Howard, as it was in this case, it was associated with the church paper to sustain the objection we are now considering. In the argument, it was said that the two were sufficient to prove it. But take the testimony of Mr. Coxe as a whole, or in its particulars, and no part of it has the slightest bearing upon the canon's prosecution of Des Grange, or upon the objection that the complainant was the offspring of an adulterous intercourse. Mr. Coxe begins with the history of Caroline Barnes, giving an account of the preparations which he had made at the solicitation of Daniel Clark for the confinement of her mother, and then states it to be his belief that Clark had never married her. Beyond this, in regard to the marriage, he does not speak, except in his offers to the success of his effort to dissuade her from attempting to prove it, and that he did not believe that Daniel Clark was in Philadelphia in the year 1803, when it is alleged that he married there the mother of the complainant. Many other circumstances are narrated by Mr. Coxe in connection with the affairs of Mr.

Clark, and of his acknowledgment of Caroline Barnes as his illegitimate child. But after the closest examination of them in connection with the point of adulterous bastardy, and that Clark and Zulime, after the birth of Caroline, were married in good faith, there is not a word in Coxe's testimony to impeach the fact of marriage, or the fidelity of the parties in entering into it.

The defendant also gave in evidence a letter written by Bellechasse, from Matanzas, to Coxe, in reply to one from the latter. Coxe had written to Bellechasse at the instigation of Mr. Relf, requiring him to dispose of fifty-one lots in favor of Caroline Barnes, to the exclusion of the complainant, for whom they were confided by Clark to him for her benefit. This Bellechasse refused to do. He then states what had previously passed between Relf and himself concerning these lots. He had before given to Relf his renunciation of any ownership of them, with directions to dispose of them for Myra, stating what had passed between himself and Clark upon the subject, as he has related it in his testimony. Probate Record, pages 173 to 182, inclusive, answer to 13th interrogatory. This letter does not relate in any way to the marriage between Clark and the complainant's mother, or to their alleged adulterous intercourse. It, however, confirms the honorable character of Bellechasse, and strengthens all that he had said of Clark's declarations to him of the legitimacy of his daughter Myra, and of his intentions to make her the heiress of his estate. This letter seems to us to have been introduced into this case by the defendants, with some expectation that it might serve to make Bellechasse's testimony equivocal, and also to associate both Myra and Caroline as the adulterine offspring of Clark and Zulime. The attempt, in our view, is a failure as to both. The complainant's status depends upon the evidence in this case. That of Caroline Barnes, notwithstanding the declarations of Coxe that she is the natural child of Clark by Zulime, must be determined by the law as to what were the relations between her mother and Des Grange when she was conceived and born. The witness, Madame Despau, says that she was at the birth of Caroline, and that it took place in 1801. Mr.

Coxe says, to the best of his belief, that she was born in the year 1802, but without any of those attendant circumstances which give even a coloring to the correctness of his chronology as to the event of which he was speaking, and with one proceeding from himself, which shows how little reliance can be put upon the accuracy of his memory, either as to the time when he says Mrs. Des Grange presented to him Clark's letter to have her taken care of in her confinement, as she was with child by him, or as to the time of the birth of Caroline, or as to Clark's visits to Philadelphia immediately preceding his departure for Europe in the year 1802. In Mr. Coxe's second examination, he states it had been disclosed to him by his correspondence with Clark that the latter had been in Philadelphia from late in 1801 to the last of April, 1802, all of which time Zulime was there; that it was in April that Clark returned to New Orleans, and afterwards that he had revisited Philadelphia in July, 1802, on his way to Europe; thus confirming the statement of Madame Despau in those particulars. In the absence of all contrary proof, either by circumstance or deposition, the declaration of Madame Despau as to the time when Caroline Barnes was born must be received to establish that fact. And that being in the year 1801, however much it may be suspected that she was the child of Clark, and even that he supposed her to be so, she must be considered in law to be the child of Des Grange, the gestation of her mother and the birth of the child being within the time before any interruption had taken place of their conjugal relations. That is proved by evidence introduced into the case by the defendants. The first is the power of attorney of the 26th of March, 1801, given by Mesdames Caillavet, Lasabe, and Despau, authorizing Des Grange, their brother-in-law, to proceed to Bordeaux, in France, to recover property of which they were coheiresses of their father and mother. Next, by a general power of attorney, which Des Grange at the same time gave to Zulime to act for him in all his affairs during his absence. She did so in several particulars, styling herself the legitimate wife and general attorney of Don Geronimo Des Grange. Des Grange accepted the power given to him, sailed for France in

April, and on the 1st July, 1801, wrote from Bordeaux to Clark to aid his wife with his advice, should she be embarrassed in any respect, and expressed his uneasiness that he had not yet heard from her; saying, also, that he was then engaged in a "lawsuit for the purpose of recovering an estate belonging to my wife and family." Now, under such a chronology of circumstances and of conjugal amity, we need not say that as access between man and wife is always presumed until otherwise plainly proved, and that nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been the father of it, the law, then, establishes the relation between Des Grange and Caroline as having been that of father and legitimate child, and that she was not the offspring of an adulterous commerce between Clark and Zulime; though Coxe says she was, and reaffirmed substantially in his letter to Bellechasse, as we gather from his answer in his refusal to turn over property to Caroline which was received by him from her father for Mrs. Gaines. See letter in page 896 of Record of Gaines *v.* Hennen.

The defendants also gave in evidence an authenticated record from the county court of New Orleans. It was introduced by them, and declared by them, in their answers to the complainant's bill, to be a petition by her mother, Zulime Nee Carriere, wife of the said Des Grange, to a competent judicial tribunal in New Orleans, praying for a divorce and dissolution of the bonds of matrimony existing between her and Des Grange, which was subsequently decreed after the birth of the complainant. But they now urge and declare that such record and decree prove nothing in the case. In our opinion it proves much, though differently from what it was introduced for. Their counsel now says, that the record is deficient in the petition, and therefore that it does not appear that its object was the annulment of the marriage between Zulime and Des Grange on account of his bigamy. The petition is wanting; and why, has not been satisfactorily shown by the defendants. They knew it to be wanting when they introduced the record of evidence, and on that account cannot now repu-

diate it for what it contains, because that is against the purpose for which it was introduced. It shows that a petition was filed; that a curator was appointed for Des Grange; that he was summoned to answer for Des Grange; that he appeared and demurred to the jurisdiction of the court *in cases of divorce*, and on that account that the court could not pronounce a judgment therein, and that the damages prayed for in the petition could not be assessed until after the court had rendered judgment touching the validity of the marriage. There was a joinder in demurrer, which, however, was withdrawn, and the curator filed the general issue. The docket entries in the suit, kept by the clerk, are in conformity with the act of April 10th, 1805, section 11. They are as follows: Petition filed June 24, 1806. Debt or damages, $100. Plea filed 1st July, 1806. Answer filed July 24, 1806. Set for trial 24th July. The witnesses are stated, and the costs given. And then follows judgment for plaintiff, damages $100, July 24, 1806. Now, this extract of so many particulars makes out as well as it could be done the purpose of the petition, and establishes consistently, as it is required to be done, by the rules of evidence for such a case, that the marriage between Jerome Des Grange and Zulime, or, as otherwise named, Marie Julia Nee Carriere, was thereby declared null and void. But the defendant's counsel says, that the record is inoperative for any purpose, inasmuch as it was a proceeding at the instance of Zulime in her maiden name, three years after her alleged marriage with Clark. It is forgotten that a judicial invalidation of marriage at any time for the bigamy of a party to it relates back to the time of the marriage, and places the deceived in a free condition to marry again, or to do any other act as an unmarried woman, without any sentence of the nullity of the marriage. The evidence, too, shows that the procedure by Zulime against Des Grange originated in her anxiety to place herself in that condition in respect to her marriage with Clark, which he had enjoined upon her to keep secret until a sentence of the nullity of her marriage with Des Grange had been obtained. She could not, under such circumstances, use Clark's name in such a suit; she could not

have sued in Des Grange's when disclaiming the validity of her marriage with him; and therefore her counsel in filing her petition used her maiden name, as it was proper and professional in them to do. One thing is certain, that the record from the county court of New Orleans does not in any way sustain the charge against this complainant of adulterine bastardy, but adds another circumstance to the many which exist in proof of the marriage between her father and mother, and of the good faith with which they entered into it.

To confirm what has just been said, we will now cite the evidences of it:

"Madame Despau testifies that she was at the marriage of Zulime and Clark in 1802 or 1803; that it took place in Philadelphia, and the ceremony was performed by a Catholic priest, in the presence of other witnesses as well as of herself. She states that she was present when her sister gave birth to Mrs. Gaines; that Clark claimed and acknowledged her to be his child, and that she was born in 1806. That the circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Des Grange, she heard he had a living wife. Our family charged him with the crime of bigamy in marrying Zulime. He at first denied it, but afterward admitted it, and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family." The witness then continues her narrative, that it was considered essential before the marriage should take place that proof should be obtained from the Catholic church in New York of Des Grange's bigamy, it being there that his prior marriage had taken place. They went there; found that the registry of marriages had been destroyed. Clark followed them, and having heard that a Mr. Gardette in Philadelphia had been one of the witnesses of the prior marriage of Des Grange, and he told them that he had been present at the prior marriage of Des Grange; that he knew him and his wife; that the wife had sailed for France. Clark then said, you have no reason any longer to refuse to marry me; it will be necessary, however, to keep our marriage secret until I have obtained judicial proof

of the nullity of your marriage with Des Grange. They were then married.

Such judicial proof was subsequently obtained, as has already been shown. Another witness, Madame Caillavet, confirms the statement that Clark made proposals of marriage for Zulime to her family, after her withdrawal from Des Grange, on account of her having heard that he was the husband of another woman then alive. She also swears that Clark admitted the marriage to her, and that so did Zulime. Clark also made an acknowledgment of it to other witnesses, with simultaneous declarations to them of the legitimacy of Myra; and his paternal treatment of her from her birth to his death impressed them with the full belief of the fact and of the sincerity of the purposes for which he made such declarations. Mrs. Harper, who nursed Myra, not as a hireling, but as the friend of Clark, says that he made to her at different times declarations of the child's legitimacy and of his marriage with her mother. He admitted it, also, to Boisfontaine, and added, that he would have avowed the marriage but for her subsequent marriage to Gardette. Pressed upon by such proofs, every effort was made by the most searching and repeated cross-examination to lessen the force of them without success. Failing in this, a direct attempt was made to discredit their veracity by an impeachment of their characters. It was a signal failure. Forty years of their lives were canvassed to bring upon them some reproach. The proofs to the contrary were decisive. They, too, had had their misfortunes; but their lives had been passed in the different places where they had lived, not only without censure, but altogether free from suspicion. Their testimony was also put in comparison with that of Mr. Coxe. They do differ in immaterial circumstances, but in nothing concerning the marriage between Clark and Zulime. All that Coxe had been able to say about that was, that he did not believe it. That conclusion, too, he came to by inferences from his own narrative concerning the time of the birth of Caroline Barnes; that he withdrew afterwards, as to the time of its occurrence, and also as to his declaration, that Clark had not been in Philadelphia in the year 1801, extending his sojourn there for more than

four months, whilst Zulime and her aunt were in search of proofs of the bigamy of Des Grange. The evidence also shows that Clark aided their inquiries for that purpose. Besides the want of memory of Mr. Coxe, his narrative shows so strong a bias against the marriage that we must receive it with many grains of allowance. After Zulime had obtained a sentence of the nullity of her marriage with Des Grange, she went to Philadelphia to learn the truth of reports which were in circulation concerning the fidelity of Clark to herself. She had an interview with Coxe; told him her purpose, and her intention to proclaim her marriage with Clark, unless she became satisfied upon that subject. He told her that she could not prove the marriage, and afterwards advised her to take counsel of a lawyer. He, of course, dissuaded her from any attempt to do so. At the same time Coxe aggravated her distress and hopelessness by telling her that Clark was then engaged to marry a lady of distinction in Maryland, which, whether true in the particulars of his narrative of it, or as a general report, there is no proof in this record; but it served his purpose in disuniting Zulime and Clark forever. Clark was then in the height of his popularity and distinction in the Congress of the United States. His friend sheltered him from the disclosure. Mrs. Harper, as a witness to Clark's admission to her repeatedly of the marriage, was cross-examined severely, but without any effect, to diminish the weight of her testimony in chief. Bellechasse and Boisfontaine, in their subsequent examinations, adhered to what they had at first sworn, and their characters forbade even a suspicion of its not being true.

Failing in every attempt to lessen the proof of the marriage, it was suggested that all of these witnesses were in combination to establish it by perjury. The defendant's counsel had himself extracted from their answers that they had no interest of any kind in the result of the suit. They are protected by the rules of evidence from any such imputation. There was no foundation for it.

The marriage, then, having been proved, the only point remaining is, whether it was contracted in good faith by the parties to it. We see no cause for thinking that it was not

entered into in good faith. Supposing it, however, not to have been so by Zulime, on account of her not having sincerely believed in the invalidity of her marriage with Des Grange, that could not take away the complainant's right to inherit her father's estate under his olographic will of 1813, if it has not been fully proved, as the rules of evidence in such cases require it to be done, that he did not marry in good faith. The doubts which may be indulged in respect to Zulime's sincerity cannot apply to him. He was an unmarried man, never had been married, when he united himself to Zulime, and the weight of testimony in the case is, that he did marry her in good faith. His conduct to his child from her birth to his death, his frequent declarations of his marriage to her mother, and of her legitimacy, and his avowal of it in his last will, are conclusive of his having married in good faith. The law applicable to such cases requires us to say so.

We have not thought it necessary to give all the evidence in this case in detail, but have accurately done so as to all of it bearing in any way upon the points in controversy, and especially as to that having any connection with the charge of adulterine bastardy. Those who may have any curiosity to read the testimony in full will find it in what is called the Probate Record; also in the cases as they are reported in 6 and 12 Howard, particularly in the old record of the last case.

Our judgment is, that by the law of Louisiana Mrs. Gaines is entitled to a legal filiation as the child of Daniel Clark and Marie Julia Carriere, begotten in lawful wedlock; that she was made by her father in his last will his universal legatee; and that the Civil Code of Louisiana, and the decisions and judgments given upon the same by the Supreme Court of that State, entitle her to her father's succession, subject to the payment of legacies mentioned in the record. We shall direct a mandate to be issued accordingly, with a reversal of the decree of the court below, and directing such a decree to be made by that court in the premises as it ought to have done. Thus, after a litigation of thirty years, has this court adjudicated the principles applicable to her rights in her father's estate. They are now finally settled.

When hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its courts.

DECREE OF THE COURT.

This appeal having been heard by this court upon the transcript of the record from the Circuit Court of the United States for the eastern district of Louisiana, and upon the arguments of counsel, as well for the appellant as for the appellees, this court, upon consideration of the premises, doth now here adjudge, order, and decree, that the decree of the said Circuit Court be and the same is hereby reversed, with costs, and that such other decree in the premises be passed as is hereinafter ordered and decreed.

