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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

AT

DECEMBER TERM, 1861.

By J. S. BLACK, LL. D.

VOL. I.

NEW YORK AND ALBANY:
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1892.

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JUDGES AND OFFICERS OF THE SUPREME COURT

AT DECEMBER TERM, 1861.

CHIEF JUSTICE.

HON. ROGER B. TANEY, of Maryland.

JUSTICES.

HON. JAMES M. WAYNE, of Georgia.
HON. JOHN CATRON, of Tennessee.
HON. SAMUEL NELSON, of New York.
HON. ROBERT C. GRIER, of Pennsylvania.
HON. NATHAN CLIFFORD, of Maine.
HON. NOAH M. SWAYNE, of Ohio.

ATTORNEY GENERAL.

HON. EDWARD BATES, of Missouri.

CLERK.

W. T. CARROLL, ESQ., of Washington City.

MARSHAL.

W. H. LAMON, of Illinois.

MEMORANDA.

At the commencement of the December term, 1861, there were three vacancies on the bench of the Supreme Court, occasioned by the deaths of Mr. Justice DANIEL and Mr. Justice MCLEAN, and by the resignation of Mr. Justice CAMPBELL.

During the term, the Honorable NOAH M. SWAYNE, of Ohio, was appointed to fill the place of the late Mr. Justice MCLEAN.

The two other places continue to be vacant still.

During portions of this term Mr. Chief Justice TANEY, Mr. Justice CLIFFORD, and Mr. Justice CATRON were absent on account of illness. The last-named Judge did not sit at the argument or participate in the conferences on the cases of *The New Philadelphia*, *Glasgow* vs. *Hortez*, *Crews* vs. *Burcham*, *United States* vs. *Babbit*, *United States* vs. *Coles*, *Transportation Co.* vs. *Fitzhugh*, *Rice* vs. *Railroad Co.*, *Woods* vs. *Lawrence Co.*, *O'Brien* vs. *Perry*, *Bryan* vs. *United States*, and *Johnson* vs. *Jones*.

Mr. HOWARD, the late reporter, being a candidate for Governor of Maryland, resigned during the vacation, and at the beginning of the term Mr. BLACK, of Pennsylvania, was appointed by the court in his place.

ORDER ALLOTTING THE JUDGES AMONG THE SEVERAL CIRCUITS.

There having been an Associate Justice of this court appointed since its last session, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered of record, viz:

For the	First Circuit,	NATHAN CLIFFORD,	Associate Justice.
"	Second "	SAMUEL NELSON,	"
"	Third "	ROBERT C. GRIER,	"
"	Fourth "	ROGER B. TANEY,	Chief Justice.
"	Fifth "		Associate Justice
"	Sixth "	JAMES M. WAYNE,	"
"	Seventh "	NOAH M. SWAYNE,	"
"	Eighth "	JOHN CATRON,	"
"	Ninth "		"

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GENERAL RULES.

Ordered, That the twenty-first rule in admiralty be abolished, and that the following be substituted in its place:

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulator.

Ordered, That the last paragraph in the 67th rule in equity be repealed, and the rule be amended as follows:

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill, and answer, if any, and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer in special instances, and when completed shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend: provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit, and any question or questions which may be objected to shall be noted by

the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

The compulsory attendance of witnesses, in case of refusal to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the 30th section of act of Congress, September 24, 1789.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

DEATH OF JUDGE McLEAN.

Immediately after the opening of the court on Tuesday, December 3, 1861, Mr. BATES, the Attorney General, rose and said:

May it please your Honors:

I appear before you now not on my own motion, but on the request and by the authority of my brethren of this bar, who have desired me to say to you, in their behalf, a few words expressive of their feelings. And it is with an emotion of sadness, bordering upon melancholy, that I find myself constrained by circumstances to mark my first official appearance in this high court with the repulsive prestige of a bearer of bad news.

For the heart of man will sympathize with surrounding facts, and will (often unconsciously) associate ugliness and vice with the messengers of evil, and will, on the contrary, impute beauty and goodness to the agents and instruments of its pleasure. This is a sentiment known of old as a truth rooted in the human heart. "How beautiful," exclaims the holy prophet, "how beautiful, upon the mountains, are the feet of Him that bringeth good tidings that publisheth peace!" Oh! that today it were my delightful office to bring to you good tidings, and to publish to you peace.

But, unhappily, it is not so. Since the first organization of this court, no term has yet been held under circumstances so gloomy and sorrowful. I look up to that honored bench and behold vacant seats. Even this august tribunal, the co-equal partner in the government of a great nation, the revered dispenser of our country's justice, shares with us in feeling the common sorrow, and suffers in the common calamity. It is shorn of its fair proportions, and weakened and diminished in

its strength and beauty, by the present loss of one entire third of its component members. And where are the wise, learned, and just men who used to fill those seats? Gone from this theatre of their fame and usefulness, while all of us remember them with respect and gratitude, and mourn the loss of their valuable services. Two of them have been peacefully gathered to their fathers, and have left their fame safe and unchangeable, beyond the reach of malice, and secure against accident, embalmed in history, and hallowed by the grave. And one of them, in the ripe vigor of his manhood, and in the pride of a noble and highly cultivated mind, has been swept away from his high position by the turbulent waves of faction and civil war.

And this is not all. Your lawful jurisdiction is practically restrained; your just power is diminished, and into a large portion of our country your writ does not run, and your beneficient authority to administer justice according to law, is for the present, successfully denied and resisted.

I look abroad over the country and behold a ghastly spectacle; a great nation, lately united, prosperous, and happy, and buoyant with hopes of future glory, torn into warring fragments; and a land once beautiful and rich in the flowers and fruits of peaceful culture, stained with blood, and blackened with fire. In all that wide space from the Potomac to the Rio Grande, and from the Atlantic to the Missouri, the still, small voice of legal justice is drowned by the incessant roll of the drum, and the deafening thunder of artillery. To that extent your just and lawful power is practically annulled, for the laws are silent amidst arms. But let us rejoice in the hope that these calamities are only for a season; that the same Almighty hand which sustained our fathers in their arduous struggle to establish the glorious Constitution which this court has so long and so wisely administered, will not be withdrawn from their children in a struggle no less arduous to maintain it. Now, indeed, we are overshadowed with a dark cloud, broad and gloomy as a nation's pall; but, thanks be to God, the eye of faith and patriotism can discern the bow of promise set in that cloud, spanning the gloom with its bright arch, to foreshow the coming of a day of sunshine and calm, and to justify our hope of a speedy restoration of peace, and order, and law.

This much, may it please the court, I have ventured to say, as what seemed to me a fitting preliminary to the discharge of the duty imposed upon me by my brethren of the bar. Of course, all the members of the court know the fact that, since the close of the last term, their old and honored associate, Mr. Justice McLEAN, has departed this life, for all men take sorrowful notice when "a prince and a great man has fallen in Israel." But the members of the bar, in pursuance of a worthy custom, long established, and stimulated, no doubt, by their personal reverence for the virtues and the learning of the departed judge, have held a meeting and passed a series of resolutions, which they have done me the honor to confide to me, with the request that I would present them here and ask that they may be entered upon the minutes of the court as a memorial of their profound veneration for the dead, and for the high tribunal of which he was so long a worthy member. I shall not take the risk of marring the strength or beauty of the resolutions by attempting to recite them, or to comment upon them. Let them speak for themselves, for they speak well.

But I believe it is the custom here, and I hope it will not be unseemly in me to say a few words of my own about that virtuous man, who, though he is dead, still lives in his good works, and teaches by his bright example. I had not the honor of his intimacy, but I have known him personally for more than thirty years, and under circumstances which attracted and enforced my observation. I did not consider him a man of brilliant genius, but a man of great talents, with a mind able to comprehend the greatest subject, and not afraid to encounter the minutest analysis. He was eminently practical, always in pursuit of truth, and always able to control and utilize any idea that he had once fully conceived.

In short, he was a sincere, earnest, diligent man. And this, I suppose, is the secret of his success, the reason why his course through life was always onward and upward. I am informed by those who have had good opportunity to know him in all the relations of life—as a lawyer, a judge, an executive officer, a neighbor, a friend, a professing Christian—that, in their belief, all his duties, in every relation, were fully performed. As a man he lived a blameless life, and not blame-

less only, but sweet and attractive, by the habitual exercise of all those benevolent virtues which characterized and adorned his mild and gentle nature. And while he pursued with diligence every line of study which might serve to make him at once a blessing and an ornament to society, he looked steadily beyond this transient scene, knowing that this world is but a school of preparation for that eternity upon which his soul rested with undoubting faith. I think the outlines of his character may be sketched in a very few words. He was a ripe scholar; an able lawyer, as you, his brethren, must know; a bland and amiable gentleman; a strict moralist; a virtuous man; and, above all, a modest and unobtrusive Christian philosopher. It is not for us to judge of his final condition; but, as feeling and thinking men, when we view the spotless morality of his life, and the quiet meekness of his piety, we have good reason to hope that, even now, he is enjoying the rich reward of a well spent life, in blissful communion with the spirits of the just made perfect. This much, at least, we do know, that his life has been a blessing to many individuals and a great benefit to his country, and that, dying in honored old age, he has left behind him the sweet savor of a good name.

The Attorney General concluded by moving that the proceedings of the bar meeting referred to in his address be entered on the minutes of the court, and read the proceedings, as follows:

At a meeting of the members of the bar and officers of the Supreme Court of the United States, held in the room of the Supreme Court on Monday, the 2d day of December, in the year 1861, to adopt measures to testify their high appreciation of the character and public services of the late JOHN MCLEAN, the senior Associate Justice of said court, Richard S. Coxe, Esq., on behalf of the committee appointed for that purpose, submitted the following

Resolutions.

1. That the members of this bar and the officers of the court entertain a profound sense of the loss which, in common with the entire nation, they have sustained in the death of the late

Mr. Justice McLEAN, so long known to the community, and in an especial manner to the profession, for his exalted legal accomplishments, the purity of his private character, and the eminent ability with which he discharged the duties of the high offices, judicial, administrative, and legislative, with which his name has been so long and honorably associated.

2. That we will wear the accustomed badge of mourning during the present term of the court.

3. That the Chairman and Secretary of this meeting transmit a copy of these proceedings to the family of the deceased, communicating, at the same time, the deep and sincere sympathy felt by its members in the affliction with which they have been visited by a wise and merciful Providence.

4. That the Honorable the Attorney General be respectfully solicited to present these proceedings to the Supreme Court, now in session, and to ask that they may be entered on the minutes of the court.

Mr. Chief Justice TANEY replied as follows:

The members of the court unite with the bar in sincere sorrow for the death of the late Mr. Justice McLEAN. He held a seat on this bench for more that thirty years, and until the last two years of his life, when his health began to fail, was never absent from his duties here for a single day. His best eulogy will be found in the reports of the decisions of this court during that long period of judicial life, and these reports will show the prominent part he took in the many great and important questions which from time to time have come before the court, and the earnestness and ability with which he investigated and discussed them.

They are the recorded evidence of a mind, firm, frank and vigorous, and full of the subject before him at the time.

Before he occupied a seat on this bench, he filled the office of Postmaster General of the United States; and in that post displayed an administrative talent hardly ever surpassed, with a firmness of character, and uprightness of purpose never questioned. Words of eulogy are hardly needed in memory of one so widely known and respected, eminent in political as well as judicial life.

We deplore his loss, and join the members of the bar in pay-

ing due honor to his memory, and direct the motion of the Attorney General and the resolutions of the bar in relation to our deceased brother to be placed on record with this response from the court; and, as a mark of respect, we will adjourn to-day without transacting any of the ordinary business of the court.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1861.

John R. Shepley,	*Missouri.*
Thomas Sunderland,	*California.*
Micah Dyer, Jr.,	*Massachusetts.*
Edward Patterson,	*New York.*
James B. Gardenhire,	*Missouri.*
John J. Redick,	*Nebraska Territory.*
Samuel F. Clarkson,	*New York.*
Lorenzo Sherwood,	*New York.*
Oliver H. Palmer,	*New York.*
William F. Aldrich,	*New York.*
James Monroe,	*New York.*
Horace Andrews,	*New York.*
William R. Scott,	*Pennsylvania.*
W. T. Burgess,	*Illinois.*
Menzo Diffendorf,	*New York.*
F. W. Jones,	*District of Columbia.*
Levi Parsons,	*California.*
Henry Wilkins,	*California.*
Addison L. Roache,	*Indiana.*
R. B. McComb,	*Pennsylvania.*
Titian J. Coffey,	*District of Columbia.*
Theodore Runyon,	*New Jersey.*
Benjamin Grant,	*Pennsylvania.*
Edmund L. Hearne,	*New York.*
James Amory Moore,	*New York.*
Marcus C. Riggs,	*New York.*
James F. Shunk,	*Pennsylvania.*
Davis J. Mitchell,	*New York.*
J. W. Menzies,	*Kentucky.*
W. C. Gcudy,	*Illinois.*
William A. Dant,	*New York.*

D. W. Gooch,	*Massachusetts.*
W. H. Y. Hackett,	*New Hampshire.*
E. C. Ingersoll,	*Illinois.*
George B. Corkhill,	*Iowa.*
John N. Whiting,	*New York.*
Benjamin F. Russell,	*Massachusetts.*
William B. Perrine,	*Maryland.*
William Bond,	*New York.*
Lewis Taylor,	*Pennsylvania.*
Thaddeus H. Lane,	*New York.*
Timothy O. Howe,	*Wisconsin.*
D. L. Follett,	*New York.*
Henry B. Fernard,	*Massachusetts.*
J. B. S. Todd,	*Dakota Territory.*
Richard Goodman,	*New York.*
S. B. Gookins,	*Indiana.*
E. H. Owen,	*New York.*
Thomas M. Edwards,	*New Hampshire.*
George M. Conarroe,	*Pennsylvania.*
F. E. Bissell,	*Iowa.*
Charles Eames,	*District of Columbia.*
Mark B. Moore,	*New York.*
Samuel Wells,	*Massachusetts.*
W. H. F. Gurley,	*Iowa.*
Morton S. Wilkinson,	*Minnesota.*
Jackson Grimshaw,	*Illinois.*
Addison L. Scott,	*New York.*
Levin Gale,	*Maryland.*
Alexander Evans,	*Maryland.*
Jabez R. Ward,	*New York.*
Benjamin F. Rexford,	*New York.*
C. M. Hawley,	*Illinois.*
Theodore J. Widvey,	*Wisconsin.*
J. Lawrence Smith,	*New York.*
Matthew H. Carpenter,	*Wisconsin.*
James Abrams,	*Wisconsin.*
B. K. Miller,	*New York.*
Timothy Cronin,	*New York.*
Hiram B. Crosby,	*Connecticut.*
James J. Lindley,	*Iowa.*

George N. Titus,	*New York.*
John Van Arman,	*Illinois.*
David Noggle,	*Wisconsin.*
Roland D. Noble,	*Ohio.*
Eliakim B. Forbush,	*New York.*
Edward D. Sohier,	*Massachusetts.*
Robert Jarvis C. Walker,	*Pennsylvania.*
Hamilton W. Robinson,	*New York.*
William E. Warding,	*Wisconsin.*
Calvin C. Burt,	*New York.*
William D. Booth,	*New York.*
John S. Beach,	*Connecticut.*
William C. Traphagen,	*New York.*
R. B. Van Valkenburgh,	*New York.*
H. Baldwin,	*Ohio.*
John A. Poor,	*Maine.*
Thomas H. Russell,	*Massachusetts.*
Benjamin F. Rexford, Jr.,	*New York.*
Henry P. McGown,	*New York.*
James Thomson,	*New York.*
A. Q. Keasbey,	*New Jersey.*
John B. Ireland,	*New York.*
Theodore M. Pomeroy,	*New York.*
Arson W. Palmer,	*New York.*
J. Blodgett Britton,	*Pennsylvania.*
Ira T. Drew,	*Maine.*
Lambert Tree,	*Illinois.*
Stewart L. Woodford,	*New York.*
Charles W. Jackson,	*New York.*
Irving Paris,	*New York.*
W. Jay Haskett,	*New York.*

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CASES DECIDED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1861.

DUTTON ET AL. *vs.* STRONG ET AL.

1. Riparian proprietors have a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea, if they conform to the regulations of the State and do not obstruct the paramount right of navigation.
2. The right to make such erections terminates at the point of navigability.
3. Where they are confined to the shore, and no positive law or regulation is violated by their construction, he who alleges them to be a nuisance or an obstruction to navigation must prove it—for the presumption is the other way.
4. Piers or landing places may be either public or private, and the question whether they belong to one or the other class depends upon the purpose for which they were built, the uses to which they have been applied, the place where located, and the character of the structure.
5. A riparian proprietor may construct a pier for his own exclusive use and benefit; and where he has reserved it to himself and never held it out as intended for the use of others, no implication arises, if a party without leave moors his vessel to such a pier, that he has done so with the owner's consent.
6. Where a vessel is thus wrongfully attached to a private pier without the consent of its owner, the peril of the vessel, no matter how great, imposes no obligation upon such owner to allow her to remain, and hazard his own property to save that of a trespasser.

THIS case came before the Supreme Court upon a writ of error to the District Court of the United States for the district

of Wisconsin. It was, in its origin, an action of trespass on the case brought by H. Norton Strong and William H. Goodnow against Achas P. Dutton and Cyrus Hines.

In 1855, Messrs. Dutton and Hines, the plaintiffs in error, owned a pier situated at Racine, upon Lake Michigan, and extending into the lake, which served the purposes both of a landing place for freight and for its stowage. This pier was private property, and although its owners, who were forwarding merchants, sometimes moored vessels, which came there upon their own business, to its timbers, it does not appear that they ever suffered anybody else to do so, or that any other person claimed the right. On the sixth of May, 1855, the ship Homer Ramsdell, owned by the defendants in error, Messrs. Strong and Goodnow, was driven by stress of weather to the neighborhood of this pier, and the captain, fearful of going ashore, made his vessel fast to it. The violence of the gale increased the pull on the hawser, by which the ship was moored, to such a degree that the piles began to give way under the strain, whereupon one of the owners of the pier warned the master to cut loose, or they would themselves set him adrift. The master did not heed this warning, and the defendants, after waiting to see if he meant to obey it, cut the hawser. The vessel, as soon as set loose, was driven upon another pier, and to prevent her utter destruction was scuttled and sunk.

The court below was requested by the defendants in error to instruct the jury that if the evidence satisfied them that it was material for the preservation of the pier to cut the vessel loose from it, the person in charge of the pier had a right to do so, as against all rights of property in the vessel, after reasonable notice given and request made and refused for the vessel to leave. This instruction the court refused to give, and charged the jury, that the pier was run out into the lake for the accommodation of commerce, and was used as private property in public business; that the vessel was liable for such damage as she was doing the pier, and that the owners of the pier were not justifiable or excusable in cutting the vessel loose, if it was material for the safety or protection of the pier. To this portion of the court's charge, and to its refusal to grant two other

prayers of the defendant, not necessary to be noticed here, because not considered in this court, the defendants excepted. The verdict of the jury and the judgment of the District Court were in favor of the plaintiffs; whereupon the defendants took this writ of error.

Mr. Doolittle, of Wisconsin, for plaintiffs in error, argued that the court below erred in affirming the proposition that the owners of a private pier had no right to cut away a vessel which was fastened to it without their consent, and contended that the acts of the plaintiffs in error, being justified by law, did not subject them to any damages in an action like this.

Mr. Hibbard, of Wisconsin, for defendants in error. After the vessel had been moored to the pier under the circumstances, the plaintiff in error had no right to cast her off. The pier was an unauthorized nuisance in the lake. The commercial and legal character of the Western lakes is so fixed that those waters must be considered, commercially and legally, seas. *Ordinance* 1787, (1 Stat. at L. 52, N.;) *Fitzhugh* vs. *Genesee Chief*, (12 How., 443;) *Moore* vs. *The Am. Trans. Co.*, (24 How., 1.)

The evidence was sufficient to permit the jury to find, as a matter of fact, that the pier was a nuisance. (3 Kent's Com., 427;) *Lord Hale*, (De Portibus Maris, Harg. Ed., 85;) *Lord Hale*, (De Jure Maris, Harg. Ed., 8, 9;) *Rex* vs. *Lord Grosvenor*, (2 Starkie, 511;) *Blundell* vs. *Cutterall*, (5 Barn. & Ald., 268, 7 Eng. C. L., 88, 108;) *Rex* vs. *Ward*, (4 Adol. & El., 384, 31 E. C. L., 92;) *Reg.* vs. *Randall*, (1 Car. & Marsh., 496, 41 E. C. L., 272;) *Simpson* vs. *Scales*, (2 Bos. & Pul., 496;) *The Mayor, &c.*, vs. *Brooke*, (7 Adol. & E., 339, 53 E. C. L., 339;) *Hart* vs. *The Mayor of Albany*, (9 Wend., 571;) *The People* vs. *Platt*, (17 John., 195, 209;) *The United States* vs. *The New Bedford Bridge Co.*, (1 Wood & Minot, 401, 411;) *Rex* vs. *Caldwell*, (1 Dallas, 150;) *Martin* vs. *Waddell's Lessee*, (16 Peters, 367, 421.)

This must be especially so when there is no proof that the plaintiff in error owned the soil along the shore. The pre-

sumption, besides, is, that he has no right thus to occupy, but is a mere wrong-doer.

Of course, (irrespective of the right of any one to abate a nuisance,) it cannot be claimed that the plaintiffs in error had any right in the nuisance which would permit him to cast off the vessel, thus exposing it to peril, under any circumstances. Most certainly not when the vessel was forced there by stress of weather, as the jury had a right to find she was. *The Schooner Mary*, (1 Gallison, 206;) *Peisch* vs. *Ware*, (4 Cranch, 347;) *The Frances and Eliza*, (8 Wheat., 398;) *The Gertrude*, (3 Story, 68.)

The plaintiff in error, by building his pier in the lake, invited, and, at least impliedly, licensed vessels, in pursuit of their business, to approach and moor to the pier. *Balt.* vs. *Stennett*, (8 T. R., 606;) *Bradslee* vs. *French*, (7 Conn. 125;) *Heaney* vs. *Heeney*, (2 Denio, 625.) This license, of necessity, included the right to use the dock according to the exigencies of the case. Necessarily, therefore, when those exigencies required that the vessel should hold to the pier after once mooring there, the plaintiffs in error had no right to revoke the license, and cast off the vessel, thus causing her injury.

Mr. Justice CLIFFORD.* This case comes before the court upon a writ of error to the District Court of the United States for the district of Wisconsin. It was an action of trespass upon the case, and was instituted in the court below, on the seventh day of July, 1856, by the present defendants. They were the owners of a certain vessel called the Homer Ramsdell, and the plaintiffs in error, who were the defendants in the original suit, were the owners and occupants of a certain bridge pier, situated at Racine, in the State of Michigan, southerly of the harbor at that place. Like other similar erections, it was connected with the land at the mar-

*The reader of these Reports will understand that an opinion delivered by one judge is *the opinion of the court* in that case; and it is the opinion of the *whole* court, unless a dissent be reported.

gin of the lake, and extended into the water, so that ves sels could approach it for the purpose of taking in freight, serving both as a wharf to the navigable water of the lake, and as a place of deposit for merchandise designed for transportation by water. As stated in the bill of exceptions, the defendants were forwarding merchants, and the case shows that they had used the bridge pier for the purpose of mooring vessels coming there in the course of their business; but it does not appear that it had ever been used for that purpose by any other persons. Another bridge pier, situated south of the one owned by the defendants, had been constructed, and was occupied by other parties, and was used for the same purpose by its owners as that of the defendants. According to the transcript, the declaration contained four counts, but they were all founded upon the same transaction. Three of the counts were substantially the same, and alleged, in effect, that the plaintiffs were the owners of the vessel; that, while she was lawfully employed in navigating the waters of Lake Michigan, she had, by stress of weather and the perils of navigation, been driven alongside of a certain dock and common mooring place at Racine, commonly called a bridge pier, to which she was then and there moored and fastened by cables and lines, and that the defendants, on the seventh day of May, 1855, wrongfully cut and severed the moorings by which the vessel was fastened, and cast her loose from the pier; and that, in consequence thereof, she was driven, by the force of the wind and waves, against a certain other dock and pier there situate, and on to the shore of the lake, by reason whereof she was greatly damaged, and so injured that she sunk in the lake.