And this court, thereupon proceeding to pass such decree in this cause as the said Circuit Court ought to have passed, doth now here order, adjudge, and decree that it be adjudged and decreed, and is hereby adjudged and decreed upon the evidence in this cause, that Myra Clark Gaines, complainant in the same, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same; and that under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree, that all property described and claimed by the defendant, Duncan N. Hennen, in his answer and exhibits thereto annexed, is part and parcel of the property composing the succession of the said Daniel Clark, to wit: the same which Richard Relf and Beverly Chew, under pretended authority of testamentary executors of the said Daniel Clark and of attorneys in fact of Mary Clark, by act of sale, dated December 28, 1820, conveyed to Azelic Lavigne; which the said Azelic Lavigne, by act

of sale of the 29th of February, 1836, conveyed to J. Hiddleston, and which the said J. Hiddleston, by act of the 27th of May, 1836, conveyed to the New Orleans and Carrolton Railroad Company, and which the said company, by act of sale of the 13th of May, 1844, conveyed to the said Duncan N. Hennen, the defendant in this cause; that the said Richard Relf and Beverly Chew, at the time and times when, under the pretended authority aforesaid, they caused the property so described and claimed by the defendant, Hennen, to be set up and sold by public auction on the 19th day of December, 1820, and when they executed their act of sale aforesaid of the 28th of December, 1820, to the said Azelic Lavigne, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction, and the said act of sale to Azelic Lavigne in confirmation thereof, were wholly unauthorized and illegal, and are utterly null and void; and that the defendant, Hennen, at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Beverly Chew and Richard Relf in the premises illegal, null, and void; and that he, the said Hennen, ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question, with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and their said act of sale to said Azelic Lavigne, were illegal, null, and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree, that all the property claimed and held by the defendant, Hennen, as aforesaid, now remains unclaimed and undisposed of as part and parcel of the succession of the said Daniel Clark, notwithstanding such sale at auction and act of sale in the pretended right or under the pretended authority of the said Richard Relf and Beverly Chew.

And the court doth further order, adjudge, and decree, that the complainant, Myra Clark Gaines, is the legitimate and

only child of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to the property aforesaid so claimed and held by the defendant, Hennen, together with all the yearly rents and profits accruing from the same since the same came into the said defendant's possession, to wit, on the 13th of May, 1844, and for which the said defendant is hereby adjudged, ordered, and decreed to account to the said Myra Clark Gaines.

And the court doth now here remand this cause to the said circuit court for such further proceedings as may be proper and necessary to carry into effect the following directions; that is to say:

1. To cause the said defendant, Hennen, forthwith to surrender all the property so claimed and held by him as aforesaid into the hands of the said Myra Clark Gaines, as a part of the succession of the said Daniel Clark.

2. To cause an account to be taken by the proper officers of the court, and under the authority and direction of the court, of the yearly rents and profits accrued and accruing from the said property since the 13th of May, 1844, when it came into the possession of the defendant, Hennen, and to cause the same to be accounted and paid to the said Myra Clark Gaines; the account to be taken subject to the laws of Louisiana in cases of such recovery as is now decreed in favor of the said complainant.

3. To give such directions and make such orders from time to time as may be proper and necessary for carrying into effect the foregoing directions, and for enforcing the due observance of the same by all parties and by the officers of the court.

Dissenting: Mr. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice GRIER.

Mr. Justice CATRON dissenting.

A principal question in this case is, how far it is affected by the decree in the case of Gaines and wife *v.* Chew, Relf, and others, reported in 12 Howard.

In that case the complainant sought to recover: first, four-

fifths of the real estate of Daniel Clark, alleged to be vested in the complainant, Mrs. Gaines, as heir of Daniel Clark; and, secondly, the undivided moiety of the real estate owned by Daniel Clark at his death, being the community interest taken by his widow, the mother of the complainant, Myra, from whom she obtained a conveyance for said moiety in 1844. In the former case this court found that Mrs. Gardette, the mother of Mrs. Gaines, was the wife of Jerome Des Grange, (in 1802 or 1803,) when the bill alleged she intermarried with Daniel Clark, and was, therefore, not the *widow* of Clark; and this moiety of the estate claimed by the bill was rejected.

2. It appeared in the former case, by the evidence furnished by the record in that suit, that Caroline Clark was the sister of Mrs. Gaines, born before the father and mother intermarried, as is alleged by the former bill; but she was fully recognised by the father as his illegitimate daughter, and was supported by him during his lifetime, and after his death by his friends. The deposition of Mr. Coxe proves these facts very fully.

Conceding the fact that the parents intermarried after Caroline's birth, then that marriage made Caroline a legitimate child of the marriage, and equal heir with Myra; such being the law of Louisiana. Nor could the father, by the laws of that State, take from his legitimate child more than one-fifth part of his estate by devise. Civil Code of 1808, ch. 3, sec. 1. And therefore Caroline and Myra each took as heir four-fifths of their father's estate, less the mother's moiety; that is, four shares each of twenty parts. On these portions the will of 1813 did not operate; the children holding the estate as heirs. It operated only on the two-twentieth parts which Daniel Clark had the power to devise by his will. Civil Code, 232, sec. 3; 234, sec. 4.

Caroline, who intermarried with Doctor Barnes, was a party respondent to the former suit, and answered the bill. She has since died beyond the jurisdiction of the court, and is not a party to this controversy; still, the interest of her absent heirs is entitled to protection. Nor can Mrs. Gaines set up any claim to that interest.

As respects the claim to one-tenth part, the next question is, whether the fact found in the former case, that the complainant was the daughter of Des Grange's wife, establishes the *status* of Mrs. Gaines, so that she is excluded from taking as devisee of Daniel Clark.

According to the provisions of the Code of 1808, this court held that Mrs. Gaines could not take as heir of her father; nor could she take her mother's grant by the deed of 1844.

By the laws of Louisiana, as they stood in 1813, the complainant was an adulterous bastard, and could not inherit from her father, (Code of 1808, p. 156, art. 46,) which declares, that "bastard, adulterous, or incestuous children, even duly acknowledged, shall not enjoy the right of inheriting their natural father or mother." And article 15, page 212, declares, that "natural fathers or mothers can in no case dispose of property in favor of their adulterine children, even acknowledged, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves."

The only issue decided in the former suit was, whether the complainant's mother for years before, and at the time of Myra's birth, was the lawful wife of Jerome Des Grange. The court so found, and based its decree dismissing the bill on that fact. *The fact* being established, carried with it all the legal consequences that result from the fact. 1st Stark. Ev., 182, sec. 57. One of these consequences is, that Mrs. Gaines was an adulterous bastard, according to the laws of Louisiana, and incapable of taking by the will of her father.

But suppose this consequence does not follow; then how does the matter of estoppel stand? The complainant, Mrs. Gaines, by her amended bill, filed in 1848, renounced all claim that she had to the property sued for by her original bill, (including the same sued for now,) as instituted heir of Daniel Clark, by the will of 1813, and asserted a right to four-fifths of said property as legal or forced heir and only legitimate child of Daniel Clark, and declared she would *not* rely on said will of 1813. O. R., p. 85.

She also virtually renounced as heir one moiety of the estate

Daniel Clark died possessed of, and set up a deed from her mother for the moiety as lawful widow of said Clark; this being her community interest by the laws of Louisiana. Old R., p. 32.

That the widow was entitled to a moiety as her share in the community is alleged and relied on by the foregoing amendment; and the complainant being the party who made the avowal, is irrevocably bound by it. Such is the statute law of Louisiana, declared by the Code of 1808, (p. 314,) and the Code of 1825, (vol. 2, p. 355.)

In the former case the avowal was matter of title, and in this case it is conclusive evidence of the fact avowed as against the complainant. The law of Louisiana binds the Federal courts in like manner that it is binding on the State courts. So this court has uniformly held. 1 St. at Large, 92; note (*a*) to 34th sec. of Judiciary act of 1789.

If the mother was lawful widow of Clark, then her right to the moiety was undoubted, as the parties resided in Louisiana, and it is alleged the property was acquired during the coverture. Mrs. Gaines must abide by her allegations in the former suit, as on them the issues were formed, and on which the decree in that suit proceeded.

Nine of ten parts of Clark's estate was sued for by the former bill. The decree rejected on a direct issue five-ninths claimed to have been acquired by deed from said mother, on the ground that she was the wife of Des Grange, when, as is alleged, she intermarried with Clark, and when the complainant was born. This was the precise issue made, and found by the court, and is undoubtedly *res judicata* as respects the mother's moiety. As to the other five-tenths, Mrs. Gaines, by her amended bill of 1848, in express terms renounced one-fifth to the purchasers, under Daniel Clark's will of 1811. To the extent of one-fifth, the validity of that will was recognised. The complainant cannot be allowed to split up her claim and sue for portions by several suits.

The remaining four-fifths of the moiety Mrs. Gaines claimed to recover as legal or forced heir. Heir, or no heir, was the issue tried. This court found that she was Clark's daughter

by Des Grange's wife, and not Clark's lawful heir, and therefore dismissed her bill. It follows, that as to the four-fifths of one-half, the complainant stands barred as heir by the decree. She is also estopped by the former proceedings to sue a second time for the moiety derived from her mother; and thirdly, is estopped to set up a claim to the one-tenth part she renounced and abandoned.

An objection is raised that the parties in this cause are not the same who were sued in the former case. The bill alleges that they are the same; and so they are, except that Mr. Hennen claims under the railroad company by a conveyance of the land in dispute, made pending the former suit, which, if it had been decided against the railroad company, would have bound Hennen, and being decided in favor of the company, bound the complainant.

The rule in chancery proceedings is, that where there are contesting parties in each suit, as between these parties, a decree is *res judicata.* It was so held by this court at the present term in the case of Thompson and als. *v.* Roberts and als. Sixty defendants were sued by the former bill; they all, as joint respondents, got a decree against the complainant on her common title set up against them all. The estoppel operated against her for each defendant; and in this second contestation of the same title any one respondent to the former suit can set up the estoppel in his favor.

The laws of Louisiana are confidently relied on as prescribing the true rule of estoppel. In this English bill in equity, resorted to here, as a remedy, the rule is, that the same subject-matter cannot be litigated twice between the same parties on evidence brought forward or left out of the first case. Here the will of 1813 is introduced, and could just as well have been introduced in the former suit. The difficulty was, that it had not been proved and recorded in the probate court. But it might have been proved just as well forty years before the time it was admitted of record as now. If a title deed could not be read on the hearing for want of being recorded, the complainant might fail to recover. This is of constant occur-

rence; still, the judgment or decree would be as conclusive as if the deed had been authenticated and recorded. It was simply a neglect of the complainant to produce her proof in legal form; a matter with which the defendants had no concern. Holding back an existing will and making an experiment on the issue of heirship, requiring the same proof, and, in case of failure, to bring a second suit on the established will, is a mere contrivance, and an evasion of the due administration of justice, which cannot be allowed. On the will of 1813 the present bill is founded. By that *will* Daniel Clark declares the complainant, Myra, to be his only legitimate and lawful heir, and devises to her all his estate. She must, therefore, have been his daughter, born in wedlock. Conceding this to be true, and it follows as a consequence that the complainant took as heir, and not as devisee, to the extent of four-fifths. As to four-fifths of a moiety, we are by this bill called on to try the precise issue of heir, or no heir, that we tried in the former suit.

If the decision reported in 12 How. be overthrown, ruin must be the consequence to very many who have confided in its soundness. In a rapidly-growing city like New Orleans, much of the property supposed to be protected by our former decree must have changed hands. Large improvements must have been made in the nine years since that suit was decided. It covered all Daniel Clark's estate as it existed at his death, and had over sixty defendants to it. If the twenty odd defendants to this bill can be recovered against, so can the others who were parties to the first suit.

It is most manifest from this record that the fragment of a cause brought here by Mrs. Gaines and Mr. Hennen by stipulation will, in effect, decide, *and was intended to decide*, the cause of the other defendants sued jointly with Mr. Hennen, and who are standing helpless, awaiting their fate at the hands of this court.

It is insisted by counsel that Clark, being a *free man*, could lawfully devise to his daughter; and that the laws of Louisiana did not apply to the case of a single and free man be-

queathing to his child by a married woman, as was done here. Such a construction would evade the code to a great extent. Its terms are too plain for controversy, and so the courts of Louisiana have held. Jung *v.* Dorescourt, 4 L., 178.

According to this assumption, slaves might be devisees, if the evasion was used to suppress the fact that the mother was a slave. As in case of other conveyances, wills must have a grantee capable to take by the devise; and it is undoubtedly true that the heir-at-law, or a devisee, holding under a former will, can plead and prove the facts of incapacity by parol evidence, and thereby defeat the last will, and of course alienees, in the condition these respondents are, can do the same. The case above cited (4 L., 178) is directly to this point, and to the same effect it was held in Robinett *v.* Verdum, (14 L., 542.) There, the court declared that a disguised donation to a slave child under the forms of a sale was absolutely null.

But the right and justice of this cause depends on the defence of the plea of *bona fide* purchaser set up by the answer. The bill in chancery is a remedy peculiar in its character, when resorted to in the Federal court held in the State of Louisiana. In the State courts there, this defence is unknown. But when a complainant resorts to it to enforce rights to lands in the Federal court, the respondent can defend himself, as an innocent purchaser, if he pleads, and can show that he acquired by purchase at a fair price, and got an apparent legal title, without notice of an outstanding better title, the purchaser believing that he acquired full property in the land; and the question is, has the respondent here made out such a defence? The purchase was made from Mary Clark, in 1820, by her legally-constituted attorneys in fact, Chew & Relf. She claimed to be the true owner by a will made in her favor as instituted heir. It is an olographic will, in due form, fully proved, and regularly recorded. This will, from the time it was probated in 1813, stood as the true succession of Daniel Clark for more than forty years. An immense estate in lands and personal property has been acquired under it, by all classes of innocent purchasers, without any suspicion of the fact that any other and better title existed. It is admitted on behalf of the re-

spondents, by stipulation in this cause, that each purchaser who bought in 1820, and every subsequent purchaser under the first one, bought for a full price, paid the purchase money, and got a regular conveyance for the land purchased. This title, tested by itself, was a perfectly fair legal title, according to the laws of Louisiana. Duplesse *v.* White, 6 A., 514. If Mary Clark sold the estate without an authorization from the court of probate, by that act she rendered herself liable to pay the testator's debts; but this did not affect the purchaser. He was not bound to know that any debts existed, nor to see to the application of the purchase-money. The present bill does not allege that there were any debts owing by Daniel Clark at the time of his death; on the contrary, the complainant sues for the lands, and the rents and profits of them, without any reductions. Finding Daniel Clark's estate to be insolvent on the accounts exhibited, General and Mrs. Gaines, by their amendment of 1844, declare that they do not require of said Chew & Relf any account, and that they "discontinue their prayer to that end."

The complainant admits the existence and probate of the will of 1811, but denies in general terms that the sales were lawfully made. For more than forty years the respondents and their alienors had a regular legal title, traceable to the only then existing succession of Daniel Clark; they could sue for and recover the land by force of that title. They knew nothing of the existence of Myra. She was born in New Orleans in 1804 or 1805, and immediately after her birth was taken from her mother by Daniel Clark, her reputed father, and put into the charge of Colonel and Mrs. Davis. In her childhood she was carried to the State of Pennsylvania, raised up and resided there till 1832, when she intermarried with William W. Whitney, under the name of Myra Davis; during all which time she was ignorant of her true name, history, and rights. She so states in her first bill, filed in 1836, put in evidence in this suit. Of course the purchasers of the lands sued for could have no knowledge of the complainant's existence when they paid their money and took title, in 1820.