Unlike the first three counts, the fourth alleged that the defendants, at the same time and place, did, wrongfully and unlawfully, erect, and cause to be erected, a certain permanent bridge or structure on the navigable waters of Lake Michigan, whereby the vessel of the plaintiffs was wholly unable to make the harbor at Racine, or to put out into the lake, as she otherwise might and would have done; and, in consequence of the obstruction, was, by the wind and waves, driven on the shore, and against a certain dock, and greatly damaged, as

alleged in the other counts of the declaration. To the whole declaration, as more fully set forth in the transcript, the defendants pleaded that they were not guilty, and on that issue the parties went to trial. None of the evidence given by the defendants is reported in the bill of exceptions; but it appears, from that introduced by the plaintiffs, that the schooner was bound from Chicago, in the State of Illinois, to Racine, in the State of Wisconsin, and that she was sailing in ballast. Assuming the testimony of the master to be correct, she left Chicago on the sixth day of May, 1855, and arrived off the harbor of Racine between twelve and one o'clock at night in perfect safety. When she was about one-fourth of a mile from the harbor, the wind suddenly changed from south to north-northeast, and blew hard. Those in charge of the vessel state that they could see but one light at the time; and, supposing it to be the light on the northern pier in the harbor to which they were bound, they headed the vessel for that light. Contrary, however, to what they supposed, there was no light on either of the harbor piers, and, in point of fact, it was a light on the bridge pier of the defendants. Heading for that light, the vessel, as she advanced, was approaching the shore, and she soon passed between the two bridge piers, already described as situated southerly of the harbor. When they got close to the light they discovered the mistake; but, instead of changing the course of the vessel, they took in sail and let go the anchor, to prevent her from going on to the beach. Whether these precautions were the best that could have been adopted, or not, they had the effect to check the speed of the vessel, and, as she ceased to make headway, she sagged over against the southern bridge pier without receiving any injury. Their next step was to get out lines on to the bridge pier of the defendants, in order to work the vessel away from the southern pier, and prevent her from pounding. Finding that the lines were insufficient, they got out the large hawser and two other lines, and finally, with the aid of six additional men, and after getting out another hawser belonging to the vessel, and purchasing a new one for the purpose, they succeeded in getting the vessel up to the bridge pier of

the defendants, or near it, at four o'clock in the morning. Her bow, as the master states, was still thirty or forty feet from the pier; and he says he bought the new line and employed the additional help to heave the vessel up to the pier, which was not fully accomplished until ten o'clock in the forenoon. Seeing that the wind and sea had increased in the meantime, they then concluded to make her fast to the pier; and, accordingly, got out the chain and fastened it to a pile on the opposite side of the pier, using, for that purpose, the hawsers and lines previously got out to work the vessel up to the pier. About twelve o'clock the vessel commenced pounding, and the pile to which the chain was attached started and passed through the pier eight or ten feet, and the clear inference from the testimony is, that all the fastenings gave way, except the new line and the chain.

Another witness, examined by the plaintiff, states that when the vessel commenced pounding, the pier began to start; and he says it was two o'clock in the afternoon when the pile to which the chain was attached gave way. Although it gave way, it did not then pass entirely through the bridge pier, but lodged against other piles on which the pier was built; and, consequently, the chain would still assist in holding the vessel, unless the pile broke, or that part of the pier was carried away. At this juncture, one of the defendants came upon the pier and directed the master to get the vessel away from the pier, informing him that if he did not he would cast her adrift; to which the master replied, that he would leave, if possible; and if not, he would continue to hold on to the bridge pier. But he did not make any attempt to leave, and a person in the employment of the defendants cut the hawser. When the hawser was severed, and the strain came upon the chain, the second mate of the vessel says the rest of the piles gave way, and the vessel went over to the south bridge pier, carrying away her stanchions and bulwarks on her larboard side; and, to prevent further damage, she was scuttled, by the order of the master, and presently sunk. Such is the substance of the testimony introduced by the plaintiffs, as reported in the bill of exceptions. Several prayers for instructions to the jury

were presented by the defendants, but, in the view we have taken of the case, it will only become necessary to refer to the second, and to the response given thereto by the court. By the second prayer of the defendants, the court was requested to instruct the jury, that if they believed, from the evidence, that it was material for the preservation of the pier to cut the vessel loose from it, the persons in charge of the pier had a right to do so, as against all rights of property in the vessel, after reasonable notice given, and request made and refused for the vessel to leave. But the court refused to give the instruction, as requested, and charged the jury, in substance, as follows: That if the vessel was attached to the pier towards its outer end, and was in peril, the owner of the pier could not put the vessel in greater peril by cutting her loose for the safety or protection of the pier. He also told the jury that the pier was run out into the lake for the accommodation of commerce, and was used as private property in public business; that the vessel was liable for such damage as she was doing the pier; and that the owners of the pier were not justifiable or excusable for cutting the vessel loose, even if it was material for them to do so for the safety or protection of the pier, or of that part to which the vessel was attached. Under the instructions of the court, the jury returned their verdict in favor of the plaintiffs, and the defendants excepted to the instructions given, and to the refusal of the court to instruct the jury as requested.

It is insisted by the defendants, that the District Judge erred, as well in his refusal to instruct the jury as requested, as in the instructions given.

On the part of the plaintiffs, both of those propositions are controverted; and they contend, in the first place, that the bridge pier was a nuisance, because, as they insist, it was an obstruction to the public right of navigation; and secondly, they contend that the defendants had no right to cut the hawser, and cast the vessel adrift, however necessary it was for them to do so, for the safety and protection of the bridge pier, because, as they insist, the defendants, by erecting the pier in the waters of the lake, had impliedly licensed the plaintiffs,

and all others navigating those waters, to come there with their vessels, and moor them to the pier; and that the license, of necessity, includes the right to use the pier, according to the exigencies of the case.

1. Unless it be true, that every landing place and bridge pier erected on the shore of navigable waters without a special authority from the legislature, is necessarily a nuisance, it is a sufficient answer to the first position of the plaintiffs to say, that there was not a particle of evidence in the case to support the theory of fact on which the proposition is based. All that appeared upon the subject in the court below was, that the bridge pier in question extended several hundred feet into the waters of the lake; but it was not even suggested that any less extension would have answered the purpose for which the pier was constructed, or that it was any greater than is usual in similar erections on that shore of the lake, or that the pier, as constructed, constituted any obstruction whatever to the public right of navigation. On the contrary, the court adopted the theory that the vessel or her owners would be liable for the damage done to the pier, and sustained the right of the plaintiffs to recover, entirely upon the ground that the peril of the vessel justified the master in refusing to leave; and that the defendants, whatever might be the consequences to the pier if the vessel remained, had no right to cut the hawser, and thereby expose her to greater danger, notwithstanding they were in the possession of the pier, and it was admitted that it was their private property. Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, and arms of the sea, as well as on the lakes; and where they conform to the regulations of the State, and do not extend below low-water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation. Whether a nuisance or not is a question of fact; and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove it. Wharves,

quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time. (Ang. on Tide Wat., p. 196.)

Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects. Different States adopted different regulations upon the subject; and, in some, the right of the riparian proprietor rests upon immemorial local usage. No reason is perceived why the same general principle should not be applicable to the lakes, although those waters are not affected by the ebb and flow of the tide; and, consequently, the terms "high and low-water mark" are not strictly applicable. But the lakes are not navigable, in any proper sense, at least in certain places, for a considerable distance from the margin of the water. Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases.

2. Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case

of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure. Undoubtedly, a riparian proprietor may construct any one of these improvements for his own exclusive use and benefit; and, if not located in a harbor, or other usual resting place for vessels, and if confined within the shore of the sea or the unnavigable waters of a lake, and it had not been used by others, or held out as intended for such use, no implication would arise, in a case like the present, that the owner had consented to the mooring of the vessel to the bridge pier.

Looking at the statement of the facts, as derived from the evidence reported in the bill of exceptions, it is obvious, that every one of the foregoing conditions substantially concur in this case; and, consequently, it must be assumed that the master attached the vessel to the pier without any authority from the defendants, either express or implied. He had no business to transact with the plaintiff, and the vessel was not going to the pier for freight; so that all pretence of a license utterly fails.

That fact alone, however, under the circumstances of this case, might not perhaps be sufficient to justify or excuse the defendants for cutting the hawser. Every man is bound by law so to use his own property as not to injure the property of another; and, unless the defendants are brought within the fair operation of that rule, they cannot be justified or excused. But that rule is applicable to the plaintiffs as well as to the defendants; and he who would invoke the benefit of the rule must first comply with its requisitions.

Failing to show a license to attach the vessel to the pier, the plaintiffs set up the peril of the vessel, and insist that she had a right to remain, notwithstanding the request to leave, during its continuance; and, consequently, that the defendants cannot be justified or excused for cutting her loose.

Suppose the right to remain during the continuance of the peril, if she could have done so without danger or injury to the property of the defendants, be admitted, still the admission

would not benefit the plaintiffs in this case, for the reason that they or their agent had wrongfully attached the vessel to the pier; and when it became obvious that the necessary effect of the trespass, if suffered to be continued, would be to endanger and injure, or perhaps destroy the pier, the peril of the vessel imposed no obligations upon the defendants to allow her to remain, and take the hazard that their own property would be sacrificed in the effort to save the property of wrong-doers. On the contrary, they had a clear right to interpose, and disengage the vessel from the pier to which she had been wrongfully attached, as the only means in their power to relieve their property from the impending danger. They had never consented to incur that danger, and were not in fault on account of the insufficiency of the pier to hold the vessel, because it had not been erected or designed as a mooring place for vessels in rough weather, and it was the fault of the plaintiffs or their agent that the vessel was placed in that situation.

Reference is made by the plaintiffs to the case of *Heaney et al.* vs. *Heeney et al.*, (2 Den., 625,) as asserting a contrary doctrine; but, after a careful examination of the case, we think it will not bear any such construction. Recurring to the facts of the case, it will be seen that the litigation arose out of a dispute about the title of the dock before it was completed. With a view to get possession of the dock, the plaintiffs attached their vessel to it, and the defendants, who had previously had the possession, severed the fastenings and cast her loose at a time when there was no danger whatever to the dock; and it was held that, inasmuch as the occupancy of the plaintiffs was lawful, the defendants could not terminate it by setting the vessel adrift, so as to endanger her safety, until they had put the plaintiffs in fault. But the court admitted that, if the entry of the plaintiffs into the dock had been tortious, then, indeed, the defendants would have had a right to cut her loose, doing no unnecessary damage, in order to the enjoyment of their rights.

In view of the whole case, we are of the opinion that the second prayer for instruction, presented by the defendants, should have been adopted by the court, and that the instruc-

tions given to the jury in answer to their request were also erroneous.

Judgment of the District Court reversed, with costs, and the cause remanded, with directions to issue a venire facias de novo.

UNITED STATES *vs.* HENSLEY.

The paper made by Micheltoreno, and delivered to Sutter at Santa Barbara, on the 22d December, 1844, and called the "General Title," was not a title according to the laws, customs, or usages of the Mexican government, and all claims under it are invalid.

This case came up on appeal from the decree of the District Court of the United States for the northern district of California, being a private land claim, prosecuted by the appellee under the act of Congress passed March 3, 1851.

In his petition to the Board of Land Commissioners the appellee claimed confirmation of his title to a tract of land in Butte county, known by the name of Aguas Nieves, and containing six square leagues, which, he averred, had been granted to him by Governor Micheltoreno, in December, 1844. It appeared that he did, on the 25th of July, 1844, solicit Micheltoreno for a grant of the land in question. His petition was accompanied with a *deseño* or sketch. The Secretary of the Government (Manuel Jimeno) was ordered to give information, taking the steps he might deem necessary. Jimeno referred it to Señor John A. Sutter, captain and judge of New Helvetia, who reported, on the 2d of September, 1844, that the land solicited was unoccupied. There were many other applications of the same kind on which Sutter had also reported favorably. On the 18th of November Jimeno advised that this and all similar applications for land on the Sacramento river should be suspended until the governor could make a visit to that region. Very soon after that date the insurrection of Pico, Castro, Alvarado, and other "Chiefs of the South," against the authority of Micheltoreno, broke out. The American and other foreign settlers in the valley

of Sacramento enlisted with great unanimity in his defence, and constituted the most efficient force he had. Hensley was among them. They were commanded by Captain Sutter. Many of them had, like Hensley, made applications for lands, and nearly all their applications were, like his, postponed until the governor could make his contemplated visit. After he had been compelled to leave Monterey, the capital of the department, and while he was at Santa Barbara trying to make head against the revolutionary movement, he was warned by Sutter that his banner might be deserted by the petitioners for lands, unless they should be satisfied of his (the governor's) good intentions towards them in that respect. Thereupon, Micheltoreno, on the 22d of December, 1844, at Santa Barbara, made and delivered to Sutter the paper which has been known as the "General Title," in which he said: "I confer upon them (the petitioners) and their families the lands described in their applications and maps to all and each one of them who has solicited and obtained favorable information from Señor Sutter up to this date, so that no one can dispute their title." Sutter was authorized to give each of them a copy of the document, "which," the governor adds, "will be known and acknowledged by all the civil and military authorities of the Mexican nation in this and the other departments."

Hensley, the claimant in this case, showed that he was within the terms of the general title, as having received before the date of it a favorable report from Sutter. He also proved that, though a native of the United States, he was a naturalized Mexican. Sutter, himself, testified that he had given him a copy of the general title, in conformity with the directions contained in it. But this copy was made out and given to the claimant on the 20th of April, 1845, after Micheltoreno was expelled from the country, and when Pico was in the full exercise of the functions of Political Chief. Hensley never received judicial possession of the land, but he proved that he entered upon it in 1845, built houses, ditched, fenced, cultivated, and used the land as his own.

There was no evidence that the "General Title" had ever

been recorded by the Mexican authorities. The circumstances in which Micheltoreno was placed at its date were such as deprived him of all control over the records or over the officers who had them in custody.

The commissioners were of opinion that the document signed by Micheltoreno and delivered to Sutter, had the same force and effect as a grant made to each and every one of the applicants, *nominatim;* that the subject-matter of it was sufficiently designated, because it could be made certain by reference to the petitions and maps, and that the want of a record was, under the circumstances, not conclusive against the right of the claimants. Upon these grounds the claim was admitted, and the title confirmed by the board. The same decree was made for similar reasons by the District Court (Judge McAlister) when the case went there. The United States then appealed to this court.

Mr. Stanton, for the *United States*, argued that Micheltoreno's general title to Sutter conferred no right that can be confirmed under the act of Congress to ascertain private land claims in California, and cited *U. S.* vs. *Bassett*, (21 How., 412;) *U. S.* vs. *Nye*, (21 How., 408;) *U. S.* vs. *Sutter*, (21 How., 179;) *U. S.* vs. *Burnett*, (23 How., 255;) *U. S.* vs. *Murphy*, (23 How., 476;) *U. S.* vs. *Rose & Kinlock*, (23 How., 262.)

No argument, oral or written, was made in behalf of the claimant.

Mr. Justice GRIER. The claim of the appellee in this case is under the deed of Micheltoreno, dated the 22d of December, 1844, commonly called the Sutter General Title. It differs in no material respect from the other titles or claims already adjudged by this court, in which this grant was in question. The cases of *U. S.* vs. *Nye*, (21 How., 408;) *Same* vs. *Bassett*, (ib., 412;) *Same* vs. *Bennitz*, (23 How., 255;) *Same* vs. *Rose*, (ib., 262,) settle the question that the claim of the appellee is invalid. The decree of the District Court is therefore reversed,

and the cause remanded, with directions to that court to dismiss the petition.

Decree accordingly.

BACON ET AL. *vs.* HART.

1. Where a writ of error is taken to the District Court, but no citation served on the defendant in error agreeably to the act of 1789, the writ will, on motion, be dismissed for want of jurisdiction.
2. A service of the citation on the attorney or counsel of the defendant in error is sufficient.
3. But where the attorney of record is dead, it will not do to serve it on his executrix or other personal representative.
4. Nor can the service be legally made on another member of the bar who had been a partner of the deceased counsel.
5. The courts cannot notice law partnerships or other private arrangements, and counsel cannot be known as such, unless by their appearance on the record.

Mr. Stanton, of Washington city, for the defendant in error, moved that the writ of error in this case be dismissed for want of a citation.

Mr. Chief Justice TANEY. We have looked into this record, and find that the writ of error must be dismissed. The action was in the nature of an ejectment, and brought to recover possession of land. The plaintiff below was William Hart, *junior*, a citizen of New York, residing at Manilla. His counsel in the cause was William Hart, *senior*. In March, 1858, judgment was rendered by the court for the plaintiff. In October of the same year a writ of error was sued out, returnable on the first Monday in December next thereafter, and service of the citation was on the 9th of October admitted by William Hart, *senior*. But this writ of error was not returned during the term to which it was made returnable, and failed, therefore, to bring up the case. A second writ of error was taken by the defendant below in August, 1859, returnable to the ensuing December term of this court. The citation under

this latter writ was directed to William Hart, *junior*, and served according to the marshal's certificate, on Mary Hart, widow and executrix of William Hart, *senior*, who died after the judgment, and on J. D. Stevenson, his former law partner.

A service of the citation on the attorney or counsel of the proper party is sufficient; but the executrix of the counsel on record was not the counsel of her testator's client. His character and duties as counsel did not devolve on his own personal representative after his death. Nor is Mr. Stevenson to be regarded as the counsel of William Hart, *junior*, merely because he had been the partner of William Hart, *senior*. We cannot notice law partnerships or other private relations between members of the bar. This may have been a partnership, solely because it provided for a division of profits, without putting either partner under any responsibility for the suits conducted by the other. The courts can know no counsel in a cause except those who regularly appear as such on the record.

The citation not being served on the party as his counsel, the cause is not brought into this court, agreeably to the act of 1789; and the writ must therefore be dismissed for want of jurisdiction.

Writ of error dismissed.

WEIGHTMAN *vs.* THE CORPORATION OF WASHINGTON.

1. When a municipal corporation is required by its charter to keep a bridge in repair, if the duty was imposed in consideration of privileges granted, and if the means to perform it are within the control of the corporation, such corporation is liable to the public for an unreasonable neglect to comply with the requirement.
2. When all the foregoing conditions concur, a corporation is also liable for injuries to the persons or property of individuals.
3. This liability extends to injuries arising from neglect to perform the duty enjoined, or from negligence and unskilfulness in its performance.

This was a writ of error to the Circuit Court of the United States for the District of Columbia. The plaintiff in error

brought case against the corporation of Washington for bodily injuries suffered by him, in consequence of being thrown from the bridge across Rock creek, at the termination of K street. On the trial in the Circuit Court, the plaintiff proved that the charter of the city (sec. 13) provided that "the said corporation shall have the sole control and management of the bridge, and shall be chargeable with the expenses of keeping the same in repair, and rebuilding it when necessary." In May, 1854, the plaintiff, a citizen of Washington, was crossing the bridge in an omnibus, when the bridge broke down, and he was seriously injured. On part of the defendant, evidence was given that the bridge had been erected by skilful and scientific workmen, in good faith, upon a plan patented by the Government, and believed to be faultless in principle; that the construction was thought to be strong and solid, both the work and materials being of the best description; that the giving way of the bridge was the result of an accident and of an unknown defect in the plan of it; that when the bridge was completed, in 1850, its strength and capacity were amply tested; that a commissioner was appointed by the corporation of the city to inspect and superintend the bridge, who performed his duties, but did not discover any defect; that the corporation had no notice, either through their officer or otherwise, that the bridge was unsafe, and that in fact there was no indication of unsoundness in it before the time of its fall.

To rebut this evidence of the defendant, the plaintiff proved that the bridge was built by Rider, the patentee of the plan, who warned the officers of the city corporation in vain against building the arch as high as they proposed to make it; that any bridge on that plan, unless it be horizontal, is unsafe, and the insecurity is increased in proportion as the arch is raised; that within a year after the bridge was put up the approach to it was changed at each end, adding thereby about three tons to its weight; that for several days before it fell, divers persons observed its unsafe condition.

The defendant prayed the court to instruct the jury that upon the whole evidence the plaintiff was not entitled to recover; and the court gave the instructions prayed for. A ver-

dict and judgment were accordingly given for the defendant, and the plaintiff sued out this writ of error.

Mr. Bradley and *Mr. Carlisle*, of Washington city, for plaintiff in error, contended that the judgment of the Circuit Court ought to be reversed by this court, because:

1. The terms employed in the clause of the 13th section of the charter are mandatory, and impose on the corporation the duty to keep in repair and rebuild the bridge in question when necessary. *Mason* vs. *Fearson*, (9 How., 248.)

2. The duty thus imposed on the corporation is an absolute and purely a ministerial duty. It involves no discretionary exercise of political or legislative power, and is precisely such as might have been devolved upon an individual. *Storrs* vs. *City of Utica*, (3 Smith, 17 N. Y., 104;) *Delmonico* vs. *City New York*, (4 Com., 1 Sand., 222;) *The Mayor, &c., of Albany* vs. *Cunliff*, (2 Com., 165;) *Erie City* vs. *Schwingle*, (22 Penn., 584;) *Rochester Lead Company* vs. *City of Rochester*, (3 Coms., 467.)

3. The charter has provided the most ample means to enable the corporation to discharge this duty, by the imposition of taxes, and granting licenses; by holding and owning property, and receiving the rents, issues, and profits of real estate, to be employed by the corporate authorities in the support and execution of this, among other duties, with which they are charged. *Hutson* vs. *City of New York*, (3 Sand., 297; 7 John., 439; 7 Wend., 474; 2 Hill, 619; 6 ib., 463.)

4. The franchises thus granted to the corporation are the consideration on which they have, *by accepting the charter*, undertaken to discharge the duties and burthens imposed on them as conditions of the enjoyment of those franchises. (Grant Cor., p. 18, and cases in note;) *Rutter* vs. *Chapman*, (8th M. & W., 36, 85; Wilcock Mun. Corp., 30; Ang. & Am., 3d ed., chap. 2, § 7;) *Conrad* vs. *Trustees of Ithaca*, *Weet* vs. *Brockport*, (2 Smith, 191.)

5. The line of demarkation between these duties, which are immediate parts of, or incident to their political powers, and those which are purely and absolutely ministerial, is not always well defined, and may sometimes give rise to doubt; but it

may be safely affirmed that when a municipal corporation is distinctly charged with the execution of a specific duty for the benefit of the public and of individuals, and means are in the same or some other instrument put into their hands, adequate to its full performance, they may be compelled to perform it, and will be responsible to individuals injured by their negligent or improper performance of it. *Mayor of Lynn* vs. *Turner*, (Cowp., 86; Grant Corp., 501;) *Henley* vs. *Mayor of Lyme*, (5 Bing., 91; S. C., 1 Bing. N. C., 222, in error, 2 C. & F., 354, by all the judges;) *Mayor of New York* vs. *Furze*, (3 Hill, 612;) *Mayor of Albany* vs. *Cunliff*, (2 Coms., 165;) *Lloyd* vs. *City of New York*, (1 Seld., 369;) *City of Pittsburg* vs. *Grier*, (20 Penn., 64;) *The Mayor of Baltimore* vs. *Marriot*, (9 Maryland, 160, 178;) *Memphis* vs. *Lasser*, (9 Hump., 761.)

6. The bridge thus constructed by the corporation was its property, which they could take down and dispose of at their pleasure. One end of it rested on soil beyond their municipal jurisdiction, if the whole bridge was not also beyond it, and the corporation in its political character could have no control over it. Yet they were bound to repair and rebuild it out of their corporate funds, and they were responsible, if it became a public nuisance, to any one receiving special damage from the manner in which they discharged that duty. *Bailey* vs. *The City of New York*, (3 Hill, 531; S. C. 2 Denio, 433.) Having constructed it, they had no discretionary power as to keeping it in repair. *Wilson* vs. *Mayor of New York*, (1 Denio, 595;) *The Mayor of New York* vs. *Furze*, (3 Hill, 612; Kitty's Laws, 1791, chap. 45, § 1.)

Mr. Davidge, of Washington city, *contra*. The officers of the corporation are invested with power over the bridge as the agents of the public, from public considerations and for public purposes exclusively, and are not responsible for the nonfeasances or mis-feasances of sub-agents necessarily employed. The nature of the power is public, and its object is the benefit of the public. The bridge is a public bridge, and so alleged. It spans a navigable stream, and one abutment only is within the corporate limits.