But the respondents would have been *bona fide* purchasers

had the will of 1811 never existed. Mary Clark was the apparent legal heir of her son in the ascending line. Daniel Clark was known and recognised in New Orleans as an unmarried man; he had resided there from his youth, and was extensively and uncommonly well known, having represented the Territory of Orleans in Congress. A number of witnesses prove, and most conclusively, that he was deemed and recognised universally as a man who had never been married up to the time of his death. His father was then dead, and Mary Clark, his mother, recognised as his undoubted heir. He addressed and made propositions of marriage to ladies of his own rank, after it is pretended he had married Madame Des Grange. Those who purchased in 1820, including judges of the highest rank residing on the spot, could not doubt the validity of Mary Clark's title, and power to sell the lands they bought and paid for.

In the printed argument submitted to us on behalf of the complainant, and again on the oral argument delivered before us in this court, the answer to this apparently complete defence was, that Mary Clark was dead in 1820, when her attorneys made the sales, and conveyed in her name.

The bill alleges no such fact, nor does the answer refer to it. But the complainant, by her bill of 1848, in evidence here, states that Mary Clark died in June or July, 1823, leaving a will, alleging who the legatees were, (of which the complainant was one;) and some of these legatees are made defendants to that bill. Daniel W. Coxe proves the circumstances connected with making the will of Mary Clark, and says she died in 1823, in which year her will was duly proved and recorded in Philadelphia county, Pennsylvania.

It is also relied on that Mary Clark did not accept the succession by taking possession of the estate in legal form. She made her power to sell, and did sell, and gave possession to the purchasers, and they have held actual adverse possession under their conveyances since 1820. This is admitted of record; and it is now too late, after the lapse of thirty-five years before they were sued, to set up this technical objection. The

presumption in favor of regularity in the proceeding is too clear to admit of controversy.

Another objection is made to this plea of *bona fide* purchaser, namely, that Chew & Relf had no authority from the probate court to sell, and that they joined with Mary Clark in the conveyance. The conveyance of Mary Clark was valid, notwithstanding this circumstance, as the Supreme Court of Louisiana held in Duplesse *v.* White, 6 A., 514. She held the actual legal title. The will operated as a conveyance in the same manner that a private act of sale would have done. It is proved that the sales of the estate were made at auction, and had the form of sales made by authorization of the court; this is the fair presumption; nor can the complainant at this late day have a decree against these respondents. Presumption that the executors were duly authorized to make sales for payment of debts comes instead of proof. This bill was filed more than thirty years after Mrs. Gaines became of age, and thirty-six years after the first vendor purchased and took title, in 1820; and it must be presumed that the proper orders of the probate court were granted. The presumption arises from possession and lapse of time. Possession of itself is, in the nature of men and things, an *indiceum* of ownership. If all persons acquiesce in the possession, the acquiescence tends to prove property in the possessor; and after the lapse of thirty years the probabilities so increase, that courts of justice, for the safety of society, hold an adverse claim to be without foundation. He who thirty years ago may have been abundantly able to show regularity of proceedings and evidence of ownership, may be unable to do so now. His witnesses may be dead, as is emphatically the case here. His title-papers may be destroyed or lost; and a court of equity must say, as the Supreme Court of New York did in the case of McDonald *v.* McNeal, (10 Johns. R., 380,) "The fact is presumed for the purpose and from a principle of quieting men's possessions, and not because the court really think a grant has been made." Or, as the Supreme Court of Tennessee said in the case of Hanes *v.* Peck, (Martin & Yerger's R., 236,) "In such case,

length of possession supplies the place of testimony; presumption is substituted for belief; we believe when the fact is proved; we presume in the absence of proof."

Had Mary Clark's devisees sued this purchaser, he could have relied on presumption to supply proof of regular orders from the probate court to authorize the executors to sell, or that Mary Clark regularly accepted the succession; and the same presumption must prevail against this complainant.

It is provided by the 7th section of the act of March 25, 1810, that contracts of sale of real property in Louisiana shall be recorded in the office of the parish judge where the property is situated; and if not so recorded, the contract shall be void. It is admitted in this case that both the power of attorney from Mary Clark and the deeds to purchasers made under that power were not recorded in the office of the probate judge, but that they were recorded in a notary's office in New Orleans; and it is assumed, and the cause is made to depend mainly on the fact, that the sales of Chew & Relf, as attorneys of Mary Clark, are null as to third persons for this reason. This is an entire mistake. The act of 1810, section 7, never had any application to the parish of Orleans, where the land in dispute lies. It "had reference to those parishes where the office of parish judge was established, combining with the judicial powers of the officer those of notary and recorder of mortgages," &c. "These powers were not possessed by the judge of the parish and city of New Orleans. The law is not applicable to this parish, and has been so considered ever since its enactment." Morris *v.* Crocker, 4 Louis'a, p. 149. It is further held, that the notarial offices of the city were the proper offices in which the record was to be made. Id. In this, and all other respects, Mary Clark's conveyance was regular.

The evidence shows, that as against the respondents to this bill, the claim set up is grossly unjust. Clark's failure was very large; his estate was wholly insolvent. The purchasers have in fact paid his debts to a large amount. Many of them are yet unpaid. The purchasers have built houses and raised families on the property now sought to be recovered. A city

has been built upon it. It has probably increased in value five hundred fold since 1820; much of it certainly has.

That the respondents have been harassed with a previous lawsuit for the same property, in which the complainant claimed as heir, and was defeated, neither helps her case nor lessens the hardships imposed on the respondents.

At the argument, conclusions of law and of fact were relied on as having been established by the case of Patterson *v.* Gaines and wife, reported in 6 How. R. That was a false and fictitious case made up by Gaines and wife, with the assent of Patterson, they having relinquished to him the property sued for. The object of that suit was to circumvent this court by a fraudulent contrivance to obtain an opinion here, to the end of governing the rights of the other defendants sued jointly with Patterson. And in this, General and Mrs Gaines seemingly succeeded. They obtained both the opinion and decree they sought; but when the other defendants came to a hearing they examined Patterson as a witness, and proved and exposed by his testimony the contrivance and fraud practised; and for us now to declare that so gross a contempt to this court, and the practice of a fraud so disgraceful to the administration of justice, established any matter of fact or any binding principle of law, would be to sanction and uphold that proceeding, and to invite its repetition. That case should be disregarded, as it was disregarded, when the cause of which it was part was fully and fairly heard in 1852, and which is reported in Howard's Reps., vol. 12.

The case of Lord *v.* Veazie, (8 How., 253,) is full to the point, that a fictitious proceeding is void because there is no contest. Patterson did not act in the matter at all, further than to lend his name to General and Mrs. Gaines. They made up the case by filing the answer to their own bill—filing such evidence as suited their purposes; and bringing up the appeal to this court in Patterson's name.

By an amendment to their bill made in 1849, (12 Howard, 537,) General and Mrs. Gaines had the boldness to allege and claim that the decree in Patterson's fictitious case was *res ju-*

dicata, and an estoppel to the other defendants to that suit; and to that end relied on the decree on the final hearing in 1852, thereby avowing the fraudulent object of obtaining that decree.

A question not directly decided in the case reported in 12 How. was, whether Daniel Clark married Mrs. Des Grange. Madame Despau swore that she was present at the marriage in Philadelphia, and that several others were present. Her integrity and credit as a witness were so directly overthrown in the former case by the deposition of Daniel W. Coxe, and by many circumstances, as to leave her evidence of no value. She swore that she went to Philadelphia with her sister to procure evidence of Des Grange's marriage previous to marrying her sister. Coxe proved beyond doubt that the two women came there for the sole purpose of concealing the birth of a child, of which Mrs. Des Grange was pregnant, and of which she was very soon delivered, and it was secreted and raised to womanhood near Philadelphia. This was Caroline, afterwards Mrs. Barnes. And so soon as Mrs. Des Grange was able to travel, the two women returned to New Orleans. Me. Despau also swore in several depositions that this was Des Grange's child. At the time of its birth he had been absent in France for more than a year. Clark sent Mrs. Des Grange to Mr. Coxe with a letter, saying the child was Clark's, and to provide for the mother, and take charge of the child, which Coxe did. It was suggested at the argument that Coxe was not a competent witness, and not altogether entitled to credit. Clark's estate owed Coxe largely, and if Mrs. Gaines recovered, then Coxe expected to be benefited by the recovery. So that he was interested to uphold Mrs. Gaines's claim; nor has the deposition of Mr. Coxe been objected to; on the contrary, it is admitted by stipulation. R., 93.

Mr. Coxe's character for integrity is prominently manifest by sustaining facts.

Clark never admitted the marriage to any one entitled to credit, or who could be believed, when swearing to what a dead man had said.

He proposed to marry another lady in 1808, and Mrs. Des

Grange and Madame Despau came to Philadelphia, and sent for Mr. Coxe, then in partnership with Mr. Clark in large mercantile transactions, and inquired of him whether the fact was true. Coxe assented. Mrs. Des Grange said that Clark had *promised* to marry her, and that she then felt at liberty to marry herself; and soon after, she was married to M. Gardette, a dentist of Philadelphia.

In 1805 Des Grange returned to New Orleans, and was sued by his wife for alimony. She recovered, and had a decree against him for five hundred dollars per annum. Mrs. Des Grange never assumed that Clark was her husband, so far as we are informed from any reliable source. She resided in Louisiana for many years, and until these proceedings had progressed for fifteen years and more, and could have deposed to the fact of marriage had her daughter seen proper to examine her as a witness; but this was not done.

It is altogether immaterial, however, whether Clark did or did not marry Des Grange's wife, as it could be of no value to the complainant if he did. Clark must have been an innocent and deluded party to give Mrs. Gaines the benefit proposed by the will of 1813—as in case of an adventurer, from abroad, marrying an innocent single woman, leaving a wife behind him. There, the children of the second marriage cannot be disinherited and condemned; they can take as bastards, from the mother. So the courts of Louisiana hold. But what are the facts here? Clark acted in concert with Mrs. Des Grange and her sisters in sending Des Grange to France, as agent of his wife's family, to settle up the affairs of an estate of theirs at Bordeaux. Des Grange was absent about fifteen months, and in the mean time, and shortly before the expiration of the time, Mrs. Des Grange was delivered of the child Caroline at Philadelphia, which Clark admitted at all times before his death was his child. This is an undisputed fact. Clark acted as the friend of Des Grange, and corresponded with him during his absence, and aided his wife. The criminal connection that was exposed by the birth of the child had obviously existed before Des Grange was sent to France; and in the transaction of sending him away, and of prosecuting

him on his return, Mrs. Des Grange, her two sisters, and Clark, were undoubtedly acting in conjunction. Madame Caillivet swears that she set on foot the prosecution against Des Grange. 12 How., 509, 510.

That Des Grange had a wife living when he married the complainant's mother was a mere pretence to cover a nefarious transaction, as is abundantly established by the facts appearing in the case reported in 12 Howard. The idea, therefore, that Clark was an innocent and deluded party, is wholly inadmissible, and must be rejected as the least sustained part of this remarkable case.

I am of the opinion that the decree of the Circuit Court should be affirmed.

Mr. Justice GRIER dissenting.

I wholly dissent from the opinion of the majority of the court in this case, both as to the law and the facts. But I do not think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so; I therefore dismiss the case, as I hope, for the last time, with the single remark, that if it be the law of Louisiana that a will can be established by the dim recollections, imaginations, or inventions of anile gossips, after forty-five years, to disturb the titles and possessions of *bona fide* purchasers, without notice, of an apparently indefeasible legal title, "*Haud equidem invideo, miror magis.*"

INDEX

OF THE

PRINCIPAL MATTERS.

ADMINISTRATOR.

1. This court decided, in 17th Howard, 274, that the interest in one of the shares of the Mexican Company did not pass to a trustee in insolvency in 1819, the contract with Mina having been declared by the Court of Appeals of Maryland to be utterly null and void, so that no interest could pass to the trustee of an insolvent. *Mayer* v. *White*, 318.
2. But in 1824, Mexico assumed the debt as one of national obligation, and the United States made it the subject of negotiation until it was finally paid. *Ibid.*
3. A second insolvency having taken place in 1829, there was a right of property in the insolvent which was capable of passing to his trustee. *Ibid.*
4. The claim of the latter is therefore better than that of the administrator of the insolvent. *Ibid.*

ADMIRALTY.

1. In a collision which took place in the harbor of New York, between a ship which was towed along by a steam tug, to which she was lashed, and a lighter loaded with flour, by which the latter vessel was capsized, the evidence shows that she was not in fault, and is entitled to damages. Neither the ship nor the tug had a proper look-out, and being propelled by steam they could have governed their course, which the lighter could not. *Sturgis* v. *Boyer et al.*, 110.
2. Both the tug and tow were under the command of the master of the tug, who gave all the orders. None of the ship's crew were on board except the mate, who did not interfere with the management of the vessel, the persons on board being all under the command of a head stevedore. The tug must therefore be responsible for the whole loss incurred. *Ibid.*
3. The vessel must be responsible because her owners appoint the officers, and the master of the tug was their agent, and not the agent of the owners of the ship, who had made a contract with him to remove the ship to her new position. *Ibid.*
4. Some of the cases examined as to the distinction between principal and agent. *Ibid.*

ADMIRALTY, (*Continued.*)

5. Cases arise when both the tow and the tug are jointly liable for the conse quences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. *Ibid.*

6. Other cases may be supposed when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. *Ibid.*

7. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she must be held responsible for the proper navigation of both vessels. *Ibid.*

8. In a collision which took place in the Ohio river between a steamboat ascending and a flat-boat descending, the steamboat was in fault. *Pearce* v. *Page*, 228.

9. When a floating boat follows the course of the current, the steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use. *Ibid.*

10. Any attempt to give a direction to the floating mass on the river would be likely to embarrass the steamer, and subject it to greater hazards. A few strokes of an engine will be sufficient to avoid any float upon the river which is moved only by the current, and this is the established rule of navigation. *Ibid.*

11. In a collision which took place in Elizabeth river, in 1855, between the steamship Pennsylvania and the steamship Jamestown, the Pennsylvania was in fault, and the collision cannot be imputed to inevitable accident. *Union Steamship Co.* v. *New York and Virginia Steamship Co.*, 307.

12. Inevitable accident must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution and a proper display of nautical skill, to prevent the occurrence of the accident. *Ibid.*

13. If the night was very dark, it was negligence in the master of the Pennsylvania to remain in the saloon until just before the collision occurred; and if the night was not unusually dark, there was gross negligence in those who had the management of the deck. *Ibid.*

14. The helm of the Pennsylvania was put to starboard when it ought not to have been, and the supposition that she was backing is shown not to have been correct by the force with which she struck the other vessel, which had taken every precaution to avoid the danger. *Ibid.*

15. At Mobile, it is necessary for a vessel drawing much water to lie outside

ADMIRALTY, (*Continued.*)

of the bar and have her cargo brought to her by lighters. *Bulkley* v. *Naumkeag Steam Cotton Company*, 386.

16. The usage is for the lighterman to be engaged and paid by the captain of the vessel, to give his receipt to the factor for the cotton, and to take a receipt from the captain when he delivers it on board of the vessel. *Ibid.*

17. Where a lighterman, thus employed, was conveying bales of cotton to a vessel lying outside of the bar, but before they were put on board, an explosion of the boiler threw the bales into the water, by which the cotton was damaged; the vessel was held responsible for the loss upon being libelled in a court of admiralty, the master having included these bales in the bills of lading which he signed. *Ibid.*

18. The delivery of the cotton to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master had engaged to carry the cotton to Boston. When delivered by the shipper and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed. *Ibid.*

19. The cases in this court and in England examined. *Ibid.*

APPELLATE COURT.