It is not denied that a public municipal corporation may hold franchises or other property, in relation to which it is to be regarded as a private company, and subject to the responsibilities attaching to that class of institutions. *Bailey* vs. *The Mayor, &c., of New York*, (3 Hill's N. Y. Re., 531, 540;) *S. C. on error*, (2 Denio, 434;) *Moodalay* vs. *The East India Co.*, (1 Brown's Ch. R., 469.) But as regards the power under consideration here, it has not a single element of private ownership, but stands on precisely the same footing as the powers of the corporation over the streets of the city, which powers, it is judicially settled, are exercised by the corporation as agents of the public. *Smith* vs. *Corporation of Washington*, (20 How., 135, 148;) *Van Ness* vs. *Id.*, (4 Pet., 232.) Public agents are not responsible for the mis-feasance or non-feasance of those whom they are obliged to employ. To such cases the doctrine of *respondeat superior* does not apply. *Story on Agency*, (sec. 319—322;) *Hall* vs. *Smith*, (2 Bing., 156; 9 E. C. L. R.;) *Harris* vs. *Baker*, (4 Maul & Selw., 27;) *Lave* vs. *Colton*, (1 Ld. Raymond, 646;) *Whitfield* vs. *Lord Le Despencer*, (Cowp., 754;) *Duncan* vs. *Findlater*, (6 Clark & Finell, 903, 910;) *Dunlop* vs. *Munroe*, (7 Cranch, 242, 269;) *Bailey* vs. *The Mayor, &c., of New York*, (3 Hill's N. Y. Re., 532;) *S. C. on error*, (2 Denio, 434, 450;) *Schroyer* vs. *Lynch*, (8 Watts, 453;) *Boody et al.* vs. *United States*, (1 Woodb. & Minot, 151, 170;) *White* vs. *City Council*, (2 Hill S. C. R., 571;) *Supervisors of Albany Co.* vs. *Dorr*, (25 Wend., 440.)

It may be urged that it is not sought here to hold the corporation responsible for the neglect of its official subordinates, but for neglect in the appointments of them. But admitting, *argumenti gratiâ*, that for such neglect the superior would be liable, there is no evidence to show that the commissioner lacked capacity. Moreover, it has been settled by this court that, under an allegation framed as here, evidence of neglect in making the appointment or of not properly superintending the subordinate is not admissible; but that for such neglect a recovery can be had only, if at all, upon a declaration specially framed to meet the particular kind of negligence relied on. *Dunlop* vs. *Munroe*, (7 Cranch, 242, 269.)

And to the same effect is *Bishop* vs. *Williamson*, (2 Fairfield, 495, 506.)

2. At common law no action lies against public municipal corporations or *quasi* corporations created for public purposes, or against other public officers, for neglect to repair a public bridge or highway, unless the obligation to repair rests on tenure, prescription, or contract. The only remedy is by indictment. *City of Providence* vs. *Clapp*, (17 How., 161, and cases cited, p. 162.) In Bro. Abr., Title *Sur le case*, (pl. 93,) it is said that if a highway be out of repair so that a horse be mired and injured, no action lies, "*car est populus et serre reforme per presentment.*" In *Russell* vs. *The Men of Devon*, (2 T. R., 667)—the leading case upon the subject—the precedent in *Brooke* was cited and approved, and it was held that no action lay to recover satisfaction for injury done to a wagon in consequence of a bridge being out of repair. In *Riddle* vs. *The Proprietors of the Locks and Canals on Merrimac River*, (7 Mass., 169,) Parsons, C. J., took the same distinction between corporations created for the benefit of the public, as part of the government of the country, and those created for the benefit of the corporators; and held, that the former are liable only to information or indictment. *Mower* vs. *Leicester*, (9 Mass., 947;) *Young* vs. *Comm's of Roads*, (2 Nott and M. C., 555; Com. Dig., Chemin, H. 4, B. 3;) *Bartlett* vs. *Crozier*, (17 John., 439;) *Mowry* vs. *The Town of Newfane*, (1 Bar. S. C., 645;) *White* vs. *City Council*, (2 Hill's So. Car., 571;) *Haskell* vs. *Inhabitants of Knox*, (3 Greenl., 445.) The cases of *Mayor of Lynn* vs. *Turner*, (Cowp., 86,) *Henley* vs. *Mayor of Lyme*, (5 Bing., 91, and S. C., 1 Bing. N. C., 222,) are cases of *contract*, where the grantors of franchises or property held *on condition* that they would repair or do certain acts. The English books are filled with indictments for neglect to repair; but no instance can be found of an action when the duty to repair was created by statute for the benefit of the public, and was irrespective of franchise or other private advantage.

3. But again: it is sought here to hold a municipal corporation, acting *pro bono publico*, responsible not only for its own neglect to repair, but also for that of its officer in failing to

observe the ordinance for the inspection of the bridge. In *Towle* vs. *Common Council of Alexandria*, (3 Pet., 409,) the action was brought to recover damages for the non-feasance of an officer of a municipal corporation in failing to take a bond from an auctioneer as required by an ordinance. But this court held the corporation not responsible. In *Levy* vs. *City of New York*, (1 Sandf., 465,) it was held that the city was not bound by an injury sustained in consequence of a neglect of its officers to enforce an ordinance prohibiting swine running at large. So also in *Griffin* vs. *Mayor, &c., of New York*, cited in *Hutson* vs. *Mayor, &c., of New York*, (5 Sandf., 303, 304.)

4. If an action lies at all, it is only where an indictment could be maintained. The declaration assumes that the duty of the defendant in error to repair is identical with that of a private corporation or individual in relation to its own property. No *notice* is averred of the want of repairs, nor are the facts requisite to support an indictment. The consequences of holding a public municipal corporation, or other public officer, to the strict responsibility resting upon individuals and private companies acquiring and using property for their private enjoyment and profit, must be apparent, especially as regards a bridge or highway open at all times to the public. The rigid rule applicable to individuals and private companies flows from their exclusive rights over their own property; and such a rule can never be applied when the same rights do not exist, as in the case of a bridge or highway.

Mr. Justice CLIFFORD. This is a writ of error to the Circuit Court of the United States for the District of Columbia.

According to the transcript, the action was trespass on the case, and was brought by the plaintiff, to recover damages against the corporation, defendants, on account of certain personal injuries sustained by him from the falling of a certain bridge constructed by the authorities of the corporation, and which, as he alleged, they were bound to keep in good repair, and safe and convenient for travel.

Referring to the declaration, it will be seen that the plaintiff alleged, in substance and effect, that, at the time and long be-

fore the bringing of the suit, there was and still is a certain common and public bridge over Rock creek leading from K street north, in the city of Washington, to Water street in Georgetown, and that the defendants had been accustomed to keep the same in repair, and, of right, ought to have made such repairs to the same as to have rendered it safe and convenient for travel by the citizens generally, whether on foot, or with their horses, carts, carriages, or other vehicles; nevertheless, the plaintiff averred that the bridge, on the twentieth day of May, 1854, was in an insecure, unsafe, and dangerous condition, by reason of the default and negligence of the defendants, so that, while the plaintiff was then and there lawfully passing over and across the same, in an ordinary vehicle, the bridge, in consequence of its unsafe and insecure condition, and of the default and negligence of the defendants, broke, gave way, and fell in, whereby the plaintiff was, with great force, thrown and precipitated into the creek, and received the injuries particularly described in the declaration.

Issue was duly joined between the parties, upon the plea of not guilty filed by the defendants, and upon that issue the parties went to trial. Evidence was introduced by the plaintiff, showing that he was returning from Georgetown to the city of Washington at the time the accident occurred, and was riding in one of the omnibuses running between the two cities; that while crossing the bridge in the omnibus the bridge gave way and fell, and the vehicle, with the plaintiff in it, was precipitated into the creek, whereby he narrowly escaped drowning. His left arm was broken and his left hand crushed; and the statement of the bill of exceptions is, that "the hand and arm have been rendered useless for life." He was also seriously bruised; and his injuries were of such a character that he was confined thereby to his house for a long time, under medical attendance; and the case shows that, throughout the whole of that period of time, he suffered great bodily pain.

On the other hand, evidence was given by the defendants that, before any plan of the contemplated structure was adopted, they passed an ordinance, raising a committee to advertise for proposals for the erection of the abutments and construction

of the bridge. That committee consisted of the mayor and two other members of the council; and the evidence offered by the defendants tended to show that they took the opinion of scientific men upon the subject, before they approved the plan under which the bridge was built, and that the defendants acted in good faith throughout, and with a view of building a bridge suitable, in all respects, for the purposes for which it was required. They also offered evidence tending to show that the materials of the bridge were of the best description, that the work was carefully examined by their agents as the same was done, and that the giving way of the bridge was solely the result of accident, arising from a defect in the plan under which it was constructed. After the bridge was built, the defendants passed another ordinance, appointing a commissioner to inspect the bridge; and they introduced evidence tending to show that he never ascertained or reported to them that the bridge was unsafe, defective, and out of repair; and they insisted at the trial, and offered evidence tending to prove, that they had no notice from that officer, or otherwise, that the bridge was insecure, unsafe, or defective, either in principle or in fact.

Rebutting evidence was then given by the plaintiff, showing that the bridge was an iron bridge, with a single span of more than a hundred feet; that it was constructed on the plan of Rider's patent, and was built by the inventor of that improvement. He also gave evidence tending to prove that one of the scientific persons, whose opinion was sought by the committee appointed under the first ordinance, stated to the defendants, at the time he was consulted, to the effect that, although the principle of the plan was correct, still it could not be applied indefinitely to iron bridges; that the arch of the bridge was higher than had ever before been attempted, and that the contractor remonstrated against building it so high, but that the defendants required it to be so constructed; and he also proved that the contractor was still of the opinion that the bridge fell in consequence of the height of the arch. One of the committee, also, was examined by the plaintiff, and he testified that he was not consulted about the plan; that, al-

though he believed it to be a good one at the time, he is now satisfied that it was essentially and radically defective. He also examined the commissioner of the first ward, who testified that he crossed the bridge a few days before the accident occurred, and that it was so tremulous and shook so violently that he was apprehensive it would fall; and divers other witnesses testified that, for several days before the bridge fell, they had observed that several of the braces were broken, and some of the wedges had fallen out, and the bridge was loose and shook greatly when carriages passed over it.

At the prayer of the defendants the court instructed the jury that, upon the whole evidence, the plaintiff could not recover in this action, and the plaintiff excepted. Under the instructions of the court, the jury returned their verdict in favor of the defendants.

1. Looking at the whole evidence, it is obvious that the charge of the court cannot be regarded as correct, unless it be true, as is contended by the defendants, that they are not responsible in damages to an individual for injuries received by him in crossing the bridge, although it may appear that the injuries were received without any fault of the complaining party, and were occasioned solely through the defect of the bridge, and the default and negligence of the defendants. It is conceded that the defendants were bound by their charter to maintain the bridge and keep it in repair; and it is fully proved, and not denied, that it was defective and very much out of repair at the time the accident occurred. Full and uncontradicted proof was also adduced by the plaintiff that he was seriously and permanently injured; and it is not possible to doubt, from the evidence, that his injuries were received without any fault of his own, and solely through the insufficiency of the bridge and its want of repair. Want of ordinary care on the part of the plaintiff was not even suggested at the trial, and the circumstances disclosed in the evidence afford no ground whatever for any such inference.

Having shown these facts, it only remained for the plaintiff to prove if the defendants, under any circumstances, are responsible, in this form of action, for such an injury, that they

were in default, and had been guilty of negligence in suffering the bridge to continue open for public travel while it was known to be out of repair and insecure. Both sides introduced testimony on this point, but the charge of the court withdrew entirely the plaintiff's evidence from the consideration of the jury. Where there is no evidence to sustain the action, or one of its essential elements, the court is bound so to instruct the jury; but where there is evidence tending to prove the entire issue, it is not competent for the court, although the evidence may be conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect, for the reason that, by all the authorities, they are the judges of the credibility of the witnesses, and the force and effect of the testimony. *Greenleaf* vs. *Birth*, (9 Pet., 299;) *Bank of Washington* vs. *Triplet et al.*, (1 Pet., 31.) Applying that rule to the present case, it is clear, in view of what has already been stated, that the charge of the court cannot be sustained, if the defendants are liable in this form of action, under any circumstances, for such an injury.

2. It is not, however, upon any such ground that the defendants attempt to sustain the instruction, but they insist that, being a municipal corporation, created by an act of Congress, they are invested with the power over the bridge merely as agents of the public, from public considerations and for public purposes exclusively, and they are not responsible for the non-feasances or mis-feasances of the persons necessarily employed by them to accomplish the object for which the power was granted. Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the

powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskilfulness in its performance. At one time it was held that an action on the case for a tort could not be maintained against a corporation; and, indeed, it was doubted whether assumpsit would lie against a corporation aggregate, since, it was said, the corporation could only bind itself under seal; but courts of justice have long since come to a different conclusion on both points, and it is now well settled that corporations, as a general rule, may contract by parol, and, like individuals, they are liable for the negligent and unskilful acts of their servants and agents, whenever those acts occasion special injury to the person or property of another. Whether the action in this case is maintainable against the defendants or not, depends upon the terms and conditions of their charter, as is obvious from the views already advanced.

By the second section of their charter it is provided, among other things, that they shall continue to be a body politic and corporate, * * * "and, by their corporate name, may sue and

be sued, implead and be impleaded, grant, receive, and do all other acts as natural persons." They may purchase and hold real, personal, and mixed property, and dispose of the same for the benefit of the city. Large and valuable privileges also are conferred upon the defendants; and the thirteenth section of the charter provides, in effect, that the defendants shall have the sole control and management of the bridge in question, * * * "and shall be chargeable with the expense of keeping the same in repair, and rebuilding it when necessary." Comment upon the provision is unnecessary, as it is obvious that the duty enjoined is as specific and complete as our language can make it; and it is equally clear, that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants, in consideration of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants, or within their control, to enable them to perform the duty enjoined. Whatever difference of opinion there may be as to the other conditions required to fix the liability, on this one, it would seem, there can be none, as the defendants have very large powers to lay and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages, and they also derive means for the use of the city from granting licenses, and from the rents and profits of real estate which they own and hold. All the conditions of liability, therefore, as previously explained, concur in this case.

It is supposed by the defendants, that the decision of this court in *The City of Providence* vs. *Clapp*, (17 How., 161,) is opposed to the right of the plaintiff to maintain this action; but we think otherwise. Injury had been received by the plaintiff in that case, in consequence of one of the principal streets of the city having been blocked up and encumbered with snow; and the principal question was, whether such an obstruction was one within the meaning of the statute of the State on which the action was founded; and the court held that the city was

liable. Cities and towns are required by statute, in most or all of the northeastern States, to keep their highways safe and convenient for travellers by day and by night; and if they neglect that duty, and suffer them to get out of repair and defective, and any one receives injury through such defect, either to his person or property, the delinquent corporation is responsible in damages to the injured party. No one, however, can maintain an action against the corporation grounded solely on the defect and want of repair of the highway, but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway. Duty to repair, in such cases, is a duty owed to the public, and consequently, if one person might sue for his proportion of the damages for the non-performance of the duty, then every member of the community would have the same right of action, which would be ruinous to the corporation; and, for that reason, it was held, at common law, that no action, founded merely on the neglect to repair, would lie. It was a sound rule of law, and prevails everywhere to the present time. Reference is often made to the case of *Russell* vs. *The Men of Devon*, (2 Term, 667,) as an authority to show that no action will lie against a municipal corporation in a case like the present; but it is a misapplication of the doctrine there laid down. Suit was brought, in that case, against the inhabitants of a district, called a county, where there was no act of incorporation, and the court held that the action would not lie; admitting, however, at the same time, that the rule was otherwise in respect to corporations. But whether that be so or not, the rule here adopted has been fully sanctioned in all the English courts. *Henley* vs. *The Mayor, &c., of Lyme*, (5 Bing., 91.) It was ruled in the Common Pleas by Best, Ch. J., and the case was then removed into the King's Bench by writ of error, and was then decided by Lord Tenderden and his associates in the same way. *Same* vs. *Same*, (3 Barn. & Adol., 77.)

Judgment of affirmance having been given in the King's Bench, the cause was removed to the House of Lords by another writ of error, sued out by the same party. Baron Parke

gave the opinion on the occasion, all of the other judges and the Lord Chancellor concurring. Among other things, he said that, in order to make good the declaration, it must appear, first, that the corporation is under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair; and after explaining these several conditions, and showing that the case fell within the principles laid down, he stated that it was clear and undoubted law, that wherever an indictment would lie for non-repair, an action on the case would lie at the suit of a party sustaining any peculiar damage. *Mayor of Lyme Regis* vs. *Henley*, (2 Cl. and Fin., 331.) Numerous decisions have, since that time, been made by the courts in this country, approving the rule laid down in that case, and applying it to cases like the present. *Erie* vs. *Schwingle*, (22 Penn., 384;) *Storrs* vs. *The City of Utica*, (17 N. Y., 104;) *Conrad* vs. *The Trustees of Ithaca*, (16 N. Y., 159;) *Browning* vs. *The City of Springfield*, (17 Illinois, 143;) *Hutson* vs. *The City of N. Y.*, (5 Sand., S. C. R., 289;) *Lloyd* vs. *The Mayor, &c., of the City of N. Y.*, (1 Seld., 369;) *Wilson* vs. *City of N. Y.*, (1 Denn., 595; 2 Denn., 450;) *Rochester White Lead Co.* vs. *The City of Rochester*, (3 Conn., 463;) *Smoot* vs. *The Mayor, &c, of Wetumpka*, (24 Ala., 112;) *Hicocke* vs. *The Trustees of the village of Plattsburg*, (15 Barb., S. C., 427;) *Mayor, &c., of N. Y.* vs. *Furze*, (3 Hill, 612.) Contrary decisions, undoubtedly, are to be found, but most of the cases are based upon a misapplication of what was decided in *Russell* vs. *The Men of Devon*, to which reference has already been made, and which is certainly not an authority for any such doctrine at the present time. In view of the whole case, we are of the opinion that the charge of the Circuit Court was erroneous, and the judgment is accordingly reversed with costs, and the cause remanded, with directions to issue a new venire.

Wabash and Erie Canal *vs.* Beers.

A decree of the Circuit Court adjudging that the defendant pay a certain sum into court within a limited time, or in default thereof the court will appoint a receiver, is a *final* decree, from which an appeal lies.

Appeal from the Circuit Court of the United States for the district of Indiana.

Beers filed his bill in the Circuit Court, averring *inter alia* that the defendants, as trustees of the Wabash and Erie canal, had certain moneys in their hands, arising from the sales of land and from tolls on the canal; that he, the complainant, had a lien on the proceeds of the land and upon the tolls, of which lien the defendants had notice, but refused to satisfy it. The bill prayed a decree that the defendants pay to the plaintiff the amount so due to him on a day to be named by the court, and that, in default of such payment, the canal be put into the hands of a receiver. The Circuit Court found the facts to be as alleged in the bill, ascertained the amount due the plaintiffs to be $3,755 60, and therefore ordered, adjudged, and decreed that the defendants pay into the clerk's office, on or before November 1, the sum found due; "or, in default thereof, the court will, at the next term of this court, on motion of the complainant, appoint a receiver to take possession of said canal, or some portion thereof, for such time and on such terms as shall be according to the rules of this court, and just and equitable to the parties."

Mr. Gillet, for the appellees, moved to dismiss the appeal, and submitted that this was not a final decree, from which an appeal would lie to this court. He cited the Judiciary Act of 1789, sec. 22; *Wells* vs. *Hoag*, (7 Paige, 18;) *Beebe* vs. *Russell*, (19 How., 283;) *Haskel* vs. *Roul*, (1 McCord Ch. Rep., 32;) and argued that the cases of *Fagoy* vs. *Conrad*, (6 H., 201,) *Perkins* vs. *Fonnquet*, (ib., 206,) *Pullem* vs. *Christian*, (ib., 209,) are not opposed to this view.

Mr. Usher, for the appellees, opposed the motion, and in-

sisted that the decree was final. It is a simple adjudication of the question raised upon the bill, answer, and replication, and it is none the less a final decree because it is coupled with a threat of the court to appoint a receiver in case the defendants shall disobey it. He cited *Harney* vs. *Bronson*, (1 Leigh, 108;) *Shepherd* vs. *Starke*, (3 Mumford, 29;) *Cook* vs. *Berry*, (1 How., Miss., 503;) *Larne* vs. *Larne*, (2 Little, 261;) Hynds' Ch., 429; 2 Madd., 243; Newland, 49; 3 Dan. Ch. Prac., 1949.

Mr. Chief Justice TANEY. This decree is final. It is decisive of the case made upon the record. It is positive, and not alternative. It leaves no question of right between the parties open for future adjudication. The decree orders the money to be brought into court within a limited time, and the court warns the defendants that if they fail or make default a particular measure will be taken to compel obedience. There is no want of finality here.

The motion is denied.

UNITED STATES *vs.* BABBIT.

1. The register of a land office is not entitled to retain a larger sum than three thousand dollars, as commissions for locating military bounty land warrants, under the acts of February 11, 1847; September 25, 1850; March 22, 1852, and March 3, 1855.
2. All fees received by a register, whether for locating military bounty land warrants, or for other services, in excess of the maximum fixed by law, must be paid into the treasury.
3. The second proviso, in the third section of the act of March 22, 1852, which declares "that no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law," is not limited in its effect to the section where it is found, but is an independent proposition, which applies alike to all officers of this class.

Writ of error to the District Court of the United States for the district of Iowa.

The United States brought debt against Lysander W. Babbit

and his sureties on his official bond as register of the land office at Kanesville, Iowa. Babbit was commissioned on the 6th of April, 1853, and held his office until the 20th of October, 1856, to which time his accounts were adjusted by the accounting officers of the treasury, showing a balance against him of $9,816 24. This amount consisted of fees received by him for locating military bounty land warrants under the acts of February 11, 1847, September 25, 1850, March 22, 1852, and March 3, 1855. The accounts credited him with commissions to the full amount of $3,000, and the balance of the fees received by him being in excess of the maximum allowed by law, the United States brought this suit to recover them. The defence was, that the fees rightfully belonged to the officer himself, and he was not bound to account for them to the United States. The question of law raised in the cause was, whether a register of the land office who has received fees for locating military bounty lands can retain them, whatever may be their amount, or whether he is bound to account for them, and pay over to the treasury all he receives beyond three thousand dollars of such fees, as of others. The District Court decided the point in favor of the defendants, and the United States brought the case into the Supreme Court on writ of error.

The *Attorney General* (*Mr. Bates*) for the United States.

Mr. Reverdy Johnson, of Maryland, and *r. Gillet*, of Washington city, for defendant.

Mr. Justice SWAYNE. This was an action in the court below, upon the official bond of the defendant, Babbit, as register of the land office at Kanesville, in the State of Iowa. The bond bears date on the 9th day of May, 1853. The petition, we are advised, is according to the practice in the courts of that State. It sets out a copy of the bond, and alleges, as a breach, that Babbit, "as such receiver, and by virtue of his office, to wit, from the 6th day of April, 1853, to the 20th day of October, 1856, received, as fees for the location of military

bounty land warrants, under the provisions of the acts of Congress approved 11th of February, 1847, 25th of September, 1850, 22d of March, 1852, and 3d of March, 1855, the sum total of $13,879 08; and that sum the said Babbit still holds, and refuses to pay to the plaintiffs, though often requested and directed by the proper officers to do so—the sum of nine thousand eight hundred and sixteen dollars and twenty-four cents."

The pleader has annexed to, and made a part of the petition, a Treasury transcript of the accounts of the register, showing the balance against him claimed by the plaintiffs.

The defendants demurred, and assigned for causes:

1. That the petition was so defective in form that the plaintiffs could not, by law, maintain their action.

2. That the petition did not set forth a cause of action in proper form.

3. That no cause of action was set forth in the petition; for that, by law, the defendant Babbit was entitled to retain the said moneys received by him, as fees of office, and was not bound to account to the plaintiffs for the same.

The petition is in striking contrast with the brevity and clearness of the common law forms in like cases. It contains, however, all the substantial elements of a good declaration, and sufficiently discloses the cause of action which the pleader designed to present.

This brings us to the consideration of the main question in the case, which is, whether the defendant Babbit is entitled to retain, for his own use, the fees in controversy? The proper solution of this question must depend upon a careful examination of the acts of Congress to which our attention has been called.

The act of April 20, 1818, (3 Stat., 466,) provides: "That, instead of the compensation now allowed by law to the registers of the land offices, they shall receive an annual salary of five hundred dollars each, and a commission of one per centum upon all moneys expressed in the receipts by them filed and entered, and of which they shall have transmitted an account to the Secretary of the Treasury: *Provided*, That the whole amount which any register of the land offices shall receive

under the provisions of this act shall not exceed, for any one year, the sum of three thousand dollars."