1. The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publication in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Nations* v. *Johnson*, 195.

2. These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled. *Ibid.*

3. The American and English cases upon this point examined. *Ibid.*

BASTARDY.

1. The code of Louisiana makes a distinction between acknowledged natural children and adulterine children; allowing the former to take as legatees, but not allowing the latter to do so, except to a small amount. *Gaines* v. *Hennen*, 553.

2. But the legal relations of adulterous bastardy do not arise in this case. The law examined relative to putative marriages, which are where, in cases of bigamy, both parents, or either of them, contracted the second marriage in good faith. The issue of such a marriage is legitimate. *Ibid.*

3. The Louisiana cases, the Spanish law, and the Code Napoleon, examined as bearing upon this point, and the principles established by them applied to the present case. *Ibid.*

4. Clark, the father, was capable of contracting marriage; the consequence examined of his testamentary recognition of his child's legitimacy. *Ibid.*

BIGAMY.

1. The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution. *Gaines* v. *Hennen*, 553.

BONDS.

1. Where there was an action of replevin in Wisconsin, by virtue of which the property was seized by the marshal, and a bond was given by the defendant in replevin, together with sureties, the object of which was to obtain the return of the property to the defendant; which bond was afterwards altered, by the principal defendant's erasing his name from the bond, with the knowledge and consent of the marshal but without the knowledge or consent of the sureties, the bond was thereby rendered invalid against the sureties. *Martin* v. *Thomas*, 315.

CALIFORNIA.

1. An instrument of writing, purporting to be a grant of land in California by Pio Pico, in 1846, is not sustained by the authority of the public archives or in conformity with the regulations of 1828, and therefore comes within the previous decisions of this court, declaring such grants void. *Palmer et al.* v. *United States*, 125.
2. Moreover, the evidence in the case shows that the alleged grant was utterly fraudulent. *Ibid.*
3. The decision of this court in the cases of United States *v.* Nye, 21 Howard, 408, and United States *v.* Rose, 23 Howard, 262, again affirmed; and as the testimony in the present case is similar to that offered in the above cases, the judgment of the District Court in favor of the claimant is reversed. *United States* v. *Chana et al.*, 131.
4. Where the plaintiffs in ejectment showed a legal title to land in California under a patent from the United States and a survey under their authority, it was proper in the court below to refuse to admit testimony offered by the defendants to show that the survey was incorrect, the defendants claiming under a merely equitable title. *Greer et al.* v. *Mezes et al.*, 268.
5. Where the defendants pleaded severally the general issue, it was proper for the court below to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels. *Ibid.*
6. The mode of proceeding by petition does not alter the law of ejectment under the old system of pleading. *Ibid.*
7. As a general rule, in order to support a title to land in California under a Mexican grant, the written evidence of the grant in the forms required by the Mexican law must be found in the public archives and records, where they were required by law and regulations to be deposited and recorded. *United States* v. *Castro*, 346.
8. In order to support a title by secondary evidence, the claimant must show that these title papers had been deposited and recorded in the proper office; that the records and papers of that office, or some of them, had been lost or destroyed; and also, that he entered into the possession of the premises and exercised authority as owner within a reasonable

CALIFORNIA, (*Continued.*)
time after the date of the grant. The possession is an essential part of the secondary evidence of title. *Ibid.*
9. Parol proof of a grant produced from a private receptacle, without proof that it had been deposited and recorded in the proper office and the loss and destruction of papers in that office, is not sufficient to support a title, even if possession be proved by the oral testimony of witnesses. *Ibid.*

CANAL COMPANY.
See CORPORATION.

CHANCERY.
1. The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property. *Fitch* v. *Creighton*, 159.
2. The City Council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments. *Ibid.*
3. The contractor who executed the work, and who was a citizen of another State, filed a bill upon the equity side of the Circuit Court to enforce this lien. *Ibid.*
4. The court had jurisdiction of the case. *Ibid.*
5. The courts of the United States have jurisdiction at common law and in chancery; and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State, but from the laws of the United States. *Ibid.*
6. It was not necessary to make the contractor who had sold out a party, nor was the bill multifarious because it claimed to enforce the liens upon several lots. *Ibid.*
7. Where creditors, who were so upon simple contract debts, filed a bill in chancery to set aside a deed made by the debtor as being fraudulent against creditors, and other creditors came in as parties complainants, the court below was right in ordering a pro rata distribution amongst all the creditors, none of them having a judgment or other lien at law. *Day* v. *Washburn*, 353.
8. The complainants who first filed the bill have no preference thereby over the other creditors. *Ibid.*
9. In Maryland, the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence. *Lessee of Smith et al.* v. *McCann*, 398.
10. The statute of George the Second which made lands in the American colonies liable to be sold under a *fieri facias* issued upon a judgment in a court of common law, did not interfere with this distinction, and under it a legal estate only and not an equitable interest could be seized under a *fi. fa.* *Ibid.*

CHANCERY, (*Continued.*)

11. In 1810, an act of Assembly was passed making equitable interests subject to this process. *Ibid.*

12. But the purchaser at the sale of an equitable interest under this process only buys the interest which the debtor had, and thus becomes the owner of an equitable and not a legal estate. *Ibid.*

13. It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property, and not a barren legal title held in trust. *Ibid.*

14. In the action of ejectment, in Maryland, the lessor of the plaintiff must show a legal title in himself to the land which he claims, and the right of possession under it, at the time of the demise laid in the declaration and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery. *Ibid.*

15. Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.;* and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed. *Ibid.*

16. But the plaintiff in the ejectment suit offered evidence to prove that the trusts in the deed were fraudulent, and that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors. And this proof was offered to show that the debtor had a beneficial interest in the property, liable to be seized and sold for the payment of his debts. *Ibid.*

17. This parol evidence could not be introduced to enlarge or change the legal estate of the grantee against the plain words of the instrument. *Ibid.*

18. If the evidence were admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed. Although the debtor may have paid the purchase money, that circumstance did not establish a resulting trust in his favor. *Ibid.*

19. The lessors of the plaintiff had a plain and ample remedy in chancery, where all the parties interested could be brought before the court. *Ibid.*

20. The instruction of the court below was therefore correct, that the plaintiff could not recover in the action of ejectment. *Ibid.*

21. Charles McMicken, a citizen and resident of Cincinnati, in Ohio, made his will in 1855, and died in March, 1858, without issue. *Perin et al.* v. *Carey et al.*, 465.

22. He devised certain real and personal property to the city of Cincinnati and its successors, in trust forever, for the purpose of building, establishing, and maintaining as far as practicable, two colleges for the education of boys and girls. None of the property devised, or which the city may purchase for the benefit of the colleges, should at any time be sold. In all applications for admission to the colleges, a preference

CHANCERY, (*Continued.*)

was to be given to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants. *Ibid.*

23. If there should be a surplus, it was to be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents were living; preference to be given to our relations and collateral descendants. *Ibid.*

24. The establishment of the regulations necessary to carry out the objects of the endowment was left to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution. *Ibid.*

25. This will can stand; and with reference to the various points of law connected therewith, this court establishes the following propositions, viz:

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio; but not by express legislation, nor was that necessary to give courts of equity in Ohio that jurisdiction.
2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the Governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.
3. The city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.
4. Those devises and bequests are charities in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.
5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.
6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons as to who should be pupils in the colleges which he meant to found was a lawful exercise of his rightful power to make the devises and bequests.
7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.
8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will. *Ibid.*

COLLISION OF VESSELS.

See ADMIRALTY.

COMMERCIAL LAW.

1. An act of Congress passed on the 3d of March, 1851, (9 Stat. at L., 635,) entitled "An act to limit the liability of ship owners, and for other purposes," provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please. *Moore et al.* v. *American Transportation Co.*, 1.
2. The seventh section provides that this act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation. *Ibid.*
3. The exception does not include vessels used on the great lakes. Consequently, where goods were consumed by fire upon Lake Erie, without any design or neglect on the part of the owner of the vessel, he was not responsible for the loss. *Ibid.*
4. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master and others, and also for loss or damage by collisions, and even from any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight. *Ibid.*
5. At Mobile, it is necessary for a vessel drawing much water to lie outside of the bar and have her cargo brought to her by lighters. *Bulkley* v. *Naumkeag Steam Cotton Company*, 386.
6. The usage is for the lighterman to be engaged and paid by the captain of the vessel, to give his receipt to the factor for the cotton, and to take a receipt from the captain when he delivers it on board of the vessel. *Ibid.*
7. Where a lighterman, thus employed, was conveying bales of cotton to a vessel lying outside of the bar, but before they were put on board, an explosion of the boiler threw the bales into the water, by which the cotton was damaged; the vessel was held responsible for the loss upon being libelled in a court of admiralty, the master having included these bales in the bills of lading which he signed. *Ibid.*
8. The delivery of the cotton to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master had engaged to carry the cotton to Boston. When delivered by the shipper and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed. *Ibid.*
9. The cases in this court and in England examined. *Ibid.*

CONSTITUTIONAL LAW.

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CONSTITUTIONAL LAW, (*Continued.*)

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5. The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: From the Sugar loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." *Jones* v. *Soulard*, 41.

6. This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream. *Ibid.*

7. This rule, so well established as to fresh-water rivers generally, is not varied by the circumstance that the Mississippi, at St. Louis, is a great and public water-course. The rule with respect to tide-water rivers, where the tide ebbs and flows, does not apply to the present case. *Ibid.*

8. Therefore, Duncan's island, upon which was the land in dispute, and which became connected with the shore as fast land, was included in a grant made by Congress, in 1812, to the town of St. Louis, for the public schools; and it neither passed to the State of Missouri by her admission into the Union, in 1820, nor by the act of Congress passed in 1851. *Ibid.*

9. In a suit between two States, this court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised. *Commonwealth of Kentucky* v. *Dennison, Governor of Ohio*, 66.

10. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State. *Ibid.*

11. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy. *Ibid.*

12. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution of the United States, include every offence forbidden and made punishable by the laws of the State where the offence is committed. *Ibid.*

CONSTITUTIONAL LAW, (*Continued.*)

13. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him. *Ibid.*
14. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment. *Ibid.*
15. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution, when Congress had, by that act, regulated the mode in which the duty was to be performed. *Ibid.*
16. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him. *Ibid.*
17. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago; and, upon that ground only, this motion for a mandamus was overruled. *Ibid.*
18. A stamp duty imposed by the Legislature of California upon bills of lading for gold or silver, transported from that State to any port or place out of the State, is a tax on exports, and the law of the State unconstitutional and void. *Almy* v. *State of California*, 169.
19. Whether this court has or has not jurisdiction under the 25th section of the Judiciary act may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. *Medberry et al.* v. *State of Ohio*, 413.
20. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone this court can resort to ascertain the subject-matter of the litigation. *Ibid.*
21. Therefore, where the record showed that the only question presented to the State Court, and decided by them, was, whether the provisions of an act of the Legislature were consistent with the Constitution of the State, this court has no power to review their judgment. *Ibid.*
22. Where an act of Assembly of the State of Kentucky was objected to in the State court because said act and supplement were unconstitutional and void, the court properly considered the question as relating to the power of the Legislature to pass the act under the Constitution of the State, and not under the Constitution of the United States. *Porter et al.* v. *Foley*, 415.
23. There is therefore no ground for the exercise of jurisdiction by this court under the 25th section of the Judiciary act. *Ibid.*
24. Subsequently to the decisions of this court in the cases of Williamson *v.* Berry, Williamson *v.* the Irish Presbyterian Church, and Williamson *v.* Ball, reported in 8 Howard, the Court of Appeals of the State of

CONSTITUTIONAL LAW, (*Continued.*)

New York affirmed a different opinion from that of this court respecting the title to the real property involved in those decisions. *Suydam* v. *Williamson*, 427.

25. This court now adopts the decision of the court of New York in conformity with the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals. *Ibid.*

26. Cases cited in support of this rule, and the cases in 8 Howard commented on. *Ibid.*

27. On the 9th of February, 1853, the Legislature of Pennsylvania passed an act entitled, "An act to incorporate the Northwestern Railroad Company." *Curtis* v. *County of Butler*, 435.

28. By the seventh section, the counties through parts of which the railroad may pass were authorized to subscribe to the capital stock of the company, and to make payments on such terms and in such manner as may be agreed upon by the company and proper county; and the subscription of the counties was to be held to be valid when made by a majority of its commissioners. *Ibid.*

29. The county of Butler was one of the counties through which the railroad was to pass, and coupon bonds were issued, signed by two of the three commissioners of the county, in payment of a subscription of two hundred and fifty thousand dollars on the part of the county of Butler. *Ibid.*

30. Other parts of the act required certain other things to be done, which were complied with. *Ibid.*

31. The proper construction of this act is, that power was given in the act and by the agreement of subscription and terms of payment, to the commissioners of Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them. *Ibid.*

32. The bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler. *Ibid.*

33. A statute of the State of Alabama, authorizing a redemption of mortgaged property in two years after the sale under a decree, by *bona fide* creditors of the mortgagor, is unconstitutional and void as to sales made under mortgages executed prior to the date of its enactment, as impairing the obligation of the contract. *Howard* v. *Bugbee*, 461.

34. This question was decided by this court in the case of Bronson *v.* Kinzie, 1 Howard, 311, and the decision has been since repeatedly affirmed. *Ibid.*

35. In 1833, the Legislature of Pennsylvania enacted that "the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." *Christ Church of Philadelphia* v. *County of Philadelphia*, 300.

36. In 1851, they enacted that all property, real or personal, belonging to any association or incorporated company, which is now by law exempt from

CONSTITUTIONAL LAW, (*Continued.*)

taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed. *Ibid.*

37. This last law was not in violation of the Constitution of the United States. It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign. *Ibid.*

38. Where the marshal, by virtue of mesne process issuing out of the Circuit Court of the United States for the district of Massachusetts, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff of Middlesex county under a replevin brought by the mortgagees of the railroad company, the proceeding of the sheriff was entirely irregular. *Freeman* v. *Howe et al.*, 450.