The act of February 11, 1847, (9 Stat., 125,) gave to certain non-commissioned officers, musicians, and privates in the Mexican war, each one hundred and sixty acres of land. This act makes no provision for fees.

The act of May 17, 1848, (9 Stat., 231,) authorized registers and receivers to receive from the holders of warrants the fees therein specified, for their services in carrying out the provisions of the act of 1847, with a proviso, that where the warrant was located for the use of the volunteer to whom it was issued, no compensation should be charged either by the register or receiver.

The act of September 28, 1850, (9 Stat., 520,) authorized the issuing of bounty land warrants to the soldiers who performed military service in the war of 1812, or in any of the Indian wars since 1790, and to the commissioned officers in the Mexican war. This act made no provision for fees; but, on the contrary, directed the locations to be made "free of expense."

The act of March 22, 1852, (10 Stat., 4,) extends the benefits of the act of 1850 to all cases where the militia or volunteers of any State or Territory were called into military service and paid by the United States, subsequent to the 18th of June, 1812.

The second and third sections of that act are as follows:

"SEC. 2. That the registers and receivers of the land offices shall hereafter be severally authorized to charge and receive for their services, in locating all military bounty land warrants issued since the 11th day of February, 1847, the same compensation or per-centage to which they are entitled by law for sales of public lands for cash, at the rate of $1 25 per acre, the said compensation to be hereafter paid by the assignees or holders of such warrants.

"SEC. 3. That registers and receivers, whether in or out of office at the passage of this act, or their legal representatives in case of death, shall be entitled to receive from the treasury of the United States, for services heretofore performed in

locating military bounty land warrants, the same rate of compensation provided in the preceding section for services hereafter to be performed, after deducting the amount already received by such officers under the act entitled 'An act to require the holders of military land warrants to compensate the land officers,' &c., approved May 17, 1848: *Provided*, That no register or receiver shall receive any compensation out of the treasury for past services, who has charged and received illegal fees for the location of such warrants: *And provided, further*, That no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law."

The appropriation act of March 3, 1853, (10 Stat., 224,) contains at its close the following proviso:

"That whenever the amount received at any United States land office, under the third section of an act entitled 'An act to make land warrants assignable, and for other purposes,' approved March 22, 1852, has exceeded or shall exceed the amount which the registers and receivers at any such office are entitled to receive under said third section, the surplus which shall remain, after paying the amount so due as aforesaid to said registers and receivers, shall be paid into the treasury of the United States as other public moneys."

The act of March 3, 1855, (10 Stat., 635,) provides:

"That each register of a land office and receiver of public moneys shall receive the same amount of pay for each and every entry of land made under the graduation act of 1854, as such officer is by law entitled to receive for similar entries of land at the minimum price of one dollar and twenty-five cents per acre: *Provided*, That the whole amount received per year shall in no case exceed the limitation fixed by existing laws."

By another act of the same date as the preceding act, (10 Stat., 701,) it is provided:

"That the registers and receivers of the several land offices shall be severally authorized to *charge and receive for their services*, in locating all warrants under the provisions of this act, the same compensation or per-centage to which they are entitled

by law for the sales of public lands for cash, at the rate of one dollar and twenty-five cents per acre, the said compensation to be *paid by the assignees or holders of such warrants.*"

The general appropriation act of August 18, 1856, (11 Stat., 91,) provides:

"That, in the settlement of the accounts of registers and receivers of the public land offices, the Secretary of the Interior be authorized to allow, subject to the approval of Congress, such reasonable compensation for additional clerical services and extraordinary expenses incident to said offices as he shall think just and proper, and report to Congress all such cases of allowance at each succeeding session, with estimates of the sum or sums required to pay the same."

The act of March 3, 1853, (10 Stat., 245,) fixes the salaries of registers and receivers in California at $3,000 each, and prohibits them from receiving any per-centage or fees, except for deciding pre-emption cases.

The act of July 17, 1854, (10 Stat., 306,) limits the salaries of the registers and receivers of Oregon and Washington Territories each to $2,500 per annum, and office rent, and prohibits them from receiving fees or emoluments of any kind, except the receivers' necessary expenses for depositing moneys.

The act of July 12, 1858, (11 Stat., 325,) gives the same compensation to registers and receivers in New Mexico which those officers receive in Washington Territory, with a proviso, that their compensation, including fees, shall not exceed $3,000 each per annum.

This is the legislation, by the light of which we are to make up our judgment in this case.

It is a rule in the construction of statutes, that all relating to the same subject-matter shall be considered together.

The act of 1818 fixes a specific sum as the maximum amount which registers shall be permitted to receive. Whenever Congress has spoken upon the subject since that time, the same policy has been adhered to. This remark applies to this class of officers alike in the Atlantic and Pacific States and Territories. The act of 1856 provides a mode of compensating them "for additional clerical services and extraordinary expenses."

The act of 1852 provides for the compensation, upon the basis of fees, of registers who had gone out of office, and of those who were then in office. The latter, for future as well as past services, were limited to the maximum then "allowed by law," which was three thousand dollars per annum.

It would be singular if one rate of compensation were provided for those *then* in office, and their predecessors, and another and a different one in respect of their successors, for the same services, rendered under the same circumstances. It is insisted by the counsel for the defendants in error that this is a necessary result, because the proviso at the end of the third section of this act, which imposes the limitation, is confined, in its operation, to the cases mentioned in the previous part of the same section. If this were so, the result claimed would not necessarily follow. In that case, we should find no difficulty in holding it to be clearly implied that the same rule of compensation should apply to their successors as to the then incumbents and their predecessors. What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed. (2 Paine's Rep., 251,) *Koning* vs. *Bayard;* (3 Wend., 258,) *Haight* vs. *Holley;* (10 Wend., 218,) *Rogers* vs. *Kneland;* (20 Wend., 447,) *Fox* vs. *Phelps;* (Com. Dig., Tit. Devise, n. 12.)

"A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter." (Plow., 366,) *Zouch* vs. *Stowell;* (3 How., 565,) *U. S.* vs. *Freeman.*

But we do not place our decision upon this ground. We are of opinion that the proviso referred to *is not* limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, and applies alike to all officers of this class.

Whether the proviso in the appropriation act of 1856 is to be construed as referring to the 3d section of the act of 1852, according to its letter, or to the 2d section, as is claimed in behalf of the Government, we have not found it necessary to consider.

The views we have expressed are sufficient to decide this

case. They conduct us to the conclusion, that the court below erred in sustaining the demurrer.

*Judgment of the District Court reversed, and cause remanded, with directions to proceed in conformity to the opinion of the Supreme Court.**

THE STEAMER NEW PHILADELPHIA—*Camden & Amboy Co., Claimants; Brady, Libellant.*

A steamer having a coal-barge in tow was navigated so carelessly or unskilfully that the barge was in danger of striking a sloop lying fast at a dock. The sloop, to prevent the collision, put out a fender, by which the barge was so injured that she filled and sunk: *Held*—

1. That the owner of the barge was entitled to recover from the steamer for the loss of his vessel and cargo.
2. The putting out of the fender for such a purpose was no fault on the part of the sloop.
3. If there had been a fault, from the kind of fender used, the steamer would nevertheless be responsible.
4. The rule is, that when property is injured by two co-operating causes, though the persons producing them may not be in intentional concert, the owner is entitled to compensation from either or both, according to the circumstances.
5. Especially is the injured party entitled to recover from that one of the two who has undertaken to convey the property with care and skill to a place of destination, but has failed to do so.

Patrick F. Brady filed his libel against the steamer New Philadelphia, her tackle, apparel, and furniture, in the District Court of the United States for the southern district of New York, in a case of collision, civil and maritime, alleging that he, the libellant, was owner of the coal barge Owen Gorman,

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* The case of *U. S.* vs. *Coles* was, in all essential particulars, the same as that of *U. S.* vs. *Babbit*. It was heard here at the same time, and decided in the same way.

which was taken by the New Philadelphia to be towed to and left at a certain place in New York harbor; but, owing to the unskilfulness with which the steamer was navigated, a collision occurred between the coal barge and a schooner lying at one of the docks, by which the barge was sunk.

Process was duly issued, and the New Philadelphia attached. The Camden and Amboy Railroad and Transportation Company intervened, and made claim to the vessel, as owners thereof. The proper stipulation being filed on the same day, the vessel was discharged, and the claimants put in an answer denying the material facts set forth in the libel.

The District Court, after hearing a great number of witnesses, dismissed the libel for the following reasons, given by BETTS, J.:

"The steam-tug New Philadelphia, employed in towing barges and vessels of various classes between New Brunswick and New York, through the Raritan river and across New York bay, had in towage the barge Owen Gorman, loaded with coal, to be taken from New Brunswick and landed at the foot of 26th street, on the East river. She had nine other vessels in the same tow, which were destined to different landing points on the North and East rivers, and also at docks and piers on the Brooklyn side. The Owen Gorman was to be left by the tug at Washington street, Brooklyn (Williamsburg.) In making the course round from the North river, the tug stopped and landed a barge at the Atlantic docks, Brooklyn shore, and in so doing the Owen Gorman was brought against a *small sloop*, moored at that dock. So soon as that barge was discharged the tow proceeded to Washington street, where within an hour the Owen Gorman was brought up to a pier by the tug, and was there cast off and left, the tug proceeding immediately after to her place of destination. After she was discharged and the tug was clear of her, and on her way to 26th street, the barge was found leaking rapidly, and during the effort made by those in charge of her to haul her into the slip and prevent her from sinking, she filled by water running through holes or breaks in her starboard side, and went down in deep water, and was afterwards raised, with con-

siderable cost and loss to the libellant both in respect to vessel and cargo.

"This action charges the damages the owner incurred to the fault of the tug in causing the Owen Gorman to be brought into collision with the sloop at the Atlantic docks, at the time of landing a barge at that place in her transit round to Washington street. The injury was not discovered until she had been left at the latter place, and the men were endeavoring to haul her in.

"The testimony fastens no blame upon the tug in the manner the landing of the barge was effected at Washington street. The allegations of tort in the tug by the libel, and the evidence in the support of the charge, all rest upon the assumption that the wrongful act and collision committed by the tug consisted in bringing the Owen Gorman against the side of the sloop at the Atlantic dock; and if that charge is not supported, the libellant has no ground of action before the court.

"It is unnecessary to go into a detail of the particulars of that transaction or the representations of the various witnesses in respect to it, as, in my opinion, the evidence does not justify imputing to that cause the injury which the barge received, and which led to her sinking. Over twenty witnesses were examined and re-examined with great fullness as to the facts and circumstances attendant upon the transaction; and, in my judgment, the clear weight of proof is, that the damage to the barge which caused her sinking and all subsequent expenses was received after she left charge of the tug at Washington street, and that it does not come within the scope of the present complaint. A minute collation and review of this mass of evidence would be a profitless labor, as no legal principle or doubt is involved in its admissibility or import. It is solely a question as to which class of witnesses had the best means of knowing the facts, and under all the circumstances is most to be relied upon in their statements.

"My opinion is, that the claimants have succeeded in showing that the tug was not the culpable agent of the damages sustained by the libellant, and the libel must accordingly be dismissed with costs."

From this decision of the District Court an appeal was taken to the Circuit Court, where it was reversed, and a decree made that the libellant recover. It was referred to a commissioner, who reported the amount of the damages suffered by the libellant to be $3,159 34. To this report various exceptions were taken, some of which were sustained, and others overruled, so that the damages were reduced to $2,898 84, for which latter sum it was decreed the libellant should have execution. The claimants then took their appeal to this court.

Mr. Murray, for libellant, contended that the proper view of the facts had not been taken by the Circuit Court, and argued as matter of law that the decree of the District Court ought not to have been disturbed, because the decision of a court on a question of fact, like the verdict of a jury, should be affirmed, unless it be clearly against the evidence. *The Grafton*, (1 Blatchford C. C. R., 173; 3 Graham & Waterman on New Trials, 1213 and 1240.) The evidence introduced by the libellants, after the appeal to the Circuit Court, was merely cumulative, and did not authorize a conclusion contrary to that of the District Court.

The tug-boat in this case was not a common carrier, and was not liable for anything short of gross negligence. *Wells* vs. *Steam Nav. Com.*, (2 Com., 204;) *Caton* vs. *Rumney*, (13 Wend., 387;) *Alexander* vs. *Greene*, (3 Hill, 9;) Story on Bailments, § 496; Edwards on Bailments, 428, 573, 574.

Mr. Burrell, for libellant, conceded the rule to be that the decision of the court below, upon a question of fact, should be deemed conclusive, and that this court should not be required to review such decisions, and relied upon the authorities cited by the libellant's counsel. But this principle should prevent and restrain this court from interfering with the decree made in the Circuit Court, and will certainly furnish no justification for its reversal in order to make room for the reinstatement of the decree which the libellant obtained on only a part of the testimony in the District Court.

The owners of the steamboat having undertaken to tow the

barge, and no special contract being proved, were bound to exercise all the care, skill, and diligence necessary for the discharge of their obligations. *New World* vs. *King*, (16 How., 474–5.)

In this case the damages to the tow were occasioned by negligence and want of ordinary skill, care, and prudence on the part of those who were intrusted with the navigation of the tug.

Mr. Justice WAYNE. This is an appeal in admiralty from the Circuit Court of the United States for the southern district of New York.

It has been argued with minuteness and ability by the proctors of the parties, as well in respect to the allegations of the libel and answer, as to the incidents of its trials in the Circuit and District Courts. The case has had our best consideration.

The libel sets forth that Patrick Brady was the owner of the barge Owen Gorman, and that, on the 12th April, 1856, she left Richmond, in Pennsylvania, for Brooklyn, New York, under the command of Patrick Campbell, with a cargo of 207 10–25 tons of coal; that, on the 17th April, the barge and eleven other barges were towed from the Delaware and Raritan canal, at New Brunswick, by the steamer New Philadelphia, into the waters of the Hudson or North river. There she landed one of the barges, at the foot of Washington street, New York, and another of them at the foot of Hammersly street, and then entered the East river, with several of her fleet, steering and heading for the Atlantic dock, in Brooklyn, where she was to land another of the barges. That in doing so, the steamer ran across the tide, then running a strong ebb, and steered close to the dock, in such a manner that the Owen Gorman was swung and driven with great violence against the schooner (or sloop) Financier. That persons on board of the latter, seeing the steamer swinging in, and that she would be struck by one of her barges, threw out a wooden fender, to ward off the impending collision, which, having been forced from their hands, was forced and crushed into the Owen Gorman on her starboard side, just forward of midships, cut-

ting in her planks, and making a hole, through which she was filled with water, and sunk, with her cargo.

It is alleged that the collision was caused by the negligence and want of care or skill of the master and crew of the steamer, and not from any fault of those persons who were on board of the Gorman. It is also alleged that, immediately after the sinking of the Gorman, the owners of the steamer were informed of it, and that a protest, in due form, had been served upon them.

The libellant then states the loss from the collision; that he had, at the request of the agent of the owners of the steamer, employed William J. Babcock, a wrecker, to raise her, the latter having done, upon different occasions, work of that kind for the company. That Babcock contracted to raise and put her afloat for $450—it being then expressly understood, between the agent and the libellant, that, if the hole which had caused the sinking of the barge should be found where the latter expected and said it was, the company were to be responsible for all damages done to the barge, and for the losses sustained from her having been sunk by the collision.

Babcock raised the barge sufficiently to have her taken to Red Hook Point, and there beached her upon the flats, so that the tide rose and fell in her, when it was ascertained that the hole was in the starboard side of the barge, a little forward of midships. Babcock then proceeded, without the knowledge of the libellant, to discharge the coal from the barge, had the same stored in the coal yard of the consignees of it, and then gave notice to the libellant that he had advertised the barge and the coal for sale, to pay his wrecker's lien upon them, which he claimed to have, in virtue of the wrecker's act of the State of New York.

The barge and coal were sold, the first being bought by Henry J. Vroom, for three hundred and fifty dollars; the coal was purchased by the consignees of it, at three dollars per ton. The sale was without the consent of the libellant, and when he was absent from New York. When he heard of the sale he came to New York, to protect his interest, and intending to pay Babcock for raising the barge, as the owners of the

steamer had refused to do so. It was finally arranged, by his paying to Babcock $450, the sum which had been agreed upon; the further sum of $299 96 for unloading, carting, storing, and shovelling the coal; and the further sum of $236 12 to the consignees for the deterioration of it, which had been estimated by two referees, each party having chosen one of them.

The libellant then sets out, that the barge was so injured from the force and violence of the collision, and the pressure of the steamboat and inner barge, to which she was lashed when it occurred, that it became necessary to take her to the dry dock for repairs. That it was at a time when the barge's services were particularly valuable to him, and that, from her having been sunk, he had sustained damages for her repairs, for the loss of all her fixtures, and for the loss of time, and for the expenses of her master and crew, exceeding two thousand dollars, which the consignees of the New Philadelphia had refused to pay.

The allegations in the libel are direct, positive, leaving nothing to implication, and not exaggerated, either by inapt circumstances or coloring.

We will now place in juxtaposition with it the answer. Those pleadings will disclose the issues between the parties, and enable us to apply the evidence to them successively, or in the order of their affirmation.

The claimants admit that they are and were the owners of the New Philadelphia, when the barge Owen Gorman and ten other boats were taken by her to be towed from Brunswick, New Jersey, to be left at New York and Brooklyn, at different designated points in both; that they were ignorant then, as they are still, who were the owners of the Gorman, or of the number of tons of coal then on board of her. They deny that she was then a tight, strong, and staunch vessel, and charge that she was unfit for the transportation of her load for the passage she was to make. It is then averred, upon information and belief, that the landing of the steamer at the Atlantic dock, in Brooklyn, where the injury to the barge, as is described to have happened, was in this manner:

That the steamer, after having left six barges at their places

on the North river, proceeded from it into the East river with the other barges in tow, to leave them at their places of destination; that the Gorman was in the first tier of boats on the outside, on the starboard side of the steamer as she approached the Atlantic dock "*from westwardly*," and headed up the East river, when the tide *was about the first of the ebb;* that one of the barges on the steamer's larboard was destined for that dock, and in the act of leaving her there; that the steamer came to with her fleet with her starboard side nearest the dock, and alongside of a sloop lying at the dock, which was a fit and suitable place to leave her, and that the steamer and her fleet were brought to alongside of the sloop with great care and gentleness. It is admitted that a fender had been put out by some person on board of the sloop to fend off the barge; but whether the fender had been forced and crushed into her they were ignorant, and deny. It is admitted that the barge sunk at the Washington pier, to which she had been towed by the steamer, within an hour after the collision had occurred at the Atlantic dock.

It is then alleged that the master and crew of the barge had allowed her to sink with her cargo, without making an effort to prevent it, and that notice had not been given to the master of the steamer of the barge's sinking condition, to enable him to make any attempt to do so. The claimants then deny that Babcock had been engaged by their agent to raise the barge, and that he had only recommended Babcock as a fit person to be employed for that purpose; and that if their agent had done otherwise, that it was not within the scope of those duties they had engaged him to do; that he could make no contract to bind them for any damage which the barge had sustained from the collision, or for any expense whatever growing out of her having been sunk from the causes set forth in the libel.

The damages and expenses are charged to have been largely increased by the negligence and inattention of the master of the barge. It is also charged, that she had been towed, under an agreement made with her master; that it was to be done at his and her owners' risk.

The issues, then, to which the evidence is to be applied, are substantially the state of the tide when the steamer, in entering the East river, was steered across it to land a barge at the Atlantic dock; next, that the Gorman was not seaworthy for the carriage of her cargo, and that she was not a tight, staunch, and strong vessel. We dismiss these averments in the answer, by observing that the owner of the barge proved very satisfactorily that she had been well built with the best materials; had been thoroughly repaired the year before the collision, in respect to all the wear and tear of her five or six years' service after she was built; and that she was staunch and strong, and particularly water-tight, when she was approaching the Atlantic dock in tow of the steamer. Two witnesses say that they saw her pumps tried one hour before, and that she was dry. Their testimony is conclusive to establish the seaworthiness of the barge in every particular, from the time that she was lashed to the steamer at New Brunswick to be towed to Brooklyn, until after she had been collided with the sloop at the Atlantic dock.

The third issue is, whether or not she had been brought alongside of that vessel with care and gentleness, or with the force and violence of a collision, to cause the injury by which she had been sunk.

The fourth issue arises from the charge in the answer, that there had been a want of care in her master, in permitting her to sink with her cargo, after she had been landed at the Washington pier, without any effort to prevent it, and from not having informed the master of the steamer of the injury she had sustained, or that she was sinking, until an hour or more after she had sunk. Here, let it be remarked that we have the respondents' own appreciation of the time of the delay of which they complain in not having had notice of the injury to the Gorman, and that it was an hour or more after the occurrence. It supersedes the necessity of any further consideration of that charge, particularly as, when the steamer left the barge at the Washington pier, she immediately steamed off to drop another of her fleet at a distant point, without the slightest concern or inquiry of the consequences which the collision had produced.

Such are the issues to be considered, and the only correct way of doing it is by a minute citation of the testimony. Kelly, the witness, says he was on board the Gorman at the time of the collision. The barge was on the starboard side of the steamer next to Brooklyn, and she was the outside barge, one other barge being between her and the steamer. The steamer had come from the North river around Governor's island, around Buttermilk channel, and across it to Atlantic dock. The steamer was intending to go up East river, and was attempting to drop a barge at Atlantic dock. That barge was on larboard side of tow, but cannot specify her position. The steamer came in *across, the tide running out a strong ebb*, and, in the effort, the tug swung round and struck the Owen Gorman against the schooner, which was fast at the dock, with weight of the whole tow. Two men on schooner ran and threw a long stick or fender between tug and steamer. The force of the junction pressed the stick out of their hands, and raised it perpendicularly between the two vessels; blow and jar was very severe. Witness saw the stroke; was standing forward of midships' cleet, about three feet from where the fender struck, and as he saw it wrenched out of the men's hands, he started back to get out of the way. The barge was forward of place where the witness stood. The tug landed a barge, and then started up East river with the residue of her tow, including the Owen Gorman, to Washington street, a mile or more above, where she was landed nicely. Then found she was lowered in the water. He then went on her, and into her hold, where he found the water up to his knees. She was hauled into dock, and there she sunk in twenty minutes. Found that she was making water as soon as she was cast off from the tug. Afterwards found planks crushed in at place where the stick or fender struck her, about the width of two planks, and two or three feet long; the planks were broken. Nothing occurred between Atlantic dock and place of landing. Supposes the loading of coal prevented the water pressing in sooner. *Tow was swung round at Atlantic dock by the tide.* After landing boats at North river, asked master of the Gorman how she stood the service, and a few moments before collision. He said she was per

fectly dry, and drew the pump in witness's presence, and it sucked perfectly dry. Had unloaded her four times before, and never found any water in her. She was a sound and good boat.