39. I. The suit upon the replevin was instituted and carried on to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the Federal and State courts. *Ibid.*

40. II. Also in respect to the appropriate remedy of the mortgagees of the railroad cars for the grievances complained of. *Ibid.*

41. In the case of Taylor et al *v.* Carryl, (20 Howard, 583,) the majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process. *Ibid.*

42. This principle is equally applicable to the case of property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of property seized in admiralty, and the proceedings *in rem*. *Ibid.*

43. The distinction examined which is alleged to exist between a proceeding in admiralty and process issuing from a common-law court. *Ibid.*

44. Whether the railroad cars which were seized were or were not the property of the railroad company, was a question for the United States court, which had issued the process to determine. *Ibid.*

45. Cases and authorities examined which are supposed to conflict with this principle. *Ibid.*

46. Although both parties to the replevin were citizens of Massachusetts, yet the plaintiffs were not remediless in the Federal courts. They could have filed a bill on the equity side of the court from which the process of attachment issued, which bill would not have been an original suit, but supplementary merely to the original suit out of which it had arisen. It would therefore have been within the juris-

CONSTITUTIONAL LAW, (*Continued.*)
diction of the court, and the proper remedy to have been pursued. *Ibid.*
47. Cases cited to illustrate this. *Ibid.*
CONSTRUCTION OF ACTS OF CONGRESS.
1. The exception in the seventh section of the act of 3d of March, 1851, with respect to the liability of ship owners, does not extend to the navigation of the Lakes. *Moore* v. *American Transportation Co.*, 1.
2. St. Louis, as a riparian proprietor, adjudged to be entitled to Duncan's Island, by virtue of a grant for the support of public schools. *Jones* v. *Soulard*, 41.
CONTRACT.
1. After a railroad company has received goods into their depot on Sunday, their duty to keep them safely is not within the prohibition of the Virginia law for the enforcement of the Sabbath; and if the goods are burned, the company are responsible for their loss. *Powhatan Steamboat Co.* v. *Appomattox Railroad Co.*, 247.
CORPORATION.
1. A corporate franchise to take tolls on a canal cannot be seized and sold under a *fieri facias*, unless authorized by a statute of the State which granted the act of incorporation. *Gue* v. *Tide Water Canal Co.*, 257.
2. Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise. *Ibid.*
3. An act of the Legislature of Maryland examined whereby certain named persons, and such others as might be associated with them, were incorporated by the name of the Frostburg Coal Company. *Frost's Lessee* v. *Frostburg Coal Co.*, 278.
4. The defendants in this suit were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate from the beginning. *Ibid.*
5. Even if it were otherwise, and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted or its nonperformance shown, a party dealing with the company is not permitted to set up the irregularity. *Ibid.*
6. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the Government that created it. *Ibid.*
7. The common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city. The statutes of the State examined by which such authority was conferred. *Bissell* v *City of Jeffersonville*, 287.
8. Under one of these acts, the common council determined that three-fourths had so petitioned; and under a subsequent act, authorizing them to

CORPORATION, (*Continued.*)
revise the subject, they again came to the same conclusion, and issued the bonds. *Ibid.*

9. Jurisdiction of the subject-matter on the part of the common council was made to depend upon the fact whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws the tribunal to decide that question. *Ibid.*
10. When sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city. *Ibid.*
11. Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The railroad company and their assigns had a right, therefore, to conclude that they imported absolute verity. *Ibid.*

DEEDS.

1. By the laws of Tennessee anterior to 1856, a deed for lands lying in Tennessee could not be acknowledged or proven in another State before the clerk of a court. *McEwen et al.* v. *Bulkley's Lessee*, 242.
2. In 1856, a law was passed allowing this to be done. This statute was prospective. *Ibid.*
3. The circumstance that the law of 1856 was called an amendment of the prior law does not change this view of the subject. *Ibid.*
4. Where a deed was acknowledged in 1839, before the clerk of a court in another State, a copy of it from the record was improperly allowed to be read in evidence to the jury. *Ibid.*

EJECTMENT.

1. The statutes of Illinois require that a declaration in ejectment shall be served upon the actual occupant, and the practice of that State authorizes the appearance of the landlord and his defence of the suit, either in his own name or that of the tenant with his consent. *Kellogg et al.* v. *Forsyth*, 186.
2. And when a landlord has undertaken the defence of a suit in the name of the tenant with his consent, the tenant cannot interfere with the cause to his prejudice. *Ibid.*
3. Therefore, when the defendant in ejectment in the court below died after judgment, and his attorney and landlord, who had conducted the suit in the name and with the consent of the deceased, sued out a writ of error in the name of the heirs, gave bond for the prosecution of the writ and for costs, a motion to dismiss the writ will not be entertained, although the heirs of the deceased authorize the motion to dismiss. *Ibid.*
4. It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and prosecuting the writ of error in good faith. *Ibid.*

EJECTMENT, (*Continued.*)

5. The motion to dismiss the writ of error is therefore overruled. *Ibid.*
6. Where the plaintiffs in ejectment showed a legal title to land in California under a patent from the United States and a survey under their authority, it was proper in the court below to refuse to admit testimony offered by the defendants to show that the survey was incorrect, the defendants claiming under a merely equitable title. *Greer et al.* v. *Mezes et al.*, 268.
7. Where the defendants pleaded severally the general issue, it was proper for the court below to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels. *Ibid.*
8. The mode of proceeding by petition does not alter the law of ejectment under the old system of pleading. *Ibid.*
9. In Maryland, the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence. *Lessee of Smith et al.* v. *McCann*, 398.
10. The statute of George the Second which made lands in the American colonies liable to be sold under a *fieri facias* issued upon a judgment in a court of common law, did not interfere with this distinction, and under it a legal estate only and not an equitable interest could be seized under a *fi. fa.* *Ibid.*
11. In 1810, an act of Assembly was passed making equitable interests subject to this process. *Ibid.*
12. But the purchaser at the sale of an equitable interest under this process only buys the interest which the debtor had, and thus becomes the owner of an equitable and not a legal estate. *Ibid.*
13. It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property, and not a barren legal title held in trust. *Ibid.*
14. In the action of ejectment, in Maryland, the lessor of the plaintiff must show a legal title in himself to the land which he claims, and the right of possession under it, at the time of the demise laid in the declaration and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery. *Ibid.*
15. Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.;* and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed. *Ibid.*
16. But the plaintiff in the ejectment suit offered evidence to prove that the trusts in the deed were fraudulent, and that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors. And this proof was offered to show that the debtor had a beneficial interest in the property, liable to be seized and sold for the payment of his debts. *Ibid.*
17. This parol evidence could not be introduced to enlarge or change the legal

EJECTMENT, (*Continued.*)
estate of the grantee against the plain words of the instrument. *Ibid.*
18. If the evidence were admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed. Although the debtor may have paid the purchase money, that circumstance did not establish a resulting trust in his favor. *Ibid.*
19. The lessors of the plaintiff had a plain and ample remedy in chancery, where all the parties interested could be brought before the court. *Ibid.*
20. The instruction of the court below was therefore correct, that the plaintiff could not recover in the action of ejectment. *Ibid.*
21. By a statute of Texas, actions of ejectment, trespass to try title, &c., can be maintained upon certificates for head rights or other equitable titles. *Sheirburn* v. *Cordova*, 423.
22. But this court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title. *Ibid.*
23. A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain his action. *Ibid.*

ESTOPPEL.
1. The general rule of law is, that the judgment of a court of law or a decree of a court of equity, directly upon the same point and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit. *Thompson et al.* v. *Roberts et al.*, 233.
2. Where the court left it to the jury to say whether the defence made at law was the same which was made in a prior equity suit, this error, if it be one, does not invalidate the judgment of the court below. *Ibid.*
3. The parties to the suit at law having been parties to the suit in equity, the subject matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter. *Ibid.*
4. No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides. *Ibid.*
5. The record of a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count; for the verdict may have been rendered on the common counts. *Washington, Alexandria, & Georgetown S. P. Co.* v. *Sickles et al.*, 333.
6. This rule is not varied by the circumstance that after the verdict was rendered the court directed judgment to be entered for the plaintiffs on the first count in the declaration, being the special count. *Ibid.*
7. The authorities upon the doctrine of estoppel examined. *Ibid.*

EVIDENCE.

1. The volumes of American State Papers, Public Lands, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof. *Gregg et al.* v. *Forsyth*, 179.
2. A party cannot object to the reading of a record and deed of sale, upon the ground that the proceedings had been irregular, when the parties to the decree had not complained of it. The objectors were strangers to these proceedings. *Ibid.*
3. The decisions of this court in the cases of the City of Boston *v.* Lecraw, 17 How., 426, and Richardson *v.* City of Boston, 19 How., 263, referred to and explained. *Richardson* v. *City of Boston*, 188.
4. Indictments against the city of Boston, in 1848, for permitting unhealthy vapors and exhalations to arise in that part of the city which the sewer in question was erected to remedy, were admissible in evidence, on the part of the city, to show that the conduct of the city did not tend to oppression, and as part of the history of the case. An instruction of the court below was correct, viz: that a former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, because it was founded on erroneous instructions on the law. *Ibid.*
5. So, also, an instruction was correct which told the jury that there was no evidence in the case which would authorize them to find that the city of Boston had ever dedicated to the public use a public highway, town way, dock, or public way, between the wharves in question, for the access of boats and vessels between said wharves to high-water mark or the egress therefrom to the sea. *Ibid.*
6. These instructions were in conformity with the previous decisions of this court. *Ibid.*
7. In a suit in the District Court of the United States for the western district of Texas, a transcript of a record of the high court of errors and appeals and the chancery court for the northern district of the State of Mississippi was properly allowed to be offered as conclusive proof of the value of certain slaves, and of the amount of their annual hire until given up. *Nations et al.* v. *Johnson et al.*, 195.
8. The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publication in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Ibid.*
9. These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled. *Ibid.*
10. The American and English cases upon this point examined. *Ibid.*
11. The decree of the court was also properly allowed to go to the jury as evidence of the value of the hire of the slaves after its rendition; evi

EVIDENCE, (*Continued.*)

dence having also been offered at the trial of the value of such hire at that time. *Ibid.*

12. The case having been on the chancery side of the court and transferred thence to the law docket, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side. *Ibid.*
13. On a petition for freedom, the petitioner proved that one Kirby had emancipated all his slaves by will, some immediately and some at a future day. *Vigel* v. *Naylor*, 208.
14. The petitioner, in order to bring herself within this category and show that she had been the slave of Kirby, offered to prove that her mother and brother and sister had recovered their freedom by suits brought against George Naylor, whose administrator, Henry Naylor, the defendant in the present suit was; and that it was very unusual to separate from the mother a child so young as the petitioner was at the time of Kirby's death. *Ibid.*
15. Proofs of these circumstances were not allowed by the court below to go to the jury. In this the court was in error. *Ibid.*
16. The recoveries of the mother and sister against George Naylor ought to have been allowed to go to the jury. They were not *res inter alios acta.* This case distinguished from that of Davis *v.* Wood, 1 Wheaton, 6. *Ibid.*
17. It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently, when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury. *Chandler* v. *Von Roeder et al.*, 224.
18. Therefore, where, in a land suit in Texas, the defendants pleaded the statute of limitations, and the documentary evidence showed that neither the plea of five years' possession nor three years' possession (see preceding case in this volume) could be sustained, it was errroneous for the judge to leave that question to the jury. *Ibid.*
19. It was also error in the judge to exclude testimony to show that the deed was fraudulent under which the defendant claimed. The Supreme Court of Texas have decided that conveyances made with an intent to defraud creditors are void. *Ibid.*
20. The general rule of law is, that the judgment of a court of law or a decree of a court of equity, directly upon the same point and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit. *Thompson et al.* v. *Roberts et al.*, 233.
21. Where the court left it to the jury to say whether the defence made at law was the same which was made in a prior equity suit, this error, if it be one, does not invalidate the judgment of the court below. *Ibid.*
22. The parties to the suit at law having been parties to the suit in equity,

EVIDENCE, (*Continued.*)

the subject matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter. *Ibid.*

23. No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides. *Ibid.*

24. What the plaintiff must prove in an action for a malicious prosecution. *See Malicious Prosecution.*

25. A paper called an ecclesiastical record was not admissible in evidence on a question of bigamy. *Gaines* v. *Hennen*, 553.

26. The evidence examined which is supposed to sustain the position that the connection between Clark and Zulime Carriere was adulterous, so as to bar the offspring from taking as a legatee under her father's will. The evidence declared to be sufficient in a civil suit to establish the fact that Des Grange committed bigamy when he married Zulime. *Ibid.*

27. The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution. *Ibid.*

28. The evidence of Coxe and Bellechasse examined, and also that relating to the parentage of Caroline Barnes. *Ibid.*

29. The paper misnamed the ecclesiastical record, purporting to be an acquittal of Des Grange of bigamy, is not admissible evidence in this case. But if it was so, it would neither of itself, nor in connection with all that is evidence in the record, serve to prove the adulterous bastardy of the complainant, as the rule of evidence requires that to be done, in opposition to the testamentary declaration of her father, in his own handwriting, that she was his legitimate and only daughter, and, as such, by him constituted his universal legatee. *Ibid.*

30. The charge of adulterous bastardy, as made by the defendant, is not in response to the complainant's bill, but is an affirmative allegation of a fact by them, and the burthen of proof is upon them to establish it in contradiction to the declaration of her father, in his written will, that she was his legitimate child. *Ibid.*

31. The paper or record, as called, is not that of a legally-constituted tribunal, according to either the ecclesiastical usages or the laws of Spain, as they prevailed in Louisiana at any time when that province was a part of the dominion of Spain. And neither the Canon Hasset, the Alcalde Caisergues, nor the Notary Franco Bermudez, had either individual or conjoined authority to take cognizance of a charge of bigamy in the way it was done. *Ibid.*

EXECUTION.

1. A corporate franchise to take tolls on a canal cannot be seized and sold under a *fieri facias*, unless authorized by a statute of the State which granted the act of incorporation. *Gue* v. *Tide Water Canal Co.*, 257.

EXECUTION, (*Continued.*)

2. Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise. *Ibid.*

FIERI FACIAS.

See EXECUTION.

INSOLVENCY.

1. This court decided, in 17th Howard, 274, that the interest in one of the shares of the Mexican Company of Baltimore did not pass to a trustee in insolvency in 1819, the contract with Mina having been declared by the Court of Appeals of Maryland to be utterly null and void, so that no interest could pass to the trustee of an insolvent. *Mayer* v. *White*, 318.

2. But in 1824, Mexico assumed the debt as one of national obligation, and the United States made it the subject of negotiation until it was finally paid. *Ibid.*

3. A second insolvency having taken place in 1829, there was a right of property in the insolvent which was capable of passing to his trustee. *Ibid.*

4. The claim of the latter is therefore better than that of the administrator of the insolvent. *Ibid.*

5. Where a creditor, whose debt was not yet due at the time of bringing the action, brought a suit against his debtors and two other persons, for a conspiracy to enable the debtors to dispose of their property fraudulently so as to hinder and defeat the creditors in the collection of their lawful demands, the action will not lie. *Adler et al.* v. *Fenton et al.*, 407.

6. The debtors were the lawful owners of the property at the time the suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demands. *Ibid.*

7. The authorities examined to show that this cannot be done. *Ibid.*

8. In this case, the creditor, by suing and levying an attachment upon the property of the debtor for such parts of the debt as had then become due, had waived the alleged fraud in the contract of sale and confirmed the sale. *Ibid.*

JURISDICTION.

1. In a suit between two States, this court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised. *Commonwealth of Kentucky* v. *Dennison, Governor of Ohio*, 66.

2. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State. *Ibid.*

3. A writ of mandamus does not issue in virtue of any prerogative power,

JURISDICTION, (*Continued.*)

and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy. *Ibid.*

4. The words "treason, felony, or other crime," in the second clause of the second section of the fourth article of the Constitution of the United States, include every offence forbidden and made punishable by the laws of the State where the offence is committed. *Ibid.*
5. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky, and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him. *Ibid.*
6. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment. *Ibid.*
7. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution, when Congress had, by that act, regulated the mode in which the duty was to be performed. *Ibid.*
8. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him. *Ibid.*
9. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago; and, upon that ground only, this motion for a mandamus was overruled. *Ibid.*
10. The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property. *Fitch* v. *Creighton*, 159.
11. The City Council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments. *Ibid.*
12. The contractor who executed the work, and who was a citizen of another State, filed a bill upon the equity side of the Circuit Court to enforce this lien. *Ibid.*
13. The court had jurisdiction of the case. *Ibid.*
14. The courts of the United States have jurisdiction at common law and in chancery; and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State, but from the laws of the United States. *Ibid.*
15. It was not necessary to make the contractor who had sold out a party, nor was the bill multifarious because it claimed to enforce the liens upon several lots. *Ibid.*

JURISDICTION, (*Continued.*)

16. Upon a libel to recover damages against ship-owners, a decree passed against them for over $2,000, with leave to set off a sum due them for freight, which would reduce the amount decreed against them to less than $2,000. The party elected to make the set off, saving his right to appeal to this court. *Sampson et al.* v. *Welsh et al.*, 207.
17. The reduced decree was the final decree, and the party cannot save a right of appeal where it is not allowed by act of Congress. *Ibid.*
18. Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy. *Board of Commissioners of Knox County* v. *Aspinwall et al.*, 376.
19. The Circuit Courts of the United States have authority to issue such writ of mandamus against the commissioners, where it is necessary, as a remedy for suitors in such court. *Ibid.*
20. It is not a sufficient reason for setting aside a peremptory mandamus, that a previous alternative writ had not issued. *Ibid.*
19. Whether this court has or has not jurisdiction under the 25th section of the Judiciary act may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. *Medberry et al.* v. *State of Ohio*, 413.
20. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone this court can resort to ascertain the subject-matter of the litigation. *Ibid.*
21. Therefore, where the record showed that the only question presented to the State Court, and decided by them, was, whether the provisions of an act of the Legislature were consistent with the Constitution of the State, this court has no power to review their judgment. *Ibid.*
22. Where an act of Assembly of the State of Kentucky was objected to in the State court because said act and supplement were unconstitutional and void, the court properly considered the question as relating to the power of the Legislature to pass the act under the Constitution of the State, and not under the Constitution of the United States. *Porter et al.* v. *Foley*, 415.
23. There is therefore no ground for the exercise of jurisdiction by this court under the 25th section of the Judiciary act. *Ibid.*
24. Where a decree of the Court of Appeals of Maryland affirmed the decree of the court below and remanded the case to that court, this is not such a final decree as will give jurisdiction over the case to this court. *Reddall* v. *Bryan et al.*, 420.
25. The decree of the court below was merely an interlocutory order; and although State laws allow an appeal to State courts from such an order, this cannot enlarge the jurisdiction of this court given by act of Congress. *Ibid.*
26. Moreover, the judgment of the State court was in favor of the authority

JURISDICTION, (*Continued.*)
set up under the laws of the United States, and therefore no appeal lies to this court under the 25th section of the Judiciary act. *Ibid.*

27. By a statute of Texas, actions of ejectment, trespass to try title, &c., can be maintained upon certificates for head rights or other equitable titles. *Sheirburn* v. *Cordova*, 423.

28. But this court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title. *Ibid.*

29. A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain his action. *Ibid.*

30. Where the judgment of the court below reverses the decision of the inferior court and awards a new trial, it is not a final judgment from which a writ of error will lie to this court. *Tracy* v. *Holcombe*, 426.

31. Where the marshal, by virtue of mesne process issuing out of the Circuit Court of the United States for the district of Massachusetts, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff of Middlesex county under a replevin brought by the mortgagees of the railroad company, the proceeding of the sheriff was entirely irregular. *Freeman* v. *Howe et al.*, 450.

32. I. The suit upon the replevin was instituted and carried on to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the Federal and State courts. *Ibid.*

33. II. Also in respect to the appropriate remedy of the mortgagees of the railroad cars for the grievances complained of. *Ibid.*

34. In the case of Taylor et al *v.* Carryl, (20 Howard, 583,) the majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should for the time prevail did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process. *Ibid.*

35. This principle is equally applicable to the case of property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of property seized in admiralty, and the proceedings *in rem*. *Ibid.*

36. The distinction examined which is alleged to exist between a proceeding in admiralty and process issuing from a common-law court. *Ibid.*

37. Whether the railroad cars which were seized were or were not the property of the railroad company, was a question for the United States court which had issued the process to determine. *Ibid.*

38. Cases and authorities examined which are supposed to conflict with this principle. *Ibid.*

39. Although both parties to the replevin were citizens of Massachusetts, yet the plaintiffs were not remediless in the Federal courts. They could have filed a bill on the equity side of the court from which the

JURISDICTION, (*Continued.*)

process of attachment issued, which bill would not have been an original suit, but supplementary merely to the original suit out of which it had arisen. It would therefore have been within the jurisdiction of the court, and the proper remedy to have been pursued. *Ibid.*

40. Cases cited to illustrate this. *Ibid.*

JURY.

1. It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently, when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury. *Chandler* v. *Von Roeder et al.*, 224.

2. When the general issue is pleaded to an action on the case for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of the prosecution, that the defendant was himself the prosecutor, or instigated the proceeding, and that it finally terminated in favor of the party accused. *Wheeler* v. *Nesbitt et al.*, 544.

3. He must also prove that the charge against him was unfounded, that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice. *Ibid.*

4. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Ibid.*

5. Where the court told the jury that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty, it was not error in the court to add, in the same connection, that if, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable and dispassionate man to believe that he was guilty of the charge preferred against him, then the jury ought to infer malice, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. *Ibid.*

6. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction; but the error, if it be one, forms no ground of exception by the plaintiff, because it was in his favor. *Ibid.*

7. As the magistrate who issued the warrant was one of the parties sued in this case, it was proper for the court below to instruct the jury that if there was probable cause for the arrest of the party, he could lawfully be detained for a reasonable time, owing to the neglect on his part to offer any satisfactory security for his appearance at the time appointed for examination. *Ibid.*

LANDS, PUBLIC.

1. An act of Congress passed on the 15th of May, 1829, (3 Stat. at L., 605,) authorizes persons who claim lots in the village of Peoria, in Illinois, to notify the register of the land office, who was directed to report to the Secretary of the Treasury, to be laid by him before Congress. *Hall* v. *Papin*, 132.
2. An act of March 3, 1823, (3 Stat. at L., 786,) grants to each one of the settlers who had settled on a lot prior to the 1st of January, 1813, the lot so settled on and improved, where the same shall not exceed two acres; and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: *Provided*, the right of any other person derived from the United States, or any other source whatever, &c., shall not be affected. *Ibid.*
3. These two statutes were drawn into question in the case of Bryan et al. *v.* Forsyth, 19 Howard, 334, where it was ruled that "in the interval between 1823 and the survey a patent was taken out, which was issued subject to all the rights of persons claiming under the act of 1823. This patent was controlled by the subsequent survey." *Ibid.*
4. In the present case the patent is not controlled by the subsequent survey, for the following reasons:
5. The old village of Peoria was settled very early in the history of the country, but abandoned before the years 1796, 1797, and the new village of Peoria built up at the distance of a mile and a half. *Ibid.*
6. The act of March, 1823, applies only to the new town, and the land in question is an out-lot or field of ten acres near the old village of Peoria. *Ibid.*
7. Papin, the plaintiff below, claimed under a plat of the village made in May, 1837, approved September, 1841, and a deed to himself from the confirmee made in 1854. *Ibid.*
8. Hall, the defendant below, claimed under a pre-emption certificate of 1833, a patent from the United States in 1837 to Seth and Josiah Fulton, and a deed to himself from the patentees in 1838. *Ibid.*
9. Supposing that no out-lot was meant to be confirmed, the inchoate right of the claimant under the act was subject to a survey and designation before it could be matured into a title. *Ibid.*
10. An instruction given by the court below to the jury, viz: that the persons taking under the patent of March 18, 1837, and under the entry of July 11, 1833, must be considered as taking their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and 1823; and when a party brought himself within those acts, his title was the paramount title, notwithstanding the patent to the Fultons was erroneous. *Ibid.*
11. So, also, it was error in the court below to refuse to instruct the jury, that if they believed from the evidence that by the plaintiff's recovering in this case the legal representatives of Willette would be confirmed in more than ten acres of Peoria French claims, they were to find for the defendant. *Ibid.*
12. The true construction of the act is, that a claimant was to have one con-

LANDS, PUBLIC, (*Continued.*)

firmation of "a lot so settled and improved," which had been claimed and entered in the report of the register of the land office at Edwardsville, in pursuance of the act of May 15, 1820; that no claimant, though he shall appear in the register's report as having made several claims, could, after having had one of them confirmed, transfer any right of property in the others to any person whatever. *Ibid.*

13. By the act of March 3d, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," the surveyor of public lands was directed to survey the lots. A certified copy of such survey is admissible in evidence. The survey in question was made in 1840. *Meehan et al.* v. *Forsyth*, 175.

14. Before the survey was made, Ballance made an entry of the quarter section, of which the lot in controversy makes a part, and a patent was issued to him, by which the United States granted it to him and his heirs, subject to the rights of any and all persons claiming under the act of Congress above mentioned. *Ibid.*

15. This saving clause was designed to exonerate the United States from any claim of the patentee in the event of his ouster by persons claiming under the acts of Congress, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of Congress described in it. *Ibid.*

16. The possession of Ballance under this patent was adverse to that of a claimant under the Peoria grant, and therefore the statute of limitations ran upon it; he having had possession for more than seven years, with a connected title in law or equity, deducible of record from the State or the United States. *Ibid.*

17. The possession of Ballance in the fractional quarter section of land spoken of in the preceding report of the case of Meehan and Ballance *v.* Forsyth, so as to entitle him to the benefit of the statute of limitations, need not have been by himself personally, but possession by a tenant under him enured to his benefit. *Gregg et al.* v. *Forsyth*, 179.

18. The circumstance that Ballance had laid out the land into lots and blocks did not make it necessary for him to reside upon every lot. The law only required him to possess and reside upon the premises claimed by his title papers. *Ibid.*

19. The volumes of American State Papers, Public Lands, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof. *Ibid.*

20. A party cannot object to the reading of a record and deed of sale, upon the ground that the proceedings had been irregular, when the parties to the decree had not complained of it. The objectors were strangers to these proceedings. *Ibid.*

21. After the mandate went down to the Circuit Court, in the case of Ballance *v.* Forsyth, 13 Howard, 18, Ballance filed a bill upon the equity

LANDS, PUBLIC, (*Continued.*)
side of the court, setting forth the same titles which were involved in the suit at law, and praying relief. *Ballance* v. *Forsyth et al.*, 183.

22. It was not allowable for him to appeal from the judgment of the Circuit Court and Supreme Court to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated. *Ibid.*

23. The objections to the title of his adversary should have been urged upon the trial of the suit at law; and if they are founded upon alleged errors in the location and survey, all such questions are administrative in their character, and must be disposed of in the Land Office. He ought to have made opposition there; if he did not, he is concluded by his laches. *Ibid.*

24. In the record there is a paper purporting to be an amended bill. It is doubtful whether this was properly filed; and if it was, it presents no ground of relief. *Ibid.*

25. The fourth and fifth sections of the act of Congress passed on the 31st of March, 1830, (4 Stat. at L., 392,) entitled "An act for the relief of purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the United States," cited and explained. *Fackler* v. *Ford*, 323.

26. One who covenants to sell lands which he expects to purchase at such sales, cannot afterwards plead his own fraud in obtaining his title from the Government in bar of a decree for specific performance of his agreement. *Ibid.*

27. Under several acts of Congress the register and receiver of the land office were authorized to grant a certificate to every person who should appear to be entitled to land in the section of country east of the Mississippi river and west of the Perdido river. *Tate* v. *Carney*, 357.

28. Under these acts, Robert Yair received a certificate in 1824 for the land now in controversy. *Ibid.*

29. In 1848, the register and receiver decided that Nancy Tate had settled upon this land at a very early day. They annulled the former certificate and granted an order of survey, by means of which a patent was issued in 1853 to the representatives of Nancy Tate. The patent reserves the right of Robert Yair. *Ibid.*

30. The decision of the register and receiver upon this question of title is not conclusive. They have power only to decide how the lands confirmed shall be surveyed and located. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of *bona fide* purchasers. *Ibid.*

31. Before 1819, Mackay had a claim to land in Missouri under a Spanish grant, and in that year gave a bond in the nature of a mortgage on a part of the land to Delassus. *Massey et al.* v. *Papin*, 362.

32. In 1836, Congress confirmed the claim to James Mackay or his legal representatives. This enured to the benefit of the claimants under the mortgage rather than to the heirs of Mackay. *Ibid.*

33. An imperfect Spanish title claimed by virtue of a concession was, by the

LANDS, PUBLIC, (*Continued.*)
laws of Missouri, subject to sale and assignment, and, of course, subject to be mortgaged for a debt. *Ibid.*

34. In 1850, Congress granted to the State of Illinois every alternate section of land for six sections in width on each side of a proposed railroad, and until the State could make its selection, the land on either side of the track of the road was withdrawn from entry or sale. *Clements* v. *Warner*, 394.
35. In 1852, the selections were made, and the land not selected was offered for sale, and such as were not sold became subject to private entry. *Ibid.*
36. In October, 1855, Clements began a settlement upon a portion of one of these sections. *Ibid.*
37. In November, 1855, Warner purchased the same land at private sale at the land office. *Ibid.*
38. In November, 1856, Clements claimed a pre-emption right, and the register and receiver granted a certificate of purchase accordingly. *Ibid.*
39. This court holds that the land in question was subject to a pre-emption right in November, 1855, when Warner made his purchase. Consequently it is invalid, as against the pre-emption right of Clements. *Ibid.*

LIMITATIONS, STATUTE OF.

1. The statute of limitations of Texas provides in its fifteenth section, "that every suit to be instituted to recover real estate, as against him, her, or them, in possession *under title or color of title*, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards; but in this limitation is not to be computed the duration of disability to sue from the minority, coverture, or insanity of him, her, or them, having cause of action. By the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a consecutive chain of such transfer down to him, her, or them, in possession, without being regular; as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, land warrant, or land scrip, with a chain of transfer down to him, her, or them, in possession; and provided, that this section shall not bar the right of the Government." *Davila* v. *Mumford et al.*, 214.
2. And the sixteenth section provides, "that he, she, or they, who shall have had five years like peaceable possession of real estate, cultivating, using, or enjoying the same, and paying tax thereon, if any, and claiming under a deed or deeds *duly registered*, shall be held to have full title, precluding all claims, but shall not bar the Government; and, saving to the person or persons having superior right and cause of action, the duration of disability to sue arising from nonage, coverture, or insanity." *Ibid.*

LIMITATIONS, STATUTE OF, (*Continued.*)

3. The construction of the fifteenth section is this: that although the elder title was on record, the constructive notice thereof to the holder of the junior title was not sufficient to charge the latter with a "want of intrinsic fairness and honesty," so as to prevent the bar of the statute from running. *Ibid.*
4. The sixteenth section commented on, but its meaning not definitively adjudged. *Ibid.*
5. An act of the Republic of Texas cured whatever defects existed in the power of the commissioner who issued the grants to the defendants. *Ibid.*
6. It is the duty of the court to determine the competency of evidence and to decide all legal questions that arise in the progress of a trial; and consequently, when assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury. *Chandler* v. *Von Roeder et al.*, 224.
7. Therefore, where, in a land suit in Texas, the defendants pleaded the statute of limitations, and the documentary evidence showed that neither the plea of five years' possession nor three years' possession (see preceding case in this volume) could be sustained, it was errroneous for the judge to leave that question to the jury. *Ibid.*
8. It was also error in the judge to exclude testimony to show that the deed was fraudulent under which the defendant claimed. The Supreme Court of Texas have decided that conveyances made with an intent to defraud creditors are void. *Ibid.*
9. The decision of the court upon another point having been favorable to the plaintiff, he has no cause of complaint against the ruling of the court. *Ibid.*
10. Where the defendant claimed under the statute of limitations and showed possession of Evans's coal bank; the validity of this plea will depend upon the fact whether or not Evans's coal bank is within the lines of the plaintiff's patent. *McEwen et al.* v. *Bulkley's Lessee*, 242.
11. The case remanded to the Circuit Court for the purpose of ascertaining this by a corrected survey made according to the rules laid down by this court. *Ibid.*
12. Where a mortgagor's interest in land was sold under the bankrupt act of the United States, the statute of limitations began to run from the time when the petitioner was declared a bankrupt, and not from the time when the purchaser took a deed from the assignee in bankruptcy. *Cleveland Insurance Co.* v. *Reed et al.*, 284.
13. By the revised statutes of Wisconsin in 1839, it is provided in the 37th section, that where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred. And in the 40th section it is provided, that bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed

LIMITATIONS, STATUTE OF, (*Continued.*)

within ten years after the cause thereof shall accrue, and not after that time. *Ibid.*

14. Therefore, where a bill was filed for a foreclosure or sale of mortgaged property, and the defendant had been in possession for more than ten years prior to the filing of the bill, there was no corresponding remedy at law, and the case fell within the 40th section of the act. *Ibid.*

15. The decree of the Circuit Court dismissing the bill must therefore be affirmed. *Ibid.*

LOUISIANA.