In the cross-interrogation of this witness, he qualifies nothing, adds nothing, and his testimony is not contradicted by any other witness in the case, but is confirmed by several. Daly, the second witness, says the *tide was ebb and strong;* blow was strong; did not feel the shock; saw men putting out fenders from the sloop; cannot describe it particularly; all done quickly; saw the collision standing on the deck of his boat. The tow, coming from North river, swung around and knocked against vessel at dock. Cannot say what caused the tug to swing round; *supposed barge was injured when the blow was given.* Daniel McCauly was in the barge, and in the cabin, when the blow was received; felt it; dishes were knocked out of his hand, and gave him a shock in his seat, but not severe enough to knock him off his seat. Patrick Campbell says, tide *was a strong ebb;* corroborates, in its particulars, the occasion of the collision; says it was the unskilful manner in which the steamer attempted to land the stern-boat on her larboard side; both she and her fleet were brought round in an unskilful and careless manner. Either the steamboat should have headed up the East river sooner than she did, and at a greater distance from the dock, and, in passing up, dropped the barge she intended to land, or else she should have headed for the dock until within a certain distance, and then heaved a line, dropped the barge, and passed on. The barge was struck on her starboard side, about midships, with great force, so as to break the planks on that side, making two holes in the third plank above the bilge plank. After the collision, steamer continued on her way with the barge as far as Washington street. The barge met with no other injury between the time of the collision and her sinking. The facts stated by the witness have been given, with his impression of the cause and consequences of them, when they occurred. John Campbell says the tide was ebb and running strong. The steamboat should have made allowance for the tide, which was running hard, which

was not done. Schweimer says the *tide was ebb and running strong.* William Murtagh says, I met the captain of the steamer, and asked him how he came to sink the Owen Gorman. He said he never landed a boat so nicely. I asked him if he did not swing her against a schooner. He said he was landing one of his boats in tow at the Atlantic dock, and it being a strong ebb tide, his tow swung round, and, the Owen Gorman being the last boat to the "spur" boat, swung in against a schooner lying next to the wharf, and that one of the hands on board of the schooner held a wooden fender down, and it was probable schooner and fender striking between two timbers made a hole in her, and caused her to sink. An unsuccessful attempt was made to weaken the force of Murtagh's testimony, but not to discredit him, by calling as a witness Edward Duffey, who was with him at the time the conversation took place between Murtagh and the captain of the steamer. In Duffey's statement of it, he does not introduce the words, "and it being a strong ebb, his tow was swung." His report of it is, the captain said he had come to Brooklyn to land one of his boats, and the swinging around, and the fact that the Owen Gorman was the boat next the spur-boat, on the outside boat of the tow, operated so that when the Owen Gorman struck a schooner lying at the dock, that if she had got a hole in her that caused her to sink, it must have been caused by the collision consequent on the tow swinging against the schooner. Duffey was introduced as a witness to relieve Captain Holman from the imputation of having misstated, in his conversation with Murtagh, the time of tide when the collision took place differently from what he said it was in his evidence. But what the captain stated was this: "Went north of Governor's island and across Buttermilk channel, three or four hundred yards below the end of the island, east face, then hauled up *against the ebb tide*, and landed barge. He considered it a good landing. Thinks it was about *slack tide in North river;* ran up the docks two or three hundred yards, and alongside of the vessel, and stopped tug, and then left the wheel, leaving pilot there, to attend to landing a barge from the larboard side; and after landing her, continued up to Wall street,

Brooklyn. Returned to the wheel again; did not see the fender put down; it was an easy landing, with a little drift play upon the boat. Stopped engine about two hundred feet from the vessel at the wharf, and headway of tug stopped three or four feet from her, when witness left the wheel; there was no headway at all on tow at the time of collision; headway of tow was a little in towards the vessel, and that caused her to come into collision; it was *that sheer that brought her against the vessel.* Thinks she was a sloop, about thirty feet long, and higher than the barge; never safe to put a wooden fender between vessels; is always liable to cause damage, because these tow-boats are weak, and fenders are apt to break them in." We have been particular in citing Captain Holman's testimony in his own words. Taken in all its connexion, it serves to establish, that the cause of the collision was owing to his not having made allowance of distance enough between the barge and the sloop, when he was approaching her, to prevent that sheer which brought the barge into collision with her. He says, "headway of tow was steered a little in towards, and that caused her to come into collision." His having said that there was no headway at all on tow at the time of collision, does not alter the fact of its occurrence—from his not having properly estimated his boats' inward movement towards the sloop, when he was steering "a little towards her," and so near to her, that the collision was caused by a sheer of the steamer. Sheer, in nautical meaning, is a deviation from the line of the course in which a vessel should be steered, and though it may occur from causes unpreventable by the most skilful seamanship, it more frequently happens from an unsteady helmsman; and the latter was the fact in this instance, probably produced by the person then at the helm not being watchful enough of the state of the tide when advancing to the Atlantic dock to land a barge. We need not cite more of the testimony to establish it to be a fact, that, when the collision happened, the tide was running strong ebb, and had its agency in producing the collision.

The attempt to account for the sinking of the barge by her having been injured by iron spikes when she was left at her

place of destination, is most unsatisfactory. Babcock's testimony in that particular, both as to his suggestions and opinions, is altogether conjectural. There is not even a possibility of its being correct, unless the testimony of every other witness in the case shall be considered mistaken and untrue. Babcock did not mean to say anything untrue; but he started an idea contrary to all the probabilities of the incident of which he was speaking, without a single fact to support it. We have not allowed ourselves to make any comparison or contrast between the witnesses in this case, either as to truthfulness or intelligence, or difference of condition. We do not think that the matters of which they spoke were above their comprehension, because every interrogation was brother-german to the occupation of all of them. They were all boatmen, very much of the same intelligence and character, and were employed by the parties to the suit to do their business, with an expectation if, in the navigation of the tug and her fleet, anything should occur leading to litigation, that they would have to resort to them to tell how it had happened. Such considerations should be kept in mind, in our judgments on such cases, and it should not be presumed, either in argument or judgment, that such classes of men have not a sense of truth fully up to their perception of moral obligation in its bearing upon those who do, from necessity, the rougher out-door work of life.

We have not been unmindful of the charge in the answer of the respondents, that the master of the barge had been careless in not making some effort to prevent her from sinking, and that the injury to her and to her cargo had been increased by the master and owner's negligence. No testimony of either can be found in the record. As to the damages and expenses accruing from repairs and the deterioration of the cargo, they were properly made the subject of a reference to a master. His report appears to have been done judiciously, and with the accustomed regularity of such a proceeding. The objection that he had excluded a witness, who was offered by the counsel of the respondents, we cannot consider here, because the proper course has not been taken in respect to it. There should have been a written statement upon oath as to the par-

ticulars which the witness was offered to prove, that the court might have compared it with what had been already proved by the other witnesses of the respondents, to enable the court to determine whether it was independent or only cumulative proof.

As to the other exceptions to the sum reported by the referee, they were fully considered by the circuit judge who tried the appeal. They were rightly passed upon by him, and this court particularly instructs me to say, notwithstanding that the exceptions were properly taken and argued in the Circuit Court, that the subsequent admission of the report, in the aggregate, by the counsel, even though that was only with the intention to give *this court jurisdiction*, shall not be reduced here by denying it in detail for the purpose of taking it away.

Our conclusions in this case are, that the ebb tide was running strong when the steamer crossed it in going from the North into the East river, and that in making the Atlantic dock allowances were not made for the strength of the tide, so as to reach it with proper care and skill, and that the collision and sinking of the Owen Gorman were the results of her having been brought, by the steamer's fault, into collision with the sloop and the fender which was put out to ward off an impending blow, and the heavy pressure upon her by the steamer and the loaded barges which she had at that moment in tow. That, putting out the fender for such a purpose was no fault upon the part of the sloop, then lying fast at the dock; and, if there was any fault in doing so from the kind of fender which had been used, the rule of law is, that when a third party has sustained an injury to his property from the co-operating consequences of two causes, though the persons producing them may not be in intentional concert to occasion such a result, the injured person is entitled to compensation for his loss from either one or both of them, according to the circumstances of the incident, and particularly so from the one of the two who had undertaken to convey the property with care and skill to a place of destination, and there shall have been, in doing so, a deficiency in either.

The testimony in the case given by the libellant shows that

the Owen Gorman was tight, staunch, and strong at the time of the collision at the Atlantic dock; that, from the time of its happening and of the sinking of the barge did not exceed one hour, and that she sank in twenty minutes after she had been cast off by the steamer at her place of destination, and that there had been no collision between the barge and anything else while being towed to it by the steamer, nor any at that place, to justify a conclusion that the injury sustained by the barge had been occasioned there or anywhere else than at the Atlantic dock, in Brooklyn, and in the manner as it has been described by the libellant.

Decree of the Circuit Court affirmed with costs.

CLARK *vs.* HACKETT.

1. This court will award a certiorari when diminution of the record is suggested, even at the third term, if the delay be accounted for; but the hearing of the cause will not be postponed on that account.
2. Where a party contested with his own assignee in bankruptcy the right to a fund, and the controversy was decided in favor of the assignee by the Circuit Court, whose decree was affirmed by this court, the same question cannot be litigated again.
3. Where the bankrupt before the distribution of the fund among the creditors filed a bill impeaching the decree of the Circuit Court and of the Supreme Court for fraud of the parties, (including his own counsel,) and entirely failed to establish his allegations, the bill must necessarily be dismissed.

This was an appeal from the Circuit Court of the United States for the district of New Hampshire, brought up, filed and docketed in this court to December term, 1859. On the 3d of January, 1862, the cause being No. 67 on the docket of the present term,

Mr. Black, of Pennsylvania, for appellant, suggested diimnution of the record, and moved for a certiorari on affidavits, which accounted for the delay.

The Appellee (a counsellor of this court) appeared *in propria persona*, and resisted the motion on the ground that it was too late: this was the third term.

THE COURT awarded the certiorari; but added, that if the cause should be reached before a return, the certiorari would not be regarded as a reason for continuance.

The cause was afterwards reached in its regular order, and the argument was directed to proceed.

Mr. Hackett argued it for himself.

No counsel appeared for appellant.

Mr. Justice NELSON. This bill was filed by the complainant, Clark, against Hackett, the defendant, to set aside a decree of the Circuit Court of the United States of the District of Columbia, and also of this court affirming that decree, on the ground that they were procured by the fraud of the parties, and of the complainant's solicitor and counsel. The suit in the Circuit Court of the District of Columbia was instituted by Benjamin C. Clark, a judgment creditor of the present complainant, for himself and other creditors, claiming a fund in the hands of the treasury of the United States, which had been awarded to the debtor by the commissioners under the treaty with the republic of Mexico. After the filing of this bill, the present respondent, Hackett, who was the assignee in bankruptcy of the present complainant, filed a bill, praying leave to come in under the creditors' bill, setting up a title to the whole of the fund in question, for the purpose of distribution among the creditors of the bankrupt. The present complainant, the bankrupt, appeared and answered these bills, and afterwards the case was heard on the pleadings and proofs, and a decree rendered by the court in favor of the assignee. The court also directed the fund to be remitted to the District Court of the United States for the district of New Hampshire, in which the bankrupt proceedings had taken place, for a distribution among the creditors by that court, as a part of the

assets of the bankrupt. An appeal was taken from the decree by the respondent to this court, and which was affirmed, as will appear by the report of the case in 17 How., 315, and the cause remanded to the Circuit Court. The fund was afterwards, in pursuance of the decree below, remitted to the District Court of New Hampshire. While it remained in that court, and before distribution among the creditors, the complainant, the bankrupt, filed the present bill for the purpose of setting aside the decree of the Circuit Court of this District, and of the Supreme Court affirming it, on the allegations of fraud committed by the parties, including his own solicitor and counsel, in procuring these decrees, and claiming that he was entitled to the fund, and that payment should be made to him accordingly.

The court below, after hearing the case on the pleadings and proofs, which were voluminous, held, that the evidence entirely failed to establish the allegations of fraud, and dismissed the bill. It is now here on appeal. The case is a very plain one; and we need only say, that the court, upon the pleadings and proofs, could come to no other conclusion.

Decree of the Circuit Court affirmed.

HAGER *vs.* THOMSON ET AL.

1. If one of the stockholders of a corporation agrees to sell out his shares to the others for such price as a fair examination into the condition of the company may show the stock to be worth, he is entitled to have the investigation which he has bargained for.
2. If any fraud or deception is practised upon the stockholder which induces him to transfer his shares for less than they are worth, he may be relieved in a court of equity.
3. But the burden of proving the charge of fraud is upon him who makes it, since fraud cannot be presumed in a court of equity any more than in a court of law.
4. Where an account is settled by parties themselves, and where there is no unfairness, and where all the facts are equally well known to both sides, their adjustment is final and conclusive.
5. Where the case is between vendor and vendee, the rights of the parties must be measured by the terms of the agreement under which the sale and purchase were made.

John D. Hager brought his bill in the Circuit Court for the district of New Jersey against John R. Thomson, Edwin A. Stevens, James Neilson, and the said John R. Thomson, Edwin A. Stevens, James Neilson, Robert F. Stockton and Richard Stockton, trustees of the New Brunswick Steamboat and Canal Transportation Company. The material averments of the bill are substantially as follows:

The complainant was the owner of seven and two-thirds shares of the capital stock of the New Brunswick Steamboat and Canal Transportation Company, a corporation of the State of New Jersey, created by law in the year 1831; and as a stockholder in the corporation he filed his bill in the Court of Chancery of the State of New Jersey against Thomson, Stevens and Neilson, three of the present defendants, charging them with divers breaches of trust and frauds in the management of the company's business, and praying for an account and other relief. The bill was answered and a replication filed. But before all the witnesses were examined the defendants

proposed to compromise, and it was agreed through R. F. Stockton, who was the agent of the company and of the defendants, that the suit should be settled. At that time the defendant was the owner not only of the seven and two-thirds shares of stock which he had had from the beginning of the company's existence, but of one third of four other shares which he had purchased after the commencement of the suit. The company, from the time of its organization in 1831, had been engaged in transporting passengers and freight between New Brunswick and New York, and in the year 1835 carried goods, coal, &c., between New York and Philadelphia by way of the Camden and Amboy railroad and the Delaware and Raritan canal. Abraham S. Nelson, of New Brunswick, was the treasurer, but kept no account of any business except that which was done by the company between New Brunswick and New York. The defendants, after the bill was filed in the Chancery Court of New Jersey, presented an abstract account of the business of the company, which they represented as containing a true and just account of all the business of the company, its receipts and expenditures. The complainant with his counsel attended at the office of the treasurer, Mr. Nelson, at New Brunswick, and examined certain books of account for about six hours without being able to ascertain the correctness of the abstract. The original books of entry were not present. The company have a set of books kept in Philadelphia by one Gatzner and others, and another in New York, kept by one Anderson, from which, and from the manifests, way-bills, receipts and vouchers, the monthly and other settlements were made out and carried to the books kept by Gatzner in Philadelphia. No books except those of Anderson were submitted to the complainant, and they were false, fraudulent, and intended to deceive the stockholders. R. F. Stockton, on the 2d of September, 1847, agreed with the complainant that the company and the defendants in the Chancery suit should purchase the complainant's stock for such price as, upon a fair examination of the assets, it should be found that the stock was worth, and on the 13th of January, 1848, Mr. Stockton met the complainant at Princeton Basin to carry out the

agreement of compromise, Anderson and Gatzner being present. The partial examination by the complainant of Anderson's books, and the assurances of Stockton, Anderson, and Gatzner, induced the complainant to believe that the abstract from the books of Anderson was correct, and contained a fair statement and just and honest account of the receipts and disbursements of the company. But the books of the company kept in Philadelphia were not produced, nor did the complainant know at that time that there were any such books, or in what manner the books kept by Anderson were made up. He assumed that the abstract was right and did not question its correctness, because he believed at the time that he was dealing with men of integrity. Acting upon this belief, he agreed that the balance of profits (forty-two thousand one hundred and fifty-six dollars and sixty cents) was the correct balance. A valuation was then agreed upon by the complainant and Stockton of the property, real and personal, belonging to the corporation, which being added to the net earnings, made the assets about two hundred and eighty-nine thousand dollars. The complainant's proportion or part of the last mentioned sum was paid to him, and he transferred his stock to the company. After this compromise was made the complainant discovered that the abstract account upon which he had based his agreement was false and fraudulent in a great many particulars. The bill set forth specifically the false credits and fraudulent charges, and prays that a just and accurate account be taken of the company's business, profits and property, and the defendants decreed to pay him such additional sum as it shall be ascertained that his stock was worth.

The answer denies the allegation that there was any important error in the accounts or abstracts of accounts or books submitted to the complainant, or that any assurance was falsely given by the defendants of their correctness, or that there was any fraudulent or deceptive means used to procure the plaintiff's assent to the compromise.

The statements in the answer do not materially vary from that contained in the bill concerning the terms and conditions upon which the purchase of the complainant's stock was made by

R. F. Stockton for the company. The contract was that the complainant should be paid such price as, upon a fair examination into the condition of the company, it might be found to be worth.

A large number of witnesses were called—more than twenty; but their testimony needs not to be stated here, since the effect of it upon the case can be seen in the opinion of Mr. Justice Clifford.

The Circuit Court dismissed the bill, and the complainant took an appeal to this court.

Mr. Ransom, of New Jersey, for the appellant. The complainant is entitled to have from the defendants such a sum of money for his stock as, upon a fair examination of the affairs of the company, and a proper estimate of its assets, the stock may be found to be worth; and if the examination at Princeton was not a fair one, he is entitled to a restatement. The account taken at Princeton is not conclusive. *Perkins* vs. *Hart, Executor*, (11 Wheat., 256;) S. C., 6 Curtis, 587; *Chappedelaine et al.* vs. *Dechenaux, Executor*, (4 Cranch, 306;) S. C., 2 Curtis, 114; 1 Bald. C. C. R., 418; *Kelsey* vs. *Hobley*, (16 Pet. R., 269.)

If the assurances given by the defendants to the complainant, that the books were correct and the abstract true, were false, then those assurances were a fraud upon the complainant, which vitiates the account rendered, and entitles him to a new account and a new valuation of his stock. 1 Story's Eq. Juris., § 200; *Atwood* vs. *Small*, (6 Clark & Finnelly's R., 232, 233;) *Camp* vs. *Pulver*, (5 Barb. Sup. Ct. R., 91;) *Sandford* vs. *Handy*, (23 Wend. R., 260;) *Wilson* vs. *Force*, (6 Johns. R., 111;) *Snyder* vs. *Finley*, (Coxe, 78;) *Gilbert* vs. *Hoffman*, (2 Watts, 66;) *Hazard* vs. *Irwin*, (18 Pick., 95;) *Rodgers, Executor*, vs. *Grundy*, (3 Pet. R., 210;) *Smith* vs. *Richards*, (13 Pet. R., 26.)

Another reason is, the defendants stood in the relation of trustees to the complainant and the other stockholders of the company, and being in possession of full and perfect information concerning its affairs, they took advantage of the superior knowledge which their position gave them to purchase the stock of the complainant for less than its real value, withhold-

ing from him the information to which he was entitled. In such cases the court will carefully inquire into and sift all the circumstances in order to ascertain the perfect fairness and propriety of the transaction, and if any unfair advantage has been taken by withholding information or other fraudulent dealing, the purchase will at once be set aside. Hill on Trustees, 537; 9 Ves., 246–7; *Morse* vs. *Royal*, (12 Ves.. 373;) *Ayliff* vs. *Murray*, (2 Atk., 59;) *Boyd* vs. *Hawkins*, (2 Dev. Eq., 195, 329;) *Schwartz* vs. *Wendell*, (Walker's Ch., 627;) *Farr* vs. *Farr*, (1 Hill's Eq., 390;) *Stewart* vs. *Kissam*, (2 Barb. S. C., 494;) *Allen* vs. *Bryant*, (7 Ired. Eq., 276;) *Hunter* vs. *Atkins*, (3 M. & H., 135;) *Herne* vs. *Mars*, (1 Vern., 465;) *Fox* vs. *Macreth*, (2 Brown's Ch. Cas., 400;) *Scott* vs. *Davis*, (Mylne & Craig's R., 87;) *Freeman* vs. *Brooks*, (9 Pick., 212.)

Mr. Bradley, of New Jersey, for the appellees. Even if the charges of error were not shown to be unfounded, or satisfactorily explained, they should be deemed settled by reason of the sale of the plaintiff's stock to the company on the 13th of January, 1848.

The plaintiff had already filed a bill against the defendants Stevens, Thomson and Neilson, charging that the defendants had never accounted for the earnings of the company in its various branches of business, and that the books showing these transactions were kept by and in the hands of the New York and Philadelphia agents, Anderson, Decker, Gatzner, Freeman, A. S. Nelson, &c., and would show the results of the business. The bill was fully answered, issue joined, testimony taken, and the books of the company exhibited before a master and examined by the complainant and his counsel. After the parties were thus at arms' length, a proposition was made to compromise by the purchase of the complainant's stock at what it appeared to be worth by examining the books and appraising the property. The proposition was agreed to and carried out at Princeton. The books were produced and examined as fully as the plaintiff chose. He asked for no others.

A mistake was made at this appraisement, it is true, but it was in favor of the complainant, the valuation of the property

being fifty thousand dollars too high. The complainant refused to correct it, saying it was too late to correct errors. He took his own course to get at the value of the stock. He was not misled; he was on his guard. He had already charged the defendants with misleading him. Such a settlement will not be disturbed without the clearest evidence of fraud on its face. *Stearns* vs. *Page*, (7 Howard, 819;) *Baker* vs. *Biddle*, (Baldwin's C. C. R., 418;) *Drew* vs. *Power*, (1 Schoale & Lefroy, 182;) *Johnson* vs. *Curtis*, (3 Brown's Ch. C., 266;) *Wilde* vs. *Jenkins*, (4 Paige, 481;) *Lockwood* vs. *Thorne*, (1 Kernan, 170;) *Phillips* vs. *Belden*, (2 Edw. Ch. Rep., 1;) *Chappedelaine* vs. *Dechenaux*, (4 Cranch, 306;) Story's Eq. Jurisprud., § 523–529; Beame's Pleas, 227; *Small* vs. *Boudinot*, (1 Stockton, 381.)

Officers and agents of a body corporate cannot be sued by individual corporators, except in cases of fraud, and where no other remedy can be had. Angell & Ames on Corp., 6th ed., sec. 312; *Bayless* vs. *Orme et al.*, (1 Freeman, Miss., 175;) *Hersey* vs. *Veazie*, (11 Shepley R., 9, 12;) *Hodges* vs. *New Eng. Screw Co. et al.*, (1 R. Isl. R., 312;) *Smith* vs. *Hurd et al.*, (12 Metc. R., 371;) *Abbot* vs. *Merriam*, (8 Cushing's R., 588, 590;) *Robinson* vs. *Smith*, (3 Paige, 222;) *Austin* vs. *Daniels*, (4 Denio, 301;) *Mozley* vs. *Alston*, (1 Phillips, 790;) *Brown* vs. *Van Dyke*, (4 Halst. N. J. Ch. R., 795;) *Smith* vs. *Poor*, (40 Maine R., 415;) *Forbes* vs. *Whitlock*, (3 Edw. Ch. R., 446.)

Mr. Justice CLIFFORD. This was a bill in equity, and the case comes before the court on appeal from a decree of the Circuit Court of the United States for the district of New Jersey, dismissing the bill of complaint. It was filed on the eighteenth day of May, 1852, and was brought by the appellant.

Some brief reference to the introductory allegations of the bill of complaint, and to the transactions out of which the controversy has arisen, is indispensable, in order that the foundation of the claim made by the complainant may be fully understood.

It appears that the New Brunswick Steamboat and Canal Transportation Company, usually called the New Brunswick Company, was incorporated on the eighteenth day of January,

1831, and that the charter expired, by its own limitation, on the eighteenth day of January, 1852. Shortly after the charter was granted the company was duly organized, with a capital of twenty-five thousand dollars. Seven and two-thirds shares of the stock were taken by the appellant, and he was elected secretary of the company. They purchased a steamboat in 1831, which was employed in the transportation business between New Brunswick and the city of New York; and they also purchased a sloop, which was employed in carrying wood for the steamboat, and was also engaged in the transportation of merchandise on the Raritan river.

Two other companies were also created by the legislature of the State of New Jersey, and authorized to engage in the transportation business. One was called the Delaware and Raritan Canal Company, incorporated in 1830; and the other the Camden and Amboy Railroad Company, incorporated contemporaneously with the New Brunswick Company. Those companies were united in 1831, and were subsequently known as the joint companies. Most or all of the respondents were largely interested in those companies, and in 1834 they purchased about four-fifths of the stock of the New Brunswick Company; but the complainant still retained his shares and his position as secretary of the company and clerk on the steamboat. Whatever might have been the object of the purchasers, it is evident that the transfer of the shares had the effect to impart new energy and efficiency to the management of the company, for they increased the capital stock to fifty thousand dollars, making the par value of the shares two hundred and fifty dollars; and, during the early part of the year 1835, made an arrangement with the joint companies for transporting freight through the canal and over the railroad between New York and Philadelphia, and other intermediate places on the route. Under this arrangement they also built and procured canal boats and barges, and ran them on the Delaware and Raritan rivers and through Staten Island sound to the city of New York, operating them by means of steam-tugs furnished by the joint companies. They also did a large business on the Camden and Amboy railroad, using the locomotives, cars, and

steamboats of the railroad company for that purpose. Throughout this period they also continued to operate their steamboat line between New Brunswick and New York; and in 1837 they engaged in the coal business, purchasing and transporting coal to market, as is more fully set forth in the pleadings. Large profits were made by the company under these various arrangements; but they also incurred very large expenses, and the complainant became dissatisfied with the management of the company. Failing to get any redress for his supposed grievances, he, on the twenty-fifth day of March, 1847, filed a bill in equity in the chancery court of the State against three of the present respondents, charging them, as directors of the company, with divers frauds and breaches of trust in the management of its affairs, and praying for an account of all the business of the company. To that bill of complaint the respondents in the suit made answer, denying the charges, and exhibiting what they alleged to be the actual circumstances of the case. Pending that suit, the complainant, with two other persons, purchased four additional shares of the stock of the company, and the same were held in the name of one of those persons for the equal benefit of the purchasers at the time the suit was brought.