1. Since the case of Mrs. Gaines was before this court, as reported in 12 Howard, 537, the olographic will made by Daniel Clark, in 1813, was ordered by the Supreme Court of Louisiana to be admitted to probate, notwithstanding its loss. *Gaines* v. *Hennen*, 553.

2. The judgment of the Supreme Court of that State is coincident with the conclusions of this court upon the testimony which related to the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death. *Ibid.*

3. This will declared Mrs. Gaines to be his legitimate and only daughter, and universal legatee. *Ibid.*

4. In the bill filed by Mrs. Gaines to recover the property sold by the executors appointed by a former will of 1811, it was not necessary to make these executors parties. The reasons stated. *Ibid.*

5. It was not necessary formally to set aside the will of 1811 before proceeding under that of 1813. Any one who desired to contest this latter will in a direct action was not concluded from doing so. *Ibid.*

6. The title of Mrs. Gaines is not barred by prescription, as defined by the law of Louisiana. The reasons explained. *Ibid.*

7. The decision of this court in 12 Howard, 473, did not overrule the decision in 6 Howard, 550. The two cases explained. *Ibid.*

8. The case in 12 Howard cannot be set up as a defence in the present case as being *res judicata*. They are dissimilar as to parties and things sued for, or what is called the object of the judgment. *Ibid.*

9. The paper misnamed the ecclesiastical record, purporting to be an acquittal of Des Grange of bigamy, is not admissible evidence in this case. But if it was so, it would neither of itself, nor in connection with all that is evidence in the record, serve to prove the adulterous bastardy of the complainant, as the rule of evidence requires that to be done, in opposition to the testamentary declaration of her father, in his own handwriting, that she was his legitimate and only daughter, and, as such, by him constituted his universal legatee. *Ibid.*

10. The charge of adulterous bastardy, as made by the defendant, is not in response to the complainant's bill, but is an affirmative allegation of a fact by them, and the burthen of proof is upon them to establish it in contradiction to the declaration of her father, in his written will, that she was his legitimate child. *Ibid.*

11. The paper or record, as called, is not that of a legally-constituted tribunal, according to either the ecclesiastical usages or the laws of Spain,

LOUISIANA, (*Continued.*)

as they prevailed in Louisiana at any time when that province was a part of the dominion of Spain. And neither the Canon Hasset, the Alcalde Caisergues, nor the Notary Franco Bermudez, had either individual or conjoined authority to take cognizance of a charge of bigamy in the way it was done. *Ibid.*

12. The difference explained between the case now before the court and that which was heretofore presented. If it had been proved, which it never was, that Mrs. Gaines was the offspring of an illicit intercourse, still she could take as universal legatee, from her father's testamentary declaration of her legitimacy. *Ibid.*

13. The code of Louisiana makes a distinction between acknowledged natural children and adulterine children; allowing the former to take as legatees, but not allowing the latter to do so, except to a small amount. *Ibid.*

14. But the legal relations of adulterous bastardy do not arise in this case. The law examined relative to putative marriages, which are where, in cases of bigamy, both parents, or either of them, contracted the second marriage in good faith. The issue of such a marriage is legitimate. *Ibid.*

15. The Louisiana cases, the Spanish law, and the Code Napoleon, examined as bearing upon this point, and the principles established by them applied to the present case. *Ibid.*

16. Clark, the father, was capable of contracting marriage; the consequence examined of his testamentary recognition of his child's legitimacy. *Ibid.*

17. The evidence examined which is supposed to sustain the position that the connection between Clark and Zulime Carriere was adulterous, so as to bar the offspring from taking as a legatee under her father's will. The evidence declared to be sufficient in a civil suit to establish the fact that Des Grange committed bigamy when he married Zulime. *Ibid.*

18. The difference explained between the evidence which is sufficient to establish the charge of bigamy in a civil suit and that necessary to establish it in a criminal prosecution. *Ibid.*

19. The evidence of Coxe and Bellechasse examined, and also that relating to the parentage of Caroline Barnes. *Ibid.*

20. The effect examined of the record from the County Court of New Orleans, in which Zulime prayed for a divorce from Des Grange; and also of the testimony to prove her marriage with Clark. *Ibid.*

21. Whether she married in good faith or not, the weight of testimony is that Clark did so; and therefore Mrs. Gaines is entitled to inherit her father's estate under the olographic will of 1813. *Ibid.*

MALICIOUS PROSECUTION.

1. When the general issue is pleaded to an action on the case for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of the prosecution, that the defendant was himself the prosecutor,

MALICIOUS PROSECUTION, (*Continued.*)

or instigated the proceeding, and that it finally terminated in favor of the party accused. *Wheeler* v. *Nesbitt et al.*, 544.

2. He must also prove that the charge against him was unfounded, that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice. *Ibid.*

3. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Ibid.*

4. Where the court told the jury that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty, it was not error in the court to add, in the same connection, that if, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable and dispassionate man to believe that he was guilty of the charge preferred against him, then the jury ought to infer malice, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. *Ibid.*

5. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction; but the error, if it be one, forms no ground of exception by the plaintiff, because it was in his favor. *Ibid.*

6. As the magistrate who issued the warrant was one of the parties sued in this case, it was proper for the court below to instruct the jury that if there was probable cause for the arrest of the party, he could lawfully be detained for a reasonable time, owing to the neglect on his part to offer any satisfactory security for his appearance at the time appointed for examination. *Ibid.*

MANDAMUS.

1. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy. *Commonwealth of Kentucky* v. *Dennison, Governor of Ohio*, 66.

2. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up a fugitive from justice; and upon that ground only a motion for a mandamus was overruled. *Ibid.*

3. Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of mandamus is the proper legal remedy. *Board of Commissioners of Knox County* v. *Aspinwall et al.*, 376.

4. The Circuit Courts of the United States have authority to issue such

MANDAMUS, (*Continued.*)

writ of mandamus against the commissioners, where it is necessary, as a remedy for suitors in such court. *Ibid.*

5. It is not a sufficient reason for setting aside a peremptory mandamus, that a previous alternative writ had not issued. *Ibid.*

NEGROES AND SLAVES.

1. On a petition for freedom, the petitioner proved that one Kirby had emancipated all his slaves by will, some immediately and some at a future day. *Vigel* v. *Naylor*, 208.
2. The petitioner, in order to bring herself within this category and show that she had been the slave of Kirby, offered to prove that her mother and brother and sister had recovered their freedom by suits brought against George Naylor, whose administrator, Henry Naylor, the defendant in the present suit was; and that it was very unusual to separate from the mother a child so young as the petitioner was at the time of Kirby's death. *Ibid.*
3. Proofs of these circumstances were not allowed by the court below to go to the jury. In this the court was in error. *Ibid.*
4. The recoveries of the mother and sister against George Naylor ought to have been allowed to go to the jury. They were not *res inter alios acta*. This case distinguished from that of Davis *v.* Wood, 1 Wheaton, 6. *Ibid.*

OHIO.

1. For the laws of Ohio respecting charitable devises, see *Wills.*

PARTIES.

1. The parties to a suit at law having been parties to a suit in equity, the subject matter and defence being the same, it is not a sufficient objection to the introduction of the record in the equity suit that other persons were parties to the latter. *Thompson et al.* v. *Roberts et al.*, 233.
2. No good reason can be given why the parties to the suit at law who litigated the same question should not be concluded by the decree because others, having an interest in the question or subject-matter, were admitted by the practice of a court of chancery to assist on both sides. *Ibid.*
3. In a bill filed by Mrs. Gaines to recover property sold by the executors of a will made in 1811, when she claimed under one made in 1813, it was not necessary to make those executors parties. *Gaines* v. *Hennen*, 553.

PARTNERSHIP.

1. To enlarge his business, Goldsmith, the original plaintiff, authorized a third person to go to St. Louis to negotiate an arrangement with some commission house there to accept consignments of cigars from him and to sell the same on his account, agreeing with the person so authorized to give him half the profits, with a guaranty that his compensation should amount to eighteen hundred dollars *per annum*. He made the arrangement with the defendants, stipulating as to their commissions, and that the cigars should be shipped at Baltimore, in bond,

PARTNERSHIP, (*Continued.*)

subject to duties and charges, and notified the plaintiff of the terms and conditions; whereupon the plaintiff wrote the defendants a letter, concluding with these words: "All shipped to your house. I will hold you responsible;" and sent two invoices of cigars, which were duly received. Afterwards, the person who negotiated the arrangement wrote an order to the defendants to deliver all the cigars, not sold, to another firm, upon receiving whatever sums they had advanced. That firm paid the advances, received the cigars, and sold them, but no portion of the proceeds ever came to the hands of the plaintiff. The defence was, that the person who gave the order was either a partner or an agent of the plaintiff, and in either capacity had a right to direct a transfer of the cigars, and thus exonerate the defendants from all liability. *Berthold et al.* v. *Goldsmith*, 536.

2. Held:

1. Actual participation in the profits, as principals in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm, but the rule has no application to a case of mere service or special agency, where the employee has no power in the firm and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same or to compel an account. Unless such employee is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor. Cases may arise, on one side and the other of the line, where the difference between them is so slight that it may appear to be unsubstantial; yet the distinction itself is well founded in reason, and the only difficulty is in the application of the principle on which it rests. No such difficulty, however, occurs in this case, for the defendants were a party to the arrangement, and knew the relation which the person who negotiated it sustained to them and to the plaintiff, and they also knew that the goods had been sent by the plaintiff and received by them on the terms and conditions specified in the plaintiff's letter. He was not, therefore, a partner in fact, or as between the plaintiff and defendants. *Ibid.*

2. He was not an agent of the plaintiff, authorized to withdraw the consignments, or to exonerate the defendants from their obligation to account for the sales. On the contrary, the arrangement was, that the cigars should remain in their custody and control, and that they should stand responsible for the proceeds, and the case shows that it was never changed. The court below were right in instructing the jury that there was no evidence to sustain the second ground of defence. *Ibid.*

PATENT RIGHTS.

1. In a patent taken out by Page for certain improvements in the construction of the portable circular saw-mill, he claimed the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it (the saw) by friction rollers

PATENT RIGHTS, (*Continued.*)

embracing it near its periphery, so as to leave its centre entirely unchecked laterally. *Phillips* v. *Page*, 164.

2. An instruction by the court below, that the claim was as stated above, but adding "in a saw-mill capable of being applied to the sawing of ordinary logs," was erroneous. *Ibid.*

3. Although the improvements of the patentee may have enabled the machine to be applied to the purpose of sawing logs, when before it was applied only to the purpose of sawing light materials, such as shingles, and blinds for windows, yet there is nothing in the patent to distinguish the new parts of the machine from the old, or to state those parts which he had invented, so as to enable the machine to saw logs. *Ibid.*

4. The patent law does not require the defendant to give notice of the time when any person may have possessed the knowledge or use of the invention in question, but only of the name of the person and of his place of residence, and the place where it has been used. *Ibid.*

5. An instruction of the court below, making the time material, was therefore erroneous. *Ibid.*

PLEAS AND PLEADINGS.

1. After the defendants had put in a plea in bar, they moved the court for leave to withdraw the plea, and to plead in abatement that the plaintiffs had alleged themselves to be citizens of another State, but were in reality the citizens of the same State with themselves, in consequence of which the District Court of the United States had not jurisdiction of the case. *Eberly et al.* v. *Moore et al.*, 147.

2. The court allowed the motion and the plea in abatement to be filed. Being satisfied by the verdict of a jury that the allegation of the plea was true, the petition of the plaintiffs was dismissed. *Ibid.*

3. In this the District Court was right. The jurisdiction has been conferred by acts of Congress upon the courts of the United States so to supervise the various steps in a cause as to prevent hardship and injustice, and that the merits of a cause may be fairly tried. *Ibid.*

4. That the plea was not artistically drawn is not a sufficient reason for reversing the judgment of the court below. *Ibid.*

PRACTICE.

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PRACTICE, (*Continued.*)

4. That the plea was not artistically drawn is not a sufficient reason for reversing the judgment of the court below. *Ibid.*

5. After the mandate went down to the Circuit Court, in the case of Ballance *v.* Forsyth, 13 Howard, 18, Ballance filed a bill upon the equity side of the court, setting forth the same titles which were involved in the suit at law, and praying relief. *Ballance* v. *Forsyth et al.*, 183.

6. It was not allowable for him to appeal from the judgment of the Circuit Court and Supreme Court to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated. *Ibid.*

7. The objections to the title of his adversary should have been urged upon the trial of the suit at law; and if they are founded upon alleged errors in the location and survey, all such questions are administrative in their character, and must be disposed of in the Land Office. He ought to have made opposition there; if he did not, he is concluded by his laches. *Ibid.*

8. In the record there is a paper purporting to be an amended bill. It is doubtful whether this was properly filed; and if it was, it presents no ground of relief. *Ibid.*

9. The statutes of Illinois require that a declaration in ejectment shall be served upon the actual occupant, and the practice of that State authorizes the appearance of the landlord and his defence of the suit, either in his own name or that of the tenant with his consent. *Kellogg et al.* v. *Forsyth*, 186.

10. And when a landlord has undertaken the defence of a suit in the name of the tenant with his consent, the tenant cannot interfere with the cause to his prejudice. *Ibid.*

11. Therefore, when the defendant in ejectment in the court below died after judgment, and his attorney and landlord, who had conducted the suit in the name and with the consent of the deceased, sued out a writ of error in the name of the heirs, gave bond for the prosecution of the writ and for costs, a motion to dismiss the writ will not be entertained, although the heirs of the deceased authorize the motion to dismiss. *Ibid.*

12. It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and prosecuting the writ of error in good faith. *Ibid.*

13. The motion to dismiss the writ of error is therefore overruled. *Ibid.*

14. In a suit in the District Court of the United States for the western district of Texas, a transcript of a record of the high court of errors and appeals and the chancery court for the northern district of the State of Mississippi was properly allowed to be offered as conclusive proof of the value of certain slaves, and of the amount of their annual hire until given up. *Nations et al.* v. *Johnson et al.*, 195.