With these explanations as to the origin of this controversy, we will proceed to state the foundation of the claim made by the complainant. Among other things, he alleged, that after he had proceeded to take testimony in that suit in support of his bill of complaint, propositions of compromise were made in behalf of the defendants, and that the propositions so made were entertained by him in the spirit of conciliation. Those propositions of compromise, he alleged, were made to him through R. F. Stockton, one of the respondents in this suit, who was the agent of the company and of these respondents; and he also alleged, that it was agreed and arranged that the suit should be compromised and settled in the manner and upon the basis set forth in the present bill of complaint. Both parties agree that the suit was settled in consequence of that arrangement, and that the stock of the complainant, including the four shares purchased during the pendency of that suit, was trans-

ferred to the company; but they differ, in some respects, as to the terms of the agreement providing for the transfer, and still more widely as to the circumstances under which the transfer was made.

As alleged in the bill of complaint, R. F. Stockton applied to the complainant, about the second day of September, 1847, to ascertain whether there could not be an amicable settlement of the matters involved in that suit, and that the conference resulted in an agreement that the company and the defendants in that suit should purchase his stock in the company, and pay him therefor such price or sum as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the money, property, and assets of the company, the stock should be found to be worth. Having set forth the supposed agreement, the complainant proceeded to allege that he and R. F. Stockton, accordingly, met at Princeton, on the thirteenth day of January, 1848, to carry out and complete the same, for the sale and purchase of the stock; that from a partial examination of the books kept by the treasurer, and from assurances there given by R. F. Stockton and others that a certain abstract account there exhibited, and which was taken from the books, was correct, and contained a fair statement of the business of the company, and of the moneys received and of the disbursements made, and not knowing that there were other books of the company not produced at the time the abstract was prepared, he was induced to believe that the account was true and correct, and consequently did, upon the payment of his proportionate part of two hundred and eighty-nine thousand dollars, transfer the stock owned by him, including the four shares purchased during the pendency of the suit, to the company, and received pay for the same from the company's funds. But he alleged that he had since discovered that the abstract account was false and fraudulent in very many particulars, as specified in the bill of complaint; and, therefore, insists that he is entitled to have the settlement corrected and reformed, and to have an account taken of the entire property and estate of the company, and to be paid such additional sum for his stock as the same, upon such accounting, be found

to have been worth. On the other hand, the respondents, in their answer, admitted that they, by virtue of their being the last president and directors of the company, became and were the trustees of the corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property of the company among the stockholders, after paying the debts due and owing from the corporation; but they allege that the agreement was, that the complainant should sell the stock, held and represented by him, at such price as the same should be found to be worth, upon a fair valuation of the property of the company, and that the complainant, if he desired it, should have an opportunity of examining the company's books to satisfy himself of their correctness. Substantially adopting the language of the bill of complaint, they admitted that the complainant and R. F. Stockton met at Princeton, on the thirteenth day of January, 1848, to make a valuation of the property, and carry out the agreement; but aver that the counsel of the complainant and the defendants in that suit were present, as well as several other directors, and the treasurer and clerk of the company. According to the answer, all those persons, with others connected with the company, were present to aid and assist in making the valuation and statement of the property, and in such examination of the books of the company as the complainant or his counsel might desire to make. In this connection, they also allege that the books of the company were produced at the meeting and were examined by the complainant and his counsel as fully and for such length of time as they desired; and that all such explanations of the same as the complainant or his counsel required were fully and freely given by the persons present, who were the persons best qualified to make such explanations. It was at that meeting that the valuation was made; and the respondents alleged that all of the property of the company, according to the best of their judgment, information, and belief, was fairly and liberally appraised, and to the satisfaction of the complainant; and they also alleged, that he finally agreed that the settlement should be made on the basis that the books were correct as they stood on the

second day of April, 1847, when the abstract exhibit was made out, without taking into the account any subsequent transactions. One matter only, and that not now in dispute, was left in doubt, and provision was made for its satisfactory adjustment. Assuming the abstract to be correct, it showed a balance in favor of the company of forty-two thousand one hundred and fifty-six dollars and sixty cents. That sum, added to the appraised value of the property, ought to have been taken, as the respondents alleged, as the true value of the capital stock of the company; but they alleged that, at the suggestion of the complainant, and by mistake on their part, the sum of fifty thousand dollars, being the whole amount of the original capital, was added to that amount as the basis of the settlement, making the sum of two hundred and eighty-nine thousand dollars, as alleged in the bill of complaint. Pursuant to that settlement, the company paid to the complainant one thousand four hundred and forty-five dollars for each share, paying therefor, as they alleged, two hundred and fifty dollars on each share more than they ought to have paid according to the terms of the agreement; and they denied that there was any fraud or deception practised by them or their agents in any part of the transaction. Some eighteen witnesses were examined by the complainant in support of the allegations of the bill of complaint, but the respondents took no testimony; and, after a full hearing in the Circuit Court, a decree was entered dismissing the bill of complaint. 1. It is contended by the complainant, that the agreement obligated the respondents to pay him such price for the stock he transferred to them as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the moneys, property, and assets of the same, the stock was found to be worth; and if the examination of the books at Princeton was not a fair examination of the affairs of the company, and the estimate there made of the moneys, property, and assets of the company was not a proper and fair estimate of the same, and in consequence thereof he was induced to accept a less price than the agreement authorized him to expect and demand, then he is entitled to have an examination of the books and

the accounts, and to be paid such additional sum for his stock as it may be found to have been worth upon such restatement. Suppose the proposition to be correct as a general rule of law, still it remains to be ascertained whether the theory of fact on which it is based is sustained by the evidence. Undoubtedly, if there was any fraud or deception practised upon the complainant, as alleged in the bill of complaint, to induce him to transfer his stock for a less price than he was entitled to receive upon the reasonable fulfilment of the condition of sale to which he had agreed, and in consequence of such fraudulent acts or misrepresentations, he actually parted with the stock at less than its value on the basis of the agreement, then clearly he would be entitled to relief; but the burden of proving the charge of fraud is upon the complainant. Fraud cannot be presumed or inferred without proof in a court of equity, any more than in a court of law; and in both the rule is, that he who makes the charge must prove it; and there are some circumstances in this case, besides the fact that the charge is denied in the answer, that render the application of that rule peculiarly proper. As appears by the complainant's own showing in the present bill of complaint, he became dissatisfied with the manner in which the affairs of the company were conducted as early as the twenty-fifth day of March, 1847; and he accordingly alleges, that on that day he filed his bill in the Chancery Court of the State of New Jersey against three of the present respondents, charging them, as directors of the company, with divers frauds and breaches of trust in the management of its affairs. Answer was made to that suit by the respondents, and the complainant continued to prosecute it until the thirteenth day of January, 1848, when the settlement took place, and he transferred his stock. Most of the substantial matters now in controversy were more or less involved in that litigation; and, during the pendency of the suit, both the complainant and his counsel, on two or more occasions, were allowed to inspect the books of the company, and his own testimony shows that they examined them as fully and for such length of time as they desired. On one occasion the treasurer and book-keeper appeared before the master in

chancery, and, in obedience to a subpœna *duces tecum*, produced the books, and they were examined for several days. His own testimony also shows that he was present at the meeting of the stockholders on the third day of April, 1847, when the abstract in question was made; and several of his witnesses testify that the books were produced and submitted to the examination of the stockholders. No suggestion was made that any other books or vouchers, not produced, were necessary to a full exhibition and understanding of the affairs of the company; and none of the circumstances elicited on the various occasions, when the books were produced, afford any countenance whatever to the theory that any concealment, deception, or evasion was practised by the respondents. On the contrary, they furnish indubitable evidence that the complainant had every reasonable facility, and the most ample means, to ascertain the true state of the accounts. Whatever means of information the respondents had upon the subject appears to have been laid before the complainant, and surely he had no right to ask for more; and he is equally unfortunate, if the testimony adduced by him, as to what occurred at Princeton on the thirteenth day of January, 1848, be compared with the allegations of his bill of complaint. It was at that meeting, it will be remembered, that he accepted the propositions of compromise, and transferred his stock, and the witnesses substantially agree that the allegations of the answer are correct; that his counsel was present, and that he examined the books to his satisfaction, without even suggesting that any others were desired. Complaint is now made that the books of the agents in New York and Philadelphia were not produced on that occasion; but his own witnesses testify that he called for no others at the time; expressed himself as satisfied with the examination; and the bill of complaint admits that he agreed to the settlement, accepted the estimated price of his stock, and transferred it to the company.

Looking at the whole evidence, therefore, it is obvious that the charge of fraud and deception is wholly unsustained by proof, and we think the allegations of mistake, so far as the complainant is concerned, are equally unfounded. But it is

fully proved that a mistake in his favor was made in the basis of the settlement to the amount of fifty thousand dollars. That mistake, as appears by the evidence, was made by adding the capital stock to the estimated amount of all the moneys, property, and assets of the company, when, in point of fact, the whole of the capital stock had been expended in purchasing the property already included in the valuation. Before the consideration was paid for the stock the mistake was discovered, and the complainant was requested to consent to the correction by a corresponding reduction from the basis of the settlement, but he replied that it was too late to correct errors. That refusal is a circumstance of some significance, plainly indicating that the complainant did not then think it for his interest to rescind the contract, or that he had been circumvented by the respondents. He who seeks equity should do equity, is a maxim in equity jurisprudence, and we think that rule has some application to this case. 2. Numerous mistakes in the basis of the settlement are alleged in the bill of complaint, and some eighteen in number were urged upon the attention of the court at the argument by the counsel of the complainant. It was held by this court in a case between creditor and debtor that a settled account is only *prima facie* evidence of its correctness; that it may be impeached by proof of unfairness, or mistake in law or fact; and, if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it. (*Perkins* vs. *Hart*, 11 Whea., 256.) Granting the correctness of that principle as applied to the case then before the court, still it is obvious that it cannot have any very direct application to the case under consideration. Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement, and afterwards maintain a suit for that which he voluntarily surrendered. But the present case is one between ven-

dor and vendee, and the rights of the parties must be measured by the terms of the agreement under which the sale and purchase were made. Assuming that the agreement was as is alleged in the bill of complaint, all the complainant could claim was such a price for his stock as, upon a fair examination of the affairs of the company and a proper and fair estimate of its moneys, property, and assets, the stock should be found to be worth. That examination into the affairs of the company was made by the parties to their satisfaction, and they also made the estimate; and there is no evidence of any unfairness, or that they committed any error, except the one already mentioned in favor of the complainant. On this point the complainant called and examined the agents of the railroad line, and the agents of the canal lines, and the agents of the coal barge lines, and they all testified, in substance and effect, that the accounts, or the results of the business, as ascertained by the monthly settlements, were correctly entered on the company's books. All of the accounts of the steamboat line were kept by the treasurer, and it has already appeared that those books were exhibited to the complainant at the time of his settlement. Nothing need be remarked respecting the steam-towing business, except to say that the matter was fully settled between the two companies in 1846, and the result of the settlement was duly entered on the books of the company. Without entering more into detail, suffice it to say that the gravamen of the bill of complaint is, that the complainant was induced to sell his stock for less than its worth; but he has not introduced one word of proof to sustain the allegation, and his own testimony shows that by mistake he received two hundred and fifty dollars on each share more than he was entitled to according to the agreement. In view of the whole case, we are of the opinion that the complainant has wholly failed to support the allegations of the bill of complaint, and the decree of the Circuit Court is accordingly affirmed, with costs.

HECKER *vs.* FOWLER.

The court will not dismiss a writ of error to the Circuit Court on the ground that there is no error apparent on the face of the record.

This was *covenant* brought in the Circuit Court for the southern district of New York. While the cause was pending there, it was referred by consent. The referee found for the plaintiff. The court entered judgment on the award, and the defendant below took this writ of error. The defendant in error (plaintiff below) moved to dismiss the writ of error, and affirm the judgment.

Mr. Andrews, of New York, in support of the motion. The facts are not found in a general or special verdict, nor agreed on in a case stated, and there is no bill of exceptions. This court must, therefore, affirm the judgment, unless there is error apparent on the face of the record. *Graham* vs. *Bayne*, (18 How., 60;) *Guild* vs. *Frontin*, (18 How., 135;) *Suydam* vs. *Williamson*, (20 How., 427;) *Kelsey* vs. *Forsyth*, (21 How., 85;) *Campbell* vs. *Boyreace*, (21 How., 223.) There is no error on the face of this record.

Mr. Monroe, of New York, resisted the motion.

Mr. Chief Justice TANEY. We are asked to dismiss this writ because no error appears on the face of the record. It is not necessary, by the practice of this court, for the party who brings a cause here to specify upon the record the errors he complains of, and they are not even informally brought to our notice until the argument is heard. Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. Where a judgment appears to have been rendered which the party is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing. To say that there is no error in this judgment, and affirm it

for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ.

Motion denied.

DERMOTT *vs.* WALLACH.

1. In replevin, the plea of property is a good plea in bar of the action.
2. Where the plea, without averring property in the defendant or a stranger, traverses the plaintiff's allegation of property in himself, it might be held defective on demurrer, but it is good in substance
3. The addition of a *similiter* to the plea of property is but matter of form, and its omission does not affect its validity.
4. Where the plea of property is put in by the defendant, but is not tried by the jury, it is a mistrial and an error, for which the judgment will be reversed.
5. An omission to join issue upon an avowry for rent in arrear, or otherwise to notice it on the record, is a mere irregularity, cured by the verdict.

Charles S. Wallach brought replevin in the Circuit Court for the District of Columbia against Ann R. Dermott. In his declaration the plaintiff averred that certain articles of household furniture were taken by the defendant and detained against sureties and pledges. The defendant pleaded that "the goods and chattels in the declaration mentioned are not the property of the said plaintiff, and of this she puts herself on the country." The defendant also avowed the taking of the goods for rent in arrear, setting out the lease, and the amount due thereon. To the avowry the plaintiff replied *riens en arriere*, but did not formally join issue on the plea of property by putting in a *similiter*. The defendant prayed the court to instruct the jury on several points, all of them having relation to the one question whether the rent had become due and payable to the plaintiff, as alleged by her. The court refused to give the instructions prayed for, and the jury found that the rent claimed by the defendant "at the time when, &c.,

was not in arrear and unpaid, nor was any penny thereof," assessing the damages of the plaintiff for the taking and detention at one cent. The court gave judgment for the plaintiff, that he have return of the goods, with the damages assessed by the jury and costs.

Mr. Brent, of Maryland, for plaintiff in error.

Mr. Carlisle and *Mr. Coxe*, of Washington city, for defendant in error.

Mr. Justice NELSON. This action was replevin, brought by the plaintiff below, Wallach, against the defendant, for taking certain goods and chattels of the plaintiff from a house called the Avenue House, situated in the city of Washington.

The defendant pleaded: 1. That the goods and chattels in the declaration mentioned were not the property of the plaintiff. 2. Avowed the taking, by way of distress, for rent due and in arrear, under special circumstances stated, concluding with a verification. 3. Like avowal for rent due and in arrear generally.

The plaintiff replied to the first avowry, no rent in arrear and unpaid. No notice is taken in the pleadings of the second avowry.

The jury found a special verdict, that no rent was due or in arrear upon the issue joined on the first avowry, and assessed the damages; and judgment was given that the plaintiff recover the goods and chattels, and have a return of the same, &c. No notice is taken in the verdict or judgment of the plea of property.

The plea of property in replevin is a good plea in bar of the action. It is true, the plea in this case is not in due form, and might have been held defective on demurrer; but it is good in substance. The form is to plead property in the defendant, or in a stranger, traversing property in the plaintiff, which traverse raises the material issue to be tried—the averment of property in the defendant or a stranger being by way of inducement. Either plea constitutes a good defence, because it

shows property out of the plaintiff; and prima facie, therefore, he is not in condition to maintain the action. 12 Wend. R., 30, 34, 35.

The plea in this case avers the fact directly, by stating that the goods and chattels in the declaration mentioned are not the property of the said plaintiff. Under this plea, it was competent for the defendant to have proved property in herself, or in a stranger, as this would have tended directly to support the issue; and if the defendant had sustained her plea, and proved property out of the plaintiff, she would have been entitled to a return of the goods and chattels without an avowry, as it would appear the plaintiff, at the time, had no right to take or detain them.

As this plea of property is a good bar to the action, and as the record shows it has not been tried or found by the jury, there has been a mistrial below, for which the judgment must be reversed, and the case sent down, and a new venire ordered. There is a good bar to the action remaining untried, and not yet found for the plaintiff, and hence he is not entitled to the judgment rendered in his behalf in the court below.

It appears that the similiter was not added to the plea of property; but this is now regarded as matter of form, and its omission does not affect its validity.

The omission to join issue upon the second avowry, or to notice it in the finding of jury or in the judgment of the court, is cured after verdict.

There is, also, a second plea by the plaintiff to the first avowry, which issue has not been noticed in the verdict, or on the record; but, as the finding of the first issue rendered the second immaterial, the omission, in this respect, is not important.

Judgment reversed and venire facias de novo ordered.

O'Brien *vs.* Smith.

1. Where a check drawn in the afternoon of Saturday is presented for payment on the morning of the next Monday there is no negligence or delay which will discharge the drawer.
2. The holder of the check being the cashier of an unincorporated banking association, and holding it for the use of the concern, may recover upon it in his own name.

James O'Brien, the defendant below, on the 18th of September, 1858, drew his check on Chubb & Bro. for $1,150, and passed it to the Bank of the Metropolis in part payment of a debt which he owed there, and which was due that day. The drawee's place of business was in the same street with the Bank of the Metropolis, and only eighty feet distant. The Bank of the Metropolis took the check on a Saturday, about two o'clock in the afternoon, and presented it for payment on the following Monday at eleven o'clock in the morning. Chubb & Bro. had failed in the mean time, and payment was refused. The check was duly protested, and notice of its dishonor was regularly given to the drawer.

The Bank of the Metropolis was not an incorporated institution, but a private partnership, carrying on business under that name. Richard Smith, its cashier, held the note for the use of the concern, and brought assumpsit in the Circuit Court to recover the amount of the check from O'Brien, the drawer.

The defence was that the Bank of the Metropolis ought to have demanded payment of the check on the day it was received, and that the postponement of the demand from Saturday until Monday was a want of diligence which discharged the drawer from all liability on the paper.

The Circuit Court instructed the jury that if the plaintiff took the check on the 18th in the afternoon, and presented it for payment on the morning of the 20th, the intervening day being Sunday, there was no delay or negligence which would have the legal effect of discharging the drawer. To these instructions the defendant excepted, and upon the verdict and

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judgment being rendered against him, he took this writ of error.

Mr. Davidge and *Mr. Ingle*, for plaintiff in error, argued: 1. That reasonable diligence was not used in presenting the check. Admitting that the demand might have been delayed until the next day, if that had not been Sunday, yet, as this check was received on Saturday, the custom of merchants required it to be presented the same day, and this custom is extended by analogy to the execution of all contracts. 2. The Bank of the Metropolis is not chartered, and the paper sued on is held by the defendant in error for the benefit of an unincorporated partnership. He has no legal title to the paper, and cannot recover in his own name. *Olcott* vs. *Rathbone*, (5 Wend., 490;) *Sherwood* vs. *Rays*, (14 Pick., 172.)

Mr. Carlisle, for defendant in error. 1. The presentation of the check on Monday morning *was* in reasonable time. Story on Bills, § 419; Grant on Banking, 50, 200. 2. The plaintiff, as cashier of the bank and holder of the check for the use of the bank, *can* recover. It was so held in *Law* vs. *Parnell*, (7 J. Scott N. S., 282,) which was this very case.

Mr. Chief Justice TANEY. We think the decision of the Circuit Court was right upon both of the points raised in the argument. The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss here questions which we consider as too well settled to be now open to serious controversy.

Judgment of the Circuit Court affirmed.

Stiles *vs.* Davis & Barton.

1. Goods seized by a sheriff under an attachment are in the custody of the law.
2. Where the goods are attached in the hands of a common carrier, to whom they have been delivered for transportation, the carrier is not justified in giving them up to the consignee while the proceeding in attachment is pending.
3. This rule holds even where the goods have been attached for the debt of a third person, and under a proceeding to which the employer of the carrier is not a party.
4. The right of the sheriff to hold them is a question of law to be determined by the court having jurisdiction of the attachment suit, and not by the will of either the carrier or his employer.
5. If the consignee of the goods can show a title in himself, his remedy is not against the carrier, but against the officer who has wrongfully seized them, or against the plaintiff in the attachment suit, if he directed the seizure.

Writ of error to the District Court of the United States for the northern district of Illinois.

Solomon Davis and Joseph Barton brought trover in the Circuit Court of the United States for the northern district of Illinois, against Edmund G. Stiles, for twelve boxes, one trunk, and one bale containing dry goods, of the value of four thousand dollars. On the trial it was proved that Stiles, who was a common carrier, had by his agents, Scofield and Curtis, received the goods in question from Benjamin Cooley, attorney for Davis & Barton, (the plaintiffs,) to be forwarded to Ilion, New York, at two dollars and fifty cents per cwt., subject to the order of the plaintiffs, upon the surrender of the receipt and payment of charges. It appeared on the trial that they purchased the goods, or took an assignment of them, from a bankrupt firm in Janesville, (composed of D. W. C. Davis, who was a son of one plaintiff, and Davies A. Barton, a son of the other,) and made the contract above mentioned with the defendant for carrying them to Ilion, New York, the place of the plain-

tiff's own residence. The receipt is dated at Janesville, on the 2d of November, 1857. The goods arrived in Chicago on the next day, and were received by the defendant (Stiles) at his proper place of business, whence they were to be despatched by him to the place of their ultimate destination. But before they were forwarded, Andrew Cameron and others, creditors, or claiming to be creditors of the junior Davis and Barton, attached the goods in the hands of Stiles, the transporter. Shortly before this suit was brought, (the *precipe* is dated on the 16th of November, 1857,) G. W. Davenport, attorney of the plaintiffs, presented the receipt to the defendant, and demanded the goods. The defendant said they had been attached, and declined to give them up until the suit in which the process issued should be decided; the goods, he said, were in his possession in a warehouse or stored; he asserted no personal interest in them, but claimed that he was protected by the garnishee process.

The counsel of the defendant requested the court to instruct the jury: 1. That a common carrier could not be guilty of conversion by a qualified refusal when he claimed no interest in the goods himself, and he had shown reasonable grounds of dispute as to the title. 2. That a qualified refusal by the defendant, after he was garnisheed, he only claiming to hold them to await the decision of the title, when there was reasonable ground of dispute as to the title, was no conversion.

The court refused to give these instructions; but said: 1. That the jury were to determine from the evidence whether there had been a conversion. As a general rule, if the right of property was in the plaintiffs, a demand on the defendant, and a refusal by him to deliver up property in his possession, were circumstances from which the jury might infer a conversion, open, of course, to explanation. 2. That if the plaintiffs were the owners of the goods, and they were delivered by the plaintiffs, or their agent, to the defendants, and received by him or his agents to be transported for the plaintiffs to their residence in New York, then the defendant was liable under and according to the terms of the contract. And if he did not so transport them or comply with his contract, the plaintiffs had the

right to call on him to deliver up to them the goods; and if upon such demand he refused, it was for the jury to say whether it constituted, under the circumstances of this case, a conversion. 3. That in the contingency contemplated by the last preceding instruction, if the defendant declined to return or surrender the goods to the plaintiffs, it was to be considered at his own risk or peril. 4. That any proceedings in the State court to which the plaintiffs were not parties, and of which they had no notice, did not bind them or their property. 5. The court left it to the jury to say whether there was any connivance or collusion between the attaching creditors and the defendant; and if there was, then the defendant could not rely upon those proceedings as an excuse for not delivering up the goods. The judge added, that though the attachment was not a bar to the action, the jury might consider that fact as a circumstance in determining whether there was a conversion or not.

The jury found for the plaintiff $3,041 14. The court gave judgment on the verdict, and the defendant sued out this writ of error.