15. The laws of Mississippi provide, that where a case is carried up to an appellate court, and the defendant in error is a non-resident, and has no attorney of record within the State, notice shall be given by publi-

PRACTICE, (*Continued.*)

cation in a newspaper of the pendency of said cause, which the appellate court shall then proceed to hear and determine. *Ibid.*

16. These directions having been complied with, the jurisdiction of the appellate court was complete; and the plea, in Texas, of *nul tiel* record, properly overruled. *Ibid.*

17. The American and English cases upon this point examined. *Ibid.*

18. The decree of the court was also properly allowed to go to the jury as evidence of the value of the hire of the slaves after its rendition; evidence having also been offered at the trial of the value of such hire at that time. *Ibid.*

19. The case having been on the chancery side of the court and transferred thence to the law docket, a bill of exceptions does not bring into this court for revision any errors alleged to have been committed when it was on the chancery side. *Ibid.*

20. The Circuit Court certified that they had divided in opinion upon a question whether a party had a right to proceed summarily on motion to vacate a decree in that court. *Wiggins* v *Gray*, 303.

21. The question certified is merely one of practice, to be governed by the rules prescribed by this court, and the established principles and usages of a chancery court. And even if a summary proceeding on motion might have been a legitimate mode of proceeding, yet the court, in its discretion, had a right to refuse, and to order a plenary proceeding by bill and answer. The exercise of such a discretionary power by the court below cannot be revised in this court upon appeal or certificate of division, and this court therefore decline expressing any opinion on the question certified. *Ibid.*

22. Docket entries in the courts of the District of Columbia, as in Maryland, stand in the place of, and perhaps are, the record, and receive all the consideration that is yielded to the formal record in other States. *Washington, Alexandria, & Georgetown S. P. Co.* v. *Sickles et al.*, 333.

PRESCRIPTION.

1. The title of Mrs. Gaines, who claimed under a will made in 1813, was not barred by prescription. The reasons explained. *Gaines* v. *Hennen*, 553.

PROBABLE CAUSE.

1. Defined in an action for a malicious prosecution. *Wheeler* v. *Nesbitt et al.*, 544.

PUBLIC LANDS IN CALIFORNIA.

See CALIFORNIA.

RAILROAD, SUBSCRIPTION TO.

1. The common council of the city of Jeffersonville, in Indiana, had authority to subscribe for stock in a railroad company, and to issue bonds for such subscription, upon the petition of three-fourths of the legal voters of the city. The statutes of the State examined by which such authority was conferred. *Bissell* v *City of Jeffersonville*, 287.

2. Under one of these acts, the common council determined that three-fourths had so petitioned; and under a subsequent act, authorizing them to

RAILROAD, SUBSCRIPTION TO, (*Continuea.*)
revise the subject, they again came to the same conclusion, and issued the bonds. *Ibid.*

3. Jurisdiction of the subject-matter on the part of the common council was made to depend upon the fact whether the petitioners whose names were appended constituted three-fourths of the legal voters of the city, and the common council were made by the laws the tribunal to decide that question. *Ibid.*

4. When sued upon the bonds by innocent holders for value, it was too late to introduce parol testimony to show that the petitioners did not constitute three-fourths of the legal voters of the city. *Ibid.*

5. Duly certified copies of the proceedings of the common council were exhibited to the plaintiffs at the time they received the bonds, and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. The railroad company and their assigns had a right, therefore, to conclude that they imported absolute verity. *Ibid.*

6. In 1848, the Legislature of Ohio incorporated certain of its citizens under the name of the Ohio and Pennsylvania Railroad Company; and in 1849, the Legislature of Pennsylvania incorporated the same company by the same style, and adopted the act of Ohio. *Amey* v. *Mayor and Aldermen of Allegheny City*, 364.

7. In 1849, the Legislature of Pennsylvania exempted from taxation, except for State purposes, the certificates of loan theretofore issued or which might be thereafter issued by the city of Allegheny (amongst others) in payment of a subscription to the capital stock of the Pennsylvania Railroad Company, or to the capital stock of the Ohio and Pennsylvania Railroad Company. *Ibid.*

8. The charter of the last-named company had previously authorized the city corporation of the city of Allegheny to subscribe for an amount of the stock not exceeding two hundred thousand dollars. *Ibid.*

9. By virtue of two ordinances, and a supplement thereto, two hundred bonds of one thousand dollars each, with coupons attached, were executed and delivered to the company. They bore date January 1, 1850. *Ibid.*

10. On the 14th of April, 1852, another act was passed by the Legislature, providing "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the Ohio and Pennsylvania Railroad Company to an amount not exceeding the subscription heretofore made by said city, &c.; provided no bonds for the payment of stock subscribed, as aforesaid, shall be issued of a less denomination than one hundred dollars." *Ibid.*

11. On the 19th of June, 1852, an ordinance was passed authorizing the mayor to subscribe for four thousand shares, (equal to two hundred thousand dollars,) &c., &c. This ordinance was never recorded; but the stock was subscribed for and the bonds issued. *Ibid.*

12. On the 8th of May, 1850, the Legislature had passed an act limiting the debt of the city of Allegheny to $500,000, exclusive of the first subscription

RAILROAD, SUBSCRIPTION TO, (*Continued.*)

above mentioned. The debt of the city had reached that limit prior to the second subscription. *Ibid.*

13. These acts of the Legislature, mentioned in the first part of this note, conferred authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise called bonds, with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio and Pennsylvania Railroad Company. *Ibid.*

14. The limitation in the act of 8th of May, 1850, only meant that the city council, by its own authority, should not go into debt to a greater amount than $500,000. But this restriction was not binding on the Legislature. *Ibid.*

15. The circumstance that the ordinance of 19th of June, 1852, was not recorded or published, does not invalidate the bonds. The charter of the city requires that those ordinances only which were passed under the seventh section of the charter should be recorded and published. The ordinance in question did not belong to that class. *Ibid.*

16. This court adopts the judgment of the courts of Pennsylvania, that the above acts of the Legislature were not inconsistent with the Constitution of the State. *Ibid.*

REPLEVIN.

1. Where there was an action of replevin in Wisconsin, by virtue of which the property was seized by the marshal, and a bond was given by the defendant in replevin, together with sureties, the object of which was to obtain the return of the property to the defendant; which bond was afterwards altered, by the principal defendant's erasing his name from the bond, with the knowledge and consent of the marshal but without the knowledge or consent of the sureties, the bond was thereby rendered invalid against the sureties. *Martin* v. *Thomas*, 315.

RIPARIAN PROPRIETORS.

1. The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: From the Sugar loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." *Jones* v. *Soulard*, 41.

2. This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream. *Ibid.*

3. This rule, so well established as to fresh-water rivers generally, is not varied by the circumstance that the Mississippi, at St. Louis, is a great and public water-course. The rule with respect to tide-water rivers, where the tide ebbs and flows, does not apply to the present case. *Ibid.*

4. Therefore, Duncan's island, upon which was the land in dispute, and which became connected with the shore as fast land, was included in a grant made by Congress, in 1812, to the town of St. Louis, for the public schools; and it neither passed to the State of Missouri by her admission into the Union, in 1820, nor by the act of Congress passed in 1851. *Ibid.*

SHIPS AND VESSELS.
See COMMERCIAL LAW and ADMIRALTY.
STATUTE OF LIMITATIONS OF TEXAS.
See LIMITATIONS, STATUTE OF.
ST. LOUIS, AS A RIPARIAN PROPRIETOR
See RIPARIAN PROPRIETORS.
SUBSCRIPTION TO RAILROADS.
See RAILROAD SUBSCRIPTIONS.
SUNDAY LAWS.
1. In the code of Virginia, chapter 196, are the following sections, viz:
"Sec. 15. If a free person, on a Sabbath day, be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit $10 for each offence; every day any servant, apprentice, or slave, is so employed, constituting a distinct offence.
"Sec. 17. No forfeiture shall be incurred under the preceding section for the transportation on Sunday of the mail, or of passengers and their baggage. And the said forfeiture shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day; provided he does not compel a slave, apprentice, or servant, not of his belief, to do secular work or business on Sunday, and does not, on that day, disturb any other person." *Powhatan Steamboat Co.* v. *Appomattox Railroad Co.*, 247.
2. The acts prohibited by these sections are no doubt unlawful, but the following case does not fall within their operation. *Ibid.*
3. The Powhatan Steamboat Company were the owners of a line of steamers employed in the transportation of goods from Baltimore to Richmond, stopping at City Point to deliver goods, which were to be carried thence to Petersburg by the Appomattox Railroad Company. The steamboat company gave receipts for the goods when shipped, undertaking to deliver them at Petersburg, paying the railroad company a portion of the freight. *Ibid.*
4. Leaving Baltimore on Saturday, one of the steamers arrived at City Point on Sunday morning and delivered the goods intended for Petersburg, which were received and locked up in a warehouse, belonging to the railroad company, to remain until the next day. But in the after part of the day, the warehouse and goods were destroyed by fire. The steamboat company were sued by the shippers and compelled to pay the value of the goods, to recoup which they now sued the railroad company. *Ibid.*
5. The instructions of the court below to the jury were erroneous, viz: that if they found that the goods were delivered on a Sunday, under a contract between the parties, express or implied, that they might be received and accepted on that day, and were destroyed by fire on the day on which they were delivered and received, their verdict should be for the defendants. *Ibid.*
6. The steamboat company and railroad company each worked for them-

SUNDAY LAWS, (*Continued.*)

selves. The railroad company, having received the goods into their warehouse, were bound to keep them in safe custody, as carriers for hire, although they could not transport them to Petersburg until the next day. To take care of them on the Sabbath day was a work of necessity, and therefore not unlawful. *Ibid.*

7. The cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening or closing of the warehouse, but it is based upon the non-performance of the duty which arose after those acts had been performed. *Ibid.*

8. If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply. *Ibid.*

TARIFF.

1. Where there was a controversy with respect to the amount of duties properly payable upon an importation, the collector and importers entered into an agreement to submit samples of the article to the board of general appraisers to be convened at New York, and to abide by their appraisement in the same manner and to the same extent as if it had been made by merchant appraisers, regularly appointed according to law. *Belcher et al.* v. *Linn*, 508.

2. The article imported was called in the invoice "concentrated molasses," which is syrup boiled down to a denser consistency, and thus evaporating the watery particles, until the point of crystalization is reached. *Ibid.*

3. The appraisers decided that this article was, in point of fact, a species of green sugar, and that the invoice and entry were erroneous, not only with respect to the value affixed to the article, but also as to its description. Green sugar was subject to an export duty, but molasses was not. They therefore added, as appeared by their report, a sum equal to the amount of that duty, although none such had been paid. But the statement annexed to the report described the addition made thus, "to add export duty on." *Ibid.*

4. Held:

   1. That in the absence of fraud, the decision of the appraisers as to the character of the article and the dutiable value of the importations was final and conclusive.

   2. That the report and statement must be construed together, and that by their true construction they showed, irrespective of the parol testimony, that the addition was made, not as an export duty, but to bring up the invoice valuation to the actual market value of the merchandise at the place of exportation.

   3. That if the words "to add export duty on" were of doubtful signification, and must be separately considered, then the case would be one where parol testimony would be admissible, so that, in either point of view, there was no error in the action of the Circuit Court.

TARIFF, (*Continued.*)

4. That the importer was not entitled to recover on account of the leakage while the merchandise was detained for the purpose of the appraisement.
5. That the assessment of duties is properly made upon the quantity of merchandise entered at the custom-house. *Ibid.*

5. When barrels are manufactured in the United States and shipped empty to Cuba, there filled with molasses, and brought back to the United States, the duty must be levied upon the value of the barrels, as well as upon the molasses. This conclusion rests upon the following reasons: Molasses barrels, under such circumstances, have been applied to the commercial use for which they were manufactured, and on their re-importation here, even if fit for a second voyage, seldom or never have the same value as when new. When filled in the foreign market, re-imported here, and offered at the custom-house for entry, they have then acquired a new character within the meaning of the revenue laws. With their contents they are then denominated packages, from which one in ten must be selected and ordered to the public stores for appraisement, and as such constitute a part of the charges of importation. *Knight et al.* v. *Schell*, 526.
6. The acts of Congress, and the uniform interpretation placed on them by the Treasury Department, require this to be done. *Ibid.*

TENNESSEE.

1. By the laws of Tennessee anterior to 1856, a deed for lands lying in Tennessee could not be acknowledged or proven in another State before the clerk of a court. *McEwen et al.* v. *Bulkley's Lessee*, 242.
2. In 1856, a law was passed allowing this to be done. This statute was prospective. *Ibid.*
3. The circumstance that the law of 1856 was called an amendment of the prior law does not change this view of the subject. *Ibid.*
4. Where a deed was acknowledged in 1839, before the clerk of a court in another State, a copy of it from the record was improperly allowed to be read in evidence to the jury. *Ibid.*
5. Where the defendant claimed under the statute of limitations and showed possession of Evans's coal bank; the validity of this plea will depend upon the fact whether or not Evans's coal bank is within the lines of the plaintiff's patent. *Ibid.*
6. The case remanded to the Circuit Court for the purpose of ascertaining this by a corrected survey made according to the rules laid down by this court. *Ibid.*

TEXAS.

1. By the colonization laws of Mexico passed in 1824 and 1828, the consent of the federal Executive of Mexico was essential to the validity of a grant of lands within ten leagues of the coast. *League* v. *Egery et al.*, 264.
2. The Supreme Court of Texas has repeatedly so decided, and this court adopts their decision. *Ibid.*
3. Although by the laws of Texas an action of ejectment can be maintained

TEXAS, (*Continued.*)

upon a certificate for a head-right or other equitable title, yet it cannot be so maintained in the courts of the United States. *Sheirburn* v. *Cordova*, 423.

WILLS.

1. Charles McMicken, a citizen and resident of Cincinnati, in Ohio, made his will in 1855, and died in March, 1858, without issue. *Perin et al.* v. *Carey et al.*, 465.
2. He devised certain real and personal property to the city of Cincinnati and its successors, in trust forever, for the purpose of building, establishing, and maintaining as far as practicable, two colleges for the education of boys and girls. None of the property devised, or which the city may purchase for the benefit of the colleges, should at any time be sold. In all applications for admission to the colleges, a preference was to be given to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants. *Ibid.*
3. If there should be a surplus, it was to be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents were living; preference to be given to our relations and collateral descendants. *Ibid.*
4. The establishment of the regulations necessary to carry out the objects of the endowment was left to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution. *Ibid.*
5. This will can stand; and with reference to the various points of law connected therewith, this court establishes the following propositions, viz:
   1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio; but not by express legislation, nor was that necessary to give courts of equity in Ohio that jurisdiction.
   2. The English statutes of mortmain were never in force in the English colonies, and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the Governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.
   3. The city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.
   4. Those devises and bequests are charities in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.
   5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

WILLS, (*Continued.*)

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons as to who should be pupils in the colleges which he meant to found was a lawful exercise of his rightful power to make the devises and bequests.
7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.
8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will. *Ibid.*

6. How a lost olographic will is admitted to probate in Louisiana. *Gaines* v. *Hennen*, 553.
7. It was not necessary formally to set aside a will which had been admitted to probate as being made in 1811 before proceeding under the later one made in 1813. *Ibid.*