Mr. Dewey, of Illinois, for the plaintiff in error. A demand and refusal to deliver goods are evidence of a conversion, but not *per se* a conversion. *Munger* vs. *Hess*, (28 Barbour, 75;) *Chancellor of Oxford's case*, (10 Rep., 566;) *Mires* vs. *Soleburg*, 2 Mod., 244; Bull, N. P., 34. But to make the detention a conversion, it must appear that it was wrongful. In this case, the attachment of the goods being given as a reason for detaining them, the detention was not wrongful. It must appear that the goods were in possession of the defendant at the time the demand was made, and that he had the power to give them up. Bull, N. P., 44; *Vincent* vs. *Cornell*, (13 Pick., 294;) *Nixon* vs. *Jenkins*, (2 H. Bl., 135;) *Edwards* vs. *Hooper*, (11. M. & W., 366, per Parke, B.;) *Smith* vs. *Young*, (1 Camp., 441;) *Kinder* vs. *Shaw*, (2 Mass., 398;) *Chamberlain* vs. *Shaw*, (18 Peck, 278;) *Leonard* vs. *Todd*, (2 Met., 6;) *Jones* vs. *Fort*, (9 B. & C., 764;) *Knapp* vs. *Winchester*, (11 Vermont, 351;) *Kelsey* vs. *Griswold*, (6 Barbour, 436;) *Verrall* vs. *Robinson*, (2 C. M. & R.,

495.) When this demand was made the goods had been attached, were in the custody of the law, and the defendant had no right or power to deliver them to any person except the attaching officer. *Bedlam* vs. *Tucker*, (1 Peck, 289;) *Ludden* vs. *Leavett*, (9 Mass., 104;) *Perley* vs. *Foster*, (9 Mass., 112;) *Warren* vs. *Leland*, (9 Mass., 265;) *Gates* vs. *Gates*, (15 Mass., 310;) *Gibbs* vs. *Chase*, (10 Mass., 125;) *Odiorne* vs. *Colley*, (2 N. Hamp., 66;) *Kennedy* vs. *Brent*, (6 Cranch, 187;) *Parker* vs. *Kinnssman*, (8 Mass., 486;) *Blaisdell* vs. *Ladd*, (14 N. Hamp., 189;) *Burlingame* vs. *Bell*, (16 Mass., 318;) *Swett* vs. *Brown*, (5 Pick., 178;) *Tillinghast* vs. *Johnson*, (5 Alab., 514;) *Thompson* vs. *Allen*, (4 Stew. and Porter, 184;) *Bryan* vs. *Lashley*, (13 Smedes & Marshall, 284;) *Watkins* vs. *Field*, (6 Arkansas, 391;) *Martin* vs. *Foreman*, (18 Ark., 249;) *Harker* vs. *Stevens*, (4 McLean, 535;) Drake on Attachments, sections 271, 290, 350, 453; *Brashear* vs. *West*, (7 Peters, 608;) *Briggs* vs. *Kouns*, (7 Dana, 405;) *Erskine* vs. *Staley*, (12 Leigh, 406;) *Walcott* vs. *Keith*, (3 Foster, 196;) *Brownell* vs. *Manchester*, (1 Pick., 232;) *Gordon* vs. *Jeneny*, (16 Mass., 465;) *Lathrop* vs. *Blake*, (3 Foster, 46;) *Whitney* vs. *Ladd*, (10 Vermont, 165;) *Verrall* vs. *Robinson*, (5 Turwhitt's Exch. R., 1069.) In the case last cited the chaise for which trover was brought belonged to the plaintiff, but was attached in the hands of the defendant as the property of a third person, who had hired it from the plaintiff and left it with the defendant for sale. Lord Abinger and Baron Alderson held that the chaise was in the custody of the law, and the defendant's refusal to deliver it to the plaintiff was no evidence of a wrongful conversion.

Mr. Burnet, of Illinois, for defendant in error. This was a conversion. 9 Cush., 148; 1 McCord, 504, 392; 4 Hill, 14; 1 E. D. Smith, 522; 1 Taunt., 391; 4 Esp., 157. Stopping the goods at Chicago was itself a conversion. Angell on Com. Carriers, § 431, 432, 433. The disposing or assuming to dispose of plaintiff's goods is the gist of the action, and it is no answer for defendant that he acted under the instructions of others who had themselves no authority. 6 Wend., 609; 4 Maule & Selw., 259; 6 East., 538; 1 Burr, 20; 2 Strange, 813;

Saund., 47, e.; 2 Phill. Ev., 126 The title of the plaintiffs cannot be disputed by the common carrier to whom they were delivered for transportation. Edw. on Bailments, 503, 513, 535, 539. Mere notice to the defendant that a garnishee suit had been commenced did not put the goods into the custody of the law. It was a special proceeding under a statute, and the court had no jurisdiction unless the statute was specially followed. No application, affidavit, or bond is shown, and the proceeding is therefore unauthorized. 19 Johns., 39; 6 Wh., 119; 3 Carnes, 129; 1 Stat. of Ill., 229. Ex parte attachment proceedings must be in strict conformity with the statute. 2 Scam., 15, 17; 12 Ill. R., 358, 363; 22 Ill. R., 455. It is absurd to say that the goods were in the custody of the law before they were attached or *levied* on.

Mr. Justice NELSON. The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury, that any proceedings in the State court to which the plaintiffs were not parties, and of

which they had no notice, did not bind them or their property; and further, that the fact of the goods being garnished, as the property of third persons, of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attach't, 2d edition.

This precise question was determined in *Verrall* vs. *Robinson*, (Turwhitt's Exch. R., 1069; 4 Dowling, 242, S. C.) There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord Abinger, C. B., observed, that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no

evidence of a wrongful conversion to his own use. After it was attached as Banks's property, it was not in the custody of the defendant, in such a manner as to permit him to deliver it up at all. And Alderson, B., observed: Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no justification, if the plaintiff could have maintained a title and right to possession in themselves.

Judgment of the court below reversed, and venire de novo, &c.

4,885 BAGS OF LINSEED—*Wills, Claimant; Sears, Libellant.*

1. A vessel was chartered for a voyage from Boston to Calcutta and back, and the agents of the charterers at Calcutta sub-chartered her to other persons there, who loaded her with goods consigned to parties in Boston, under special bills of lading, which did not refer to the original charter party: *Held*, that the rights of the ship-owners to the freight, payable by the consignees, and their lien for it upon the goods, depended entirely on the contract expressed in the bills of lading, and not upon anything contained in the charter party.
2. The lien of a ship-owner for freight being but a right to retain the goods until payment of the freight, is inseparably associated with the possession of the goods, and is lost by an unconditional delivery to the consignee.
3. But if the cargo is placed in the hands of the consignee, with an understanding that the lien for freight is to continue, a court of admiralty will regard the transaction as a deposit of the goods in the warehouse, and not as an absolute delivery, and on that ground will consider the ship-owner as being still constructively in possession so far as to preserve his lien.
4. That such an understanding did exist between the parties must appear in the evidence, or be plainly inferable from the established local usage of the port, otherwise there is no possession, actual or constructive, to support the lien.

Appeal from the decree of the Circuit Court of the United States for the district of Massachusetts.

The libel in this case was filed in the District Court by Paul Sears, Reuben Hopkins, James Smith, Alexander Child, William N. Batson, and Rowland H. Crosby, owners of the ship Bold Hunter, against four thousand eight hundred and eighty-five bags of linseed, seven thousand pockets of linseed, and fifteen hundred and thirty bags of pegue cutch. The goods libelled were part of a larger quantity brought to Boston from Calcutta by the Bold Hunter for Augustine Wills, and were at the time in store. The libellants demanded $14,948 57 as freight, less $5,000, which had been paid on account; and for

this balance of freight they insisted that their lien had not been waived or impaired by the delivery of the goods under the circumstances.

After warrant and monition were issued, and the goods seized by the marshal in pursuance thereof, Rufus Wills, administrator of Augustine Wills, deceased, came in as claimant, and made answer to the libel, denying that the libellants had any lien on the goods for the freight.

The parties did not dispute about the facts of the case. It appeared by their mutual admissions that the libellants were owners of the Bold Hunter, and, in October, 1856, chartered her to Tuckerman, Townsend & Co. for a voyage from Calcutta to Boston, at $15 per ton on whole packages, and half that rate on loose stowage. The charter party contained the usual lien clause, with a stipulation that the freight should be paid in five and ten days after discharge at Boston, the credit not to impair the ship-owner's lien for freight. On the ship's arrival at Calcutta, the charterers did not furnish an entire cargo, and procured some shipments on freights—among others, one to Augustine Wills—for which the master signed bills of lading, in the usual form, at various rates of freight, all less than the charter rates. These bills of lading were passed over to the libellants by Tuckerman, Townsend & Co. in part settlement of the charter money, and the libellants undertook to collect the freights. The ship arrived at Boston in October, 1857. The larger portion of the goods consigned to Wills were discharged by the consent of all parties, without being landed, into the ship Cyclone, bound to London, and the remainder were delivered to the claimant, who took them to the custom-house stores, and entered them in bond in the name of Augustine Wills. When the Bold Hunter arrived, Augustine Wills, the consignee, was sick, and he died before the goods were all discharged. Rufus Wills, the claimant, acted as his agent before his death, and was his administrator afterwards. The goods were discharged and delivered without qualification, and nothing was said about holding them or any part of them for freight. The claimant, before the death of the consignee, paid $5,000 on the freights, but afterwards declined to pay any

more, saying that he did not know how the estate of Augustine Wills would turn out.

The District Court dismissed the libel, and the decree was afterwards affirmed by the Circuit Court. Whereupon the libellant took this appeal to the Supreme Court of the United States.

Mr. C. G. Loring, for the libellants.

1. The ship-owner has a lien on the goods, which is independent of possession, and not necessarily lost by delivery to the debtor. This lien does not imply a right of property, but the privilege of resorting to the thing for payment, in preference to general creditors. *The Volunteer*, (1 Sumn., 551;) *Logs of Mahogany*, (2 Sumn., 603;) *Raymond & Tyson*, (17 How., 53;) Valin Com. on Code, art. 24; 2 Boulay Paty Com. on Code, 479; Abbot on Shipping, 127, 284; *The Freeman*, (18 How., 188;) *The Yankee Blade*, (19 How., 90;) *Dupont de Nemours* vs. *Vance*, (19 How., 171.) Waiver of the lien cannot be inferred from the fact that a portion of the cargo was at the request of the claimant discharged into another vessel to be carried to London. The libellants had a right to resort to that which remained in store at Boston for payment of their freight upon the whole. Abbot on Shipping, 377; Ang. on Car., 360; *Soddergreen* vs. *Flight*, (6 East., 422;) *Boggs* vs. *Martin*, (1 B. Monr., 239;) *Bernal* vs. *Prin*, (1 Gale, 17.) There being a stipulation in the charter party that the credit to be given for the freight should not impair the lien, that instrument does not receive its proper meaning unless the lien follows the goods into the hands of the consignee. It does follow them, subject only to the agreement of the ship-owner that he will not enforce it for a few days.

2. The admiralty jurisdiction is the "chancery of the seas," and gives relief wherever a court of equity would do so in a similar case. In equity an agreement for a lien binds the thing and creates a trust as between the parties. *Fletcher* vs. *Morey*, (2 Story, 565.) The consignee, if not an immediate party to this contract, (the charter party,) knew of it, claimed the credit under it, and cannot allege that the lien of the libel-

lants was lost by delivery. The lien may be enforced against him without regard to the possession. *Collyer* vs. *Fuller*, (1 Turn. & Rup., 469;) *Alexander* vs. *Heriot*, (1 Bailey Ch., 223;) *Read* vs. *Hill*, (2 Dessau, 552;) *Dow* vs. *Ker*, (Spear's Ch. R., 413.)

3. Even if this case be adjudged by the rules of the common law, it is with the libellants, for the courts of common law will give effect to the intentions of the parties. *Small* vs. *Moates* (9 Bing., 574;) *Wilson* vs. *Kymer*, (1 Maule & Selwyn, 167;) *Bigelow* vs. *Heaton*, (6 Hill, 43;) S. C., 4 Denio, 496; *Dodsley* vs. *Varley*, (12 Ad. & Ell., 632;) *Hussey* vs. *Thornton*, (4 Mass., 405.)

Mr. S. W. Bates, of Massachusetts, (with whom were Messrs. *Story* and *May*,) for the claimant, contended that the lien for freight was lost by the delivery; that the libellants stand upon the same footing with other creditors, and are left to their remedy *in personam*.

1. The carrier's lien for freight is a right to hold, not a right to take. It begins with, rests upon, and ends with, the possession. Delivery has always been held a waiver, or rather an abandonment, of the right.

2. Augustine Wills, whom the claimant represents, was no party to the agreement made by Tuckerman & Co. with the ship-owners. He could have known nothing about it. He did not know upon what vessel the goods were shipped until they arrived at Boston. A sub-freighter or consignee is not bound by the charter party, his bill of lading not referring to it. Abbot on Shipping, 6th ed., 287–8; *Paul* vs. *Birch*, (2 Atk., 621;) *Mitchell* vs. *Scaife*, (2 Camp., 298;) *Faith* vs. *E. Ind. Co.*, (4 B. & A., 630;) *Shepard* vs. *De Bernales*, (13 East., 570.)

3. The libellants say that the maritime law is derived from the civil law, and the civil law gave a privilege to carriers which did not depend upon possession, and was not lost by alienation. This confounds the common law lien of carriers with the carriers' *privilegium* under the civil law. They are different things. The privilege of the civil law did not depend upon possession, because the carrier had no right to re-

tain possession. It was a mere preference over other creditors. But by the common law the carrier may keep the goods until the freight is paid; so he may by the maritime law; and under both systems, for the same reason, his lien is gone when he parts with the goods. *Parker* vs. *Hill*, (2 Wood & Minot, 106;) *Raymond* vs. *Tyson*, (17 How., 53;) Parson's Merc. Law, 345. Some maritime liens are like the *privilegium* of the civil law; for instance, a lien for supplies or materials which may be enforced by one who never was in possession. *Van Bokelyn* vs. *Ingersoll*, (5 Wend., 315.) But not so of liens like this.

Mr. Chief Justice TANEY. The rights of the parties in this case depend altogether on the contract created by the bill of lading. That instrument does not refer to the charter party, nor can the charter party influence in any degree the decision of the question before us. Augustine Wills was not a party to it, and it is not material to inquire whether he did or did not know of its existence and contents; for there is nothing in it to prevent Wills & Co., the sub-charterers, or Augustine Wills, the consignee, from entering into the separate and distinct contract stated in the bill of lading, and the assignees took the rights of Wills & Co. in this contract, and nothing more. The circumstance that it came to hands of the ship-owners by assignment from the sub-charterers, who knew and were bound by all the stipulations of the charter party, cannot alter the construction of the bill of lading, nor affect the rights or obligations of Augustine Wills.

Undoubtedly the ship-owner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the ship-owner may enforce his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the ship-owner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid;

and if he delivers them, the incumbrances of the lien does not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it.

The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant, that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. *Rae* vs. *Cutler*, (7 How., 729;) *Dupont de Nemours & Co.* vs. *Vance and others*, (19 How., 171.)

In the last mentioned case, the court, speaking of the lien for general average, and referring to the decision of *Rae* vs. *Cutler* on that point, said: "This admits the existence of a lien arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation, which, as is well known, is waived by an authorized delivery without insisting on payment."

After these two decisions, both of which were made upon much deliberation, the law upon this subject must be regarded as settled in the courts of the United States, and it is unnecessary to examine the various authorities which have been cited in the argument. But it may be proper to say, that while this court has never regarded its admiralty authority as restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted, yet it has never claimed the full extent of admiralty

power which belongs to the courts organized under, and governed altogether by, the principles of the civil law.

But courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the ship-owner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by the fault of the ship. It is his duty, and not that of the ship-owner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee, without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the ship-owner and the merchant.

It is true, that such a delivery, without any condition or qualification annexed, would be a waiver of the lien; because, as we have already said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties, that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the ship-owner reserves the right to proceed *in rem* to enforce it, if the freight is not paid. And if it appears by the evidence that such an understanding did exist between

the parties, before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and, on that ground, will consider the ship-owner as still constructively in possession, so far as to preserve his lien and his remedy *in rem.*

But in the case before us, there is nothing from which such an inference can be drawn. The goods were delivered, it is admitted, generally, and without any condition or qualification. Upon such a delivery there could be neither actual nor constructive possession remaining in the ship-owner; and, consequently, there could be no right of retainer to support his lien.

The decree of the Circuit Court, dismissing the libel, must therefore be affirmed.

Decree affirmed.

HOGG *vs.* RUFFNER.

1. To constitute usury there must either be a loan upon usurious interest, or the taking of more than legal interest, for the forbearance of a debt or sum of money due. This is the common law definition of the term, and the statute of Indiana does not enlarge it.
2. Where a sum of money is due on a contract for the sale of land, and the vendor takes more than legal interest for the forbearance of the debt, it is usury.
3. But where the owner of land proposes to sell it for one price in cash, and for another price, double as large, on a long credit, and a purchaser prefers to pay the larger price for the sake of the longer time, the contract cannot be called usurious.

Cross-appeal, from the decree of the District Court of the United States for the district of Indiana.

Nathaniel B. Hogg brought his bill in the Circuit Court against Benjamin Ruffner and several other defendants, who were collaterally interested. The bill avers that Ruffner made

his nineteen promissory notes, for two thousand dollars each, amounting in all to thirty-eight thousand dollars, payable to the order of John W. Brice and James L. Birkey, with interest from their date, and that these notes were delivered to Brice and Birkey; that in order to secure the payment of the notes, Ruffner executed three mortgages to Brice and Birkey, and that some of the notes and so much of the mortgages as secured them were assigned to the plaintiff. The bill prays for a decree against the defendant that he pay the sum due upon the notes, and in default thereof that the mortgaged premises be sold. The notes were to become due as follows: two on January 1, 1856, and two on the 1st of April in each of the years 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865.

The answer of Ruffner is, that the notes and mortgages were given on a contract usurious and corrupt. He was in debt (as he asserts) in the sum of twenty thousand dollars to Brice and Birkey, who took these nineteen notes for two thousand dollars each, with interest, payable as stated in the bill; that he, the defendant, gave the notes and mortgages solely for the debt of twenty thousand dollars, and being much embarrassed and pressed for money, and seeing no other means to prevent the sacrifice of his property by an oppressive and inexorable creditor, agreed to the corrupt and usurious contract, and gave his notes for the extra sum of eighteen thousand dollars for the forbearance of the twenty thousand which were due.

The true character of the contract as proved in the Circuit Court will be found stated in the opinion of Mr. Justice Grier.

The Circuit Court held the notes which were due and to become due in the years 1861, 1862, 1863, 1864, and 1865, and which were given for the eighteen thousand dollars, to be usurious and void, and the remainder of the notes valid, as covering only the debt justly owing to the parties by whom they were taken. The court accordingly decreed payment of the notes which were already due, *with interest and costs.* From this decree both parties appealed.

Mr. Stanton and *Mr. Phillips*, of Washington city, for the

defendant, contended that the decree of the Circuit Court was erroneous, because: 1st, it includes interest and costs; and, 2d, instead of taking the usury *pro rata* from all the notes, it takes the whole from the last of the series. The law of Indiana governs the case. The statute of that State provides that six per cent. shall be the legal interest, and if more is taken the contract shall not therefore be void; but if in an action on such contract it is proved to be usurious, the defendant shall recover costs, and the plaintiff shall recover only his principal, without interest. 1 Rev. Stat. of Ind., 343. If the last notes were usurious, it is difficult to see how the first could be free from the taint. It would seem upon principle that each note of the series must be infected with its share of the poison, and so are all the authorities. Parson on Cont., 390; *Merritts* vs. *Law*, (9 Cowan, 65;) *Hammond* vs. *Howard*, (13 Johns.;) *Willard* vs. *Reeder*, (2 McCord, 369;) *Lacomic Bank* vs. *Johnson*, (31 Maine, 414.)

Mr. Hunter, of Ohio, for the complainant, insisted that the decree of the court awarding interest and costs to the complainant was not erroneous, even on the assumption that the contract was usurious. It is not affected by the statute of Indiana, for it is not alleged in the answer that the contract was made in that State, and by the common law a negotiable note in the hands of a bona fide holders, cannot be avoided for usury. Ang. & Ames on Corp., § 262; *Seneca Co. Bank* vs. *Nafs*, (5 Den., 330;) *White* vs. *How*, (3 M. L., 291.) The rule in England under the statute 12 Anne, c. 16, which declares all usurious *securities* to be void, is, that a note given on a usurious contract for the forbearance of a pre-existing debt is void, but the debt is not extinguished. Cro. Eliz., 20; 3 Campb., 119; 10 B. & C., 679. *A fortiori* such must be the rule in Indiana, where the statute expressly provides that the usurious contract itself shall not be void.

But it is utterly denied that any usurious contract was made between the parties, or that the written agreement referred to in the answer was a device to conceal usury. While the de-

fendant has no claim to a reversal of the decree for such reasons as he has given, the plaintiff, who also appeals, has a right to complain and does complain of the error which the court below committed in pronouncing a part of the notes to be void. There is no taint of usury about the contract on which they were made. The written contract repels every such presumption, and so does the other evidence in the cause.

Mr. Justice GRIER. If the exception taken to the decree of the court below by the complainant be sustained, it will be unnecessary to notice those taken by the respondents.

Was the contract of Brice and Birkey with Ruffner, which shows the consideration of the mortgage and notes assigned to the complainants, usurious?

The statute of Indiana declares, that "the rate of interest upon the loan or for the forbearance of any money, &c., shall be at the rate of six" per cent.; but "if a greater rate of interest shall be contracted for, received, or reserved, the contract shall not, therefore, be void;" "the plaintiff shall recover only his principal, without interest," and the "defendant shall recover costs."

To constitute usury, there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. This statute does not profess to enlarge the common law definition of the term, while it aims to include the common devices resorted to by usurers to evade its penalties.

The original contract by which a debt is created may be for the purchase and sale of land, and it will be, nevertheless, contrary to the statute for the vendor to demand or receive more than legal interest for the forbearance of such debt, as in the case of *Crawford* vs. *Johnson*, (11 Indiana Reports, 258,) where separate notes were taken for two per cent. interest, in addition to the legal interest, on the sum due for the purchase money of land.

But it is manifest that if A propose to sell to B a tract of land for $10,000 in cash, or for $20,000 payable in ten annual

instalments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit, and one who will not distinguish between things that differ may say, with apparent truth, that B pays a hundred per cent for forbearance, and may assert that such a contract is usurious but whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.

Does this case come within this category? We are of opinion that it does.

The mortgage and notes in question were given in execution of a contract between the parties, dated the 20th of April, 1855. This contract is in writing, and signed by the parties. It would be tedious and unprofitable to enumerate its various covenants; but the chief subject of it is a sale of land by Brice and Birkey to Ruffner for the sum of $38,000, in ten annual instalments, the sale to include, also, certain personal property. There is no proof that the recitals of this contract are untrue, or that the consideration of the notes and mortgage in question was other than is there stated. These parties had formed a partnership in February, 1854, "for dealing in land, farming," &c., &c. Brice and Birkey advanced money, and had each an interest of one-third in the lands whose title was in the name of Ruffner. In October of the same year this partnership was dissolved, and Ruffner afterwards agreed to pay certain sums of money to the other parties for a release of their interest in the land, and gave them his obligations. Afterwards, in February, 1855, in order to extinguish these obligations, which he was unable to meet, he agreed to reconvey to Brice and Birkey certain tracts of the land. In the spring of 1855 they made arrangements to take possession of these lands, with their tenants, stock, farming utensils, &c., &c. Ruffner then refused to let them have possession. Finding they could not obtain possession without great and ruinous delay,

a proposition was made to sell or release all their interest in the lands of the firm, if Ruffner would pay in cash the amount of money advanced by them. After some negotiations and calculations, this amount was ascertained to be about twenty thousand dollars. They professed a willingness to receive this amount, if paid in cash, or security given that it should be actually paid in six months. A conditional deed was proposed, by which the title was to become absolute in case payment was not made on the day. But counsel advised that this would be construed a mortgage, in whatever form of words it might be drawn. Ruffner being unable to furnish such security as was required, this agreement was not signed or executed. Proposals were then made to purchase for a larger consideration, to include the farming stock, &c., owned by Brice and Birkey, on a credit running ten years. On these terms they demanded forty thousand dollars, and Ruffner offered thirty-six thousand, and finally the amount of thirty-eight thousand was agreed upon, as set forth in the contract referred to.

Now the hearsay testimony of witnesses, who relate what they "*understood*" from conversations with the parties, or may have misunderstood to be the contract between them, and their inference, because the parties had a "*settlement*," that therefore the first terms proposed, but not accepted, amounted to the ascertainment of a debt due, cannot be received to contradict the written contract of the parties and the testimony of witnesses cognizant of the whole antecedent history of the transaction. Nor is there any irreconcilable discrepancy between their impressions or "understandings," and the written agreements and other testimony. They construed the "*settlement*" of the difficulties, which had long existed between the parties, to mean a balance of accounts of money due from one party to the other, and consequently inferred that the increased amount of the securities was for usurious interest for the forbearance of its payment. This was but the usual error of arriving at a false conclusion by the use of equivocal or ambiguous terms.

The decree of the court below is, therefore, erroneous, in so far as it is affected by the assumption that the contract was usurious.

Decree of the Circuit Court reversed, and record remitted, with directions to proceed in conformity to the opinion of this court.

THE BARQUE ISLAND CITY—*Pierce et al., Claimants; Cromwell et al., Libellants.*

1. Parties who find a vessel derelict at sea, and carry her into port, are entitled to the usual salvage, without regard to meritorious but unsuccessful efforts previously made to rescue her by other parties.
2. To constitute a case of derelict it is not sufficient that the crew have left temporarily to procure assistance; the abandonment must be final, without hope of recovery or intention to return.
3. A ship disabled at sea is partially aided by one vessel, further assisted by another, then left with nobody on board, at anchor, but still in peril, while better means of rescue are sought for, and in that condition she is discovered by a third vessel, which brings her into a safe port:—this is a case in which all three of the vessels are entitled to share in the salvage awarded.
4. A right to compensation for salvage presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors.
5. If salvors are guilty of embezzlement, whether at sea or in port, or even after the property has been delivered into the custody of the law, their claim for salvage is forfeited to the owners.
6. The operation of this rule does not depend on the amount or value of the property embezzled; the law visits any embezzlement, though small, with an entire forfeiture of all claim for salvage.
7. When the embezzlement is secret and purely an individual act, it will not prejudice co-salvors, who are innocent and ignorant of it; but all are guilty who consent to, connive at, or conceal it; who encourage it, or fail to prevent it when they can.

This was a libel for salvage by H. B. Cromwell and others, owners of the steamer Westernport, against the barque Island

City. The libel was filed in the District Court of the United States for Massachusetts, and was removed into the Circuit Court on the certificate of the district judge that he was interested.

In January, 1857, the *Island City*, on her voyage from Galveston to Boston, made Cape Cod in a snow-storm. The master finding he could not get by the cape, anchored in Vineyard Sound; but finding his ground tackle would not hold, he cut away the masts, and brought up near the Horseshoe. The schooner *Kensington* went out from Hyannis to her assistance, but, after every effort, was not able to get her into port. The Kensington towed her some distance, but finally left her anchored in four and a half fathoms of water, with a hundred fathoms of chain out, dismasted, and without a rudder. The owners of the Island City being informed of her situation, requested the master of the steamer *R. B. Forbes* to go to her aid. He did so, and found her where the Kensington had left her, and in the helpless condition mentioned. The steamer took the barque in tow on Saturday, the 24th of January, with the intention of carrying her into Boston. The severity of the weather and the floating ice made this a work of great labor, hardship, and peril. On Monday, the steamer's coal being found insufficient, she took off the crew of the barque, left her at anchor off Great Point, Nantucket Island, without any person on board, and went to Provincetown for a supply of coal. Several accidents delayed the steamer in getting the necessary quantity and quality of coal, and it was not until the Saturday afterwards that she was able to return to the place where she had left the Island City at anchor. She was not there. The steamer *Westernport* had discovered her the day before the return of the Forbes, got up her anchor, took her in tow, and brought her into Hyannis, where she was followed by the Forbes and brought to Boston.

While the Island City was in possession of the Westernport the officers and crew of the latter vessel broke open the chests of the master and seamen of the barque, robbed them of their clothes, watches, and money, carried away the quadrant and barometers of the ship, rifled trunks on freight; and this pil

lage was committed extensively and upon a plan of general plunder, by the mate and many of the seamen, without opposition from any of them. When complaint was made, some of the articles taken were restored to their owners, but a consid erable portion of the money and clothing was never returned.

The owners of the schooner Kensington, of the steamer R. B. Forbes, and of the steamer Westernport, all filed libels against the Island City for salvage, and the three cases were heard together.

Mr. Justice *Clifford*, in the Circuit Court, gave his opinion at length, and decreed that the whole amount of all the salvage services rendered by all the libellants in the three cases was $13,000, of which $3,300 were rendered by the Kensington, $5,200 by the Forbes, and $4,500 by the Westernport. One-third of the last mentioned sum was decreed to the owners of the Westernport, but the other two-thirds, (viz: $3,000,) to which the master, officers, and crew of the Westernport would otherwise have been entitled, were adjudged to be forfeited to the owners of the Island City, by reason of the misconduct of the said master, officers, and crew of the Westernport, and, so far as they were concerned, the libel was dismissed. From this decree the owners of the Westernport took the present appeal. The other parties submitted to the decree of the Circuit Court.

Mr. Dana, of Massachusetts, for libellants. There must be three elements in every case of salvage: 1st, a marine peril; 2d, voluntary service upon contingent compensation; 3d, full and entire success.

The services rendered by the crew of the Kensington had the two first of these elements, but wanted the last. They failed of success; they left the barque from necessity, and abandoned her to her chances, instead of taking her to a place of safety where she could have been delivered to her owners. The service being short of entire success, the merit of it is immaterial. The court will not inquire whether the ultimate safety of the vessel was made more or less probable by the

service rendered, nor speculate upon the comparative degrees of her peril in the places where she was found and where she was left. It must be a case of salvage, or it is nothing.

The Forbes makes a claim for nothing but contract services, to be paid on a *quantum meruit.* Her case, therefore, has not in it the necessary ingredient of voluntary service upon contingent compensation. She was engaged by the owners of the barque, was in their service, and subject to their order. Her employment was liable to be terminated at the pleasure of the owners of the barque. She could not, like a salvor, insist upon retaining possession. No question can arise between the Forbes and the real salvors. If the Forbes is entitled to compensation for contract services, it is independent of, and subject to salvage. After all the salvage awards are given, her claim may be heard.

Of all the three vessels that went to the aid of the Island City, the Westernport was the only one whose service was salvage in its nature. It had all the elements of salvage; for, 1st, the Island City was in peril; 2d, the service of the Westernport was voluntary; and, 3d, it was completely successful.

At the time when the Island City was taken possession of by the Westernport the latter vessel was not in the possession, actual or constructive, of her own crew, or of any salvor. She was derelict in the true sense of the law of salvage. She lay in an open sea, held by an insufficient anchor, surrounded by shoals, dismasted, without a rudder, and with no one on board. She was deserted, abandoned, forsaken. In our law, the word *derelict* has not the intense signification which it bore in the civil law. It does not mean that the owner has renounced title, but merely that the thing has been deserted, though it may be with the hope of returning. The test is not the *hope* but the *power* of resuming possession. In the case of a derelict vessel the title remains in the owner, with a temporary right of occupancy for salvage in the finder. It is doubtful if the crew of this vessel could have been compelled to return. Their ability to do so certainly depended on the weather, and every circumstance that increased the peril of the barque made

their return less probable. *The Amethyst*, (Davies, 21;) *The John Gilpin*, (Olcott, 78;) *The John Wurtz*, (Olcott, 470;) *Rowe* vs. —— *Brig*, (1 Mason, 373;) Swabez's Adm., Rep. 205.

The rule in cases like this is to give one-half for salvage, making an equitable division between owner and salvor; *The John Wurtz*, (Olcott, 470;) and though it be true that the rule is artificial and flexible, yet it *is* a rule, and must be adhered to, unless reasons be shown for departing from it. *The Henry Ewbank*, (1 Sumner, 411.) The rule of giving one-half to the salvors was followed in the cases of *Rowe* vs. —— *Brig*, (1 Mason, 373;) *The Henry Ewbank*, (1 Sumner, 400;) *The Boston*, (1 Sumner, 328;) *Sprague* vs. *Barrels Flour*, (2 Story, 195;) *The Galaxy*, (1 Bl. & Howl., 270;) *John Wurtz*, (Olcott, 460;) *L'Esperence*, (1 Dods., 64;) *The Frances Mary*, (2 Hagg., 89;) *The Elliotta*, (2 Dods., 75;) *The Reliance*, (2 Hagg., 90;) *The Eugene*, (3 Hagg., 156;) *The Effort*, (3 Hagg., 153;) *Zwei Gebroder*, (3 Hagg., 430;) *The Galt*, (2 W. R., 70;) *The Nicolina*, (2 W. R., 175;) *The Britannia*, (3 Hagg., 153.) And where one-half is given, the expenses of the salvors are sometimes taken out of the other half. *The Frances Mary*, (2 Hagg., 90;) *The Reliance*, (ib. in note.) In some cases one-third is given, and in some more than one-half, as in *The Waterloo*, (1 Bl. & H., 128;) *The Cora*, (4 Wash., 80;) *The Charles*, (Newb., 329;) *The Thetis*, (2 Knapp, Pr. C., 410;) *The Yonge Bastiaan*, (5 Rob., 287;) *The Jubilee*, (3 Hagg., 43;) *The Rising Sun*, (Ware, 385.) In England, the rule not to exceed one-half is not applied to cases of derelicts. *The Inca*, (Swabez's Adm. Rep., 371.) In this case all the circumstances combine to make the resort to a high rule of salvage proper and just. The reasons for giving a liberal allowance are well stated in the cases of *The Nath. Hooper*, (3 Sumner, 579;) *The Boston*, (1 Sumner, 323;) *The Hy. Ewbank*, (1 Sumner, 424–5–6, 429;) *The Missouri's Cargo*, (Sprague's Dec., 268–71;) *The John Gilpin*, (Olcott, 88;) *The Spirit of the Age*, (Swabez's Ad. R., 286;) *Barrels of Oil*, (Sprague's Dec., 93.)

As to the alleged misconduct of the salvors, the articles of clothing which were taken from the Island City by the men of the Westernport were taken and used to protect them

against the severity of the weather, and the other articles were taken on board the Westernport for safe keeping. The men intended to return, and did return, the articles taken; and if any articles were not returned, it was by accident or negligence. There was no intention of any one belonging on board the Westernport to steal or embezzle any article.

Mr. Curtis, of Massachusetts, for claimants. The vessel was not derelict, because the crew left her to obtain coal and provisions, and with intent to return. *The Aguila*, (1 C. Rob., 37;) *Taylor* vs. *Pryor*, (1 Gal. R., 133;) *The Emulous*, (1 Sum., 209;) *The Bee*, (Ware's R., 345;) *The Dodge*, (Healey, 4 Wash., 651.) To entitle a party to salvage, not only must the service rendered be meritorious, but the *possession taken* must be lawful. *The Amelia*, (1 Cranch, 1;) *The Dodge*, (Healey, 4 Wash., 651;) *The Barefoot*, (1 Law and Eq., 661.) The *jus disponendi* which belongs to the owner is not interfered with by any principle of admiralty law; and if a vessel be found, though with no one on board, under such circumstances that the defenders knew, or ought to have known, their services were not desired, and they take possession, with intent to supplant the master and owners in giving her relief, they have no claim for compensation. *The Upnor*, (2 Hag., 3;) *The Barefoot*, (1 Law and Eq., 661;) *The India*, (1 W. Rob., 408;) *The Amethyst*, (Davies' R., 23.) The court is always jealous to maintain the rights of those who have begun a salvage enterprise, and are prosecuting it in good faith. New comers are not allowed to interpose and dispossess them for covetous and selfish ends. They must prove an absolute necessity for such interposition. *The Charlotte*, (2 Hag., 361;) *The Eugene Bourne*, (3 Hag., 160;) *The Effort*, (3 Hag., 167–8;) *The Glasgow Packet*, (2 W. Rob., 306.)

But whatever salvage, if any, may have been earned by the master, officers, and crew of the Westernport was forfeited by embezzlement and by gross negligence in the custody and care of the property which came into their possession. The law is clear, that *any* embezzlement works a forfeiture. *The Blaireau*, (2 Cranch, 240;) *The Boston*, (1 Sum., 339;) *The*

Rising Sun, (Ware's R., 379.) Not only so, but the law demands of salvors what Judge Story terms "*incorruptible vigilance*," (1 Sum., 341–2;) and gross negligence, still more wilful carelessness, is cause of forfeiture. *The Duke of Manchester*, (2 W. Rob., 56, 471;) *The Barefoot*, (1 Law and Eq., 661;) *The Cape Packet*, (3 W. Rob., 122;) *The Glory*, (2 Law and Eq., 551.) Actual embezzlement of the most cruel kind, robbery of shipwrecked mariners, and extensive plunder of their effects, are clearly proved.

There was one complete salvage service performed by the successive efforts of the three vessels, and the Circuit Court properly allowed but one salvage compensation. That compensation ($13,000) was large and liberal. The distribution of it was discretionary, and should not be changed on appeal, unless it manifestly appears that some important error has been committed. *The Sybil*, (4 Wh., 98;) *Hobart* vs. *Drogan*, (10 Pet., 108.)

There is no error in the distribution of the amount allowed the Westernport. The same proportion (one-third) was allowed in the *Blaireau*, (2 Cranch, 240,) to the salving vessel *and cargo;* and that proportion has been adopted in many other cases. Mr. Justice Story says, in the case of the ship *Henry Ewbank and cargo*, (1 Sum., 426,) that one-third is the proportion habitually adopted, and to induce a departure from it very peculiar and pressing circumstances must be shown; and he refers to many cases in support of his position. In this case there are no such peculiar or pressing circumstances.

Mr. Justice GRIER. If the barque "Island City" was derelict when she was rescued by the Westernport, the libellant would be entitled to the usual allowance for salvage in such a case, without regard to previous unsuccessful attempts to rescue her by the Forbes and the schooner Kensington.

The owners of the barque have not appealed from the decision of the court on the libel filed by the other alleged salvors. But the decision of those cases may be collaterally challenged in this, in so far as they affect the rights of the libellant, if his vessel was entitled to the whole, and has received but one-third.

The first question, then, is, whether the salved barque was derelict, or totally abandoned by her crew and the others who claim to have commenced the salvage service, which, it is admitted, was successfully concluded by the Westernport.

When the barque was discovered by the Westernport, on the 30th of January, 1857, in Vineyard Sound, she was dismasted, and her rudder gone; she was held only by her stream anchor and a heavy chain. She was liable, in case of a storm of wind from the *east*, to be driven by the ice on shoals, and lost. The crew had left her thus apparently abandoned. The Westernport was, therefore, justified in taking possession of her, and taking her to a place of safety in the port of Hyannis, and to have a liberal salvage compensation, even if it should turn out that the barque had not been derelict.

To constitute a case of derelict, the abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily, with intention to return after obtaining assistance, it is no abandonment, nor will the libellant be entitled to the salvage as of a derelict.

The testimony in this case fully justifies the decision of the court below, that when the barque was discovered by the Westernport she was not derelict.

The peril from which the barque was finally rescued by the interposition of the Westernport was begun previous to the 23d of January, when the barque was first discovered by the schooner, and the salvage service was first commenced. The barque was in her greatest peril at that point, and was with much difficulty taken by the schooner to a place of greater comparative safety; but she was unable to put the barque in a place of absolute safety in the port of Hyannis. The peril was not ended. The schooner being unable to complete the rescue, gave notice, by telegraph, to the owners at Boston, who despatched the steamer Forbes to the assistance of the barque.

The Forbes then takes possession of her, and, finding it impracticable, on account of the ice, to take her into the port of Hyannis, attempts to take her to Provincetown. After encountering much peril and difficulty from the tides and the ice, it is discovered that their supply of fuel is insufficient,

under the circumstances, to take themselves, with the barque in tow, to Provincetown. They then conclude to anchor the barque, with her remaining anchor and heavy chains, in a position of greater comparative safety, where she would most probably be able, though not out of peril, to ride out the storm till the Forbes should return. The crew of the barque departed in the steamboat, intending to return, believing they could render more service by expediting her return, while they could be of no service by remaining on board the barque. They were detained at Provincetown much beyond their expectation, from the impossibility of sooner obtaining a supply of coal, and were unable to return till after the Westernport had taken possession of the boat, and brought her safely into the port of Hyannis. We concur, therefore, in the opinion of the Circuit Judge, that the barque was not abandoned after the salvage service commenced; that it was one continuous peril from which the barque was rescued, and that each of the several salvors contributed to the final result. The amount allowed for the salvage service was liberal, and the apportionment of it among the several salvors just and proper.

It has been contended *here*, that the court, in apportioning the salvage allowed to the Westernport as between the owners of the boat and the crew, should not have followed the established rule of giving but one-third to the ship, and two-thirds to the crew; that it is the power of steam, which is the chief agent in the rescue, and the danger, if any, is to the boat and cargo, and the enterprise and perils of the crew comparatively unimportant. We admit that there may be cases in which a court might be justified in not adhering ridgidly to the rule; but in this case, the question was not properly raised by the pleadings or evidence, so as to justify the court in departing from it. The evidence shows that considerable danger and hardship was encountered by the crew, and it is only after the court have adjudged their claim to have been forfeited by their misconduct, that fault has been found with the apportionment. In establishing a new rule as regards steamboats, the parties interested in the decision of the question, and claiming adverse interests, should both be heard, and a proper issue made be-

tween them, where the testimony taken should have direct reference to the issue to be decided. In this case the crew had no counsel to contest the question adversely to the boat.

Lastly, it has been contended, that the decree of the court, forfeiting the salvage apportioned to the crew on account of their misconduct, is unnecessarily harsh and severe, and ought to be reversed. The principles of law which should govern the case are correctly stated by the Circuit Judge in the following summary from adjudged cases:

"Public policy encourages the hardy and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation. Those liberal rules as to remuneration were adopted, and are administered not only as an inducement to the daring to embark in such enterprises, but to withdraw, as far as possible, every motive from the salvors to depredate upon the property of the unfortunate owner. While the law is thus liberal as to compensation, it requires on the part of the salvors the most scrupulous fidelity. It visits, says a learned judge, any embezzlement, although small, with an entire forfeiture of all claim for salvage. It not only withholds the extraordinary reward allowed to the honest salvor as a premium for his courage and hardihood, but, by way of penalty for his fraud, deprives him even of a *quantum meruit* for his labor. While the general interests of society require that the most powerful inducements should be held out to men to save life and property about to perish at sea, they also require that those inducements should likewise be held forth to a fair and upright conduct with regard to the objects preserved. Compensation for salvage service presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors. Salvors are required by the nature of their undertaking, and by a due consideration of the large award allowed them for their services, to be vigilant in preventing, detecting, and exposing every act of plunder upon the property saved; and if they are guilty of

embezzlement, whether at sea, in port, or even after the property is delivered into the custody of the law, it works a forfeiture of their claim to salvage. When secret, and purely an individual act, it is justly held not to prejudice co-salvors, who are innocent. But all may become guilty by consenting thereto, or by connivance, concealment, or encouragement afforded to the actors, or by not preventing the act when it is in their power."

On a careful examination of the testimony, we concur with the court below in their application of these principles to the case before us.

The embezzlement proved was not the secret act of one or two of the crew. A general system of plunder seems to have been carried on while the barque lay at the wharf in Hyannis, and before the crew returned to claim their property. In this the officers and crew of the Westernport seem all to have been actively or passively implicated. Locks were broken, chests and trunks forced open, and clothing, money, and other articles of value were carried away, and never returned. Those who did not actively participate in this systematic and general pillage have connived and consented thereto, and have justly been decreed to have forfeited all right to compensation.

Decree of the Circuit Court affirmed, with costs.

O'BRIEN *vs.* PERRY.

1. Under the third section of the act of 1832, persons who had claims of a certain class under France or Spain, to land upon which they were settlers and housekeepers, might have a right of pre-emption, if they would relinquish their claims. A party claimed a town lot on which he resided, and other lands adjoining. The town lot was confirmed in 1825, and in 1834 he relinquished his claim and demanded his pre-emption of the other lands under the act of 1832 *Held*, that he was a settler and housekeeper on the land of which he claimed pre-emption.
2. But the right of pre-emption did not depend on actual residence and housekeeping in the case of a person whose claim under a Spanish or French grant was still undetermined.
3. Where a person, whose right of pre-emption was founded on his relinquishment of an undetermined claim under France or Spain, has entered the land according to the act of 1832, and the Land Office has cancelled his entry and issued a patent to another person for the same land, the patent and the cancellation of the entry are both void.
4. In the State courts of Missouri, when a suit at law is brought by a patentee, the defendant may set up his prior equitable title as a bar.

This was a writ of error to the Supreme Court of the State of Missouri.

The action was brought in the Circuit Court of Washington county, Missouri, by John O'Brien against Eliza M. Perry and others. The plaintiff's petition sets forth that he was legally entitled to the possession of the east fractional half of the southeast fractional quarter of fractional section 15, in township 37 north, of range 2 east, in the county of Washington, Missouri, containing 58 54-100 acres, into which the defendants unlawfully entered and held him, the plaintiff, out of possession.

The defendants in their answer deny that the plaintiff is entitled to the possession of the land, aver their own title, and give a detailed history of it.

The cause was tried by the court without a jury, and after

the evidence and arguments thereupon were heard, the court found the facts as stated in the opinion of Mr. Justice *Nelson*, and upon these facts found, as a conclusion of law, that John Perry, under whom the defendants claimed, by virtue of his waiver and relinquishment, was entitled to a pre-emption for the land in controversy; that the cancellation of his certificate of entry was illegal and void, and therefore judgment was given for the defendants.

The cause went to the Supreme Court of the State by appeal, where it was reviewed and the judgment affirmed, when this writ of error was sued out by the plaintiff.

Mr. Noell, of Missouri, for plaintiff in error.

1. John Perry, under whom defendants claim, never was in a condition to claim as a pre-emptor under the act of July 9, 1832, not being a *housekeeper residing on the land, and not having an unconfirmed claim.*

2. There was no proof that the land embraced in Perry's claim was ever reserved from sale. The report of the register and receiver is no legal proof of the fact.

3. The proof of pre-emption, certificate of entry, and patent of the plaintiff, made out a clear legal title, upon which he ought to have recovered.

4. The land was not reserved from sale. Perry's claim under Basil Valle was confirmed under the act of 26th May, 1824, the 4th section of which embraced the village of Mine au Breton. The act of July 9, 1832, (sec. 3,) expressly provides that the lands embraced in the 2d class shall be subject to sale as other public lands; those embraced in the 1st class are reserved, and are all that are reserved.

5. The patent itself is presumed to be valid. All the prerequisites to its validity are to be presumed, and the contrary cannot be shown by any other means than by proof that it issued contrary to law. *Polk* vs. *Wendall*, (9 Cranch;) *Bognell* vs. *Boderick*, (13 Peters;) *Minter et al.* vs. *Crommelin*, (18 How., p. 87.)

6. Under the statute laws of Missouri the plaintiff was entitled to recover upon his right of pre-emption, although no

patent might have been issued. Revised Code of Missouri, 1845 and 1855, title Ejectment.

No counsel appeared for defendants in error.

Mr. Justice NELSON. This action was brought by the plaintiff, O'Brien, to recover possession of a part of section fifteen in township thirty-seven. He claimed title under a patent of the United States, dated May 4, 1854, which was founded upon a pre-emption certificate under the act of 1841, dated July 3, 1847. His possession or settlement began in April the same year.

The title which the defendants set up began as early as 1795, under Basil Valle, who settled upon the premises, which were situate at a place called Mine au Breton, in Missouri, and continued cultivating and improving the same down to the year 1806, when he sold and conveyed all his interest to John Perry, the ancestor of the defendants. In 1807, Perry, as assignee of Valle, presented the claim before the board of commissioners, enlarging it to six hundred and thirty-nine acres. No decision seems to have been made upon the claim till the meeting of the board in 1811, when it was rejected.

In 1825, William and John Perry, who had become the owners of the claim, had confirmed to them a town lot and out-lot of the village of Mine au Breton, lying within and constituting a part of the original tract of six hundred and thirty-nine acres, under the act of 1812 and the supplemental act of 1824. The dwelling-house of the Perrys was situate on this village lot.

In 1833 the claim was again presented to the board of commissioners, under the act of 1832 and the supplemental act of 1833, and further proof in support of it produced. No decision was made by the commissioners.

In August, 1834, John Perry, jr., who was then the owner, relinquished all right and title to the claim, by metes and bounds, including the whole tract of six hundred and thirty-nine acres, to the United States, and afterwards applied to the register and receiver to make his entry as purchaser of the tract under

the act of 1832, which was permitted on the 26th of November, 1839, satisfactory proof of possession, inhabitation, and cultivation having been furnished, and the purchase money paid. This entry was made under the direction of Whitcomb, the Commissioner of the Land Office; but, on an appeal to his successor by adverse claimants, the entry was cancelled on the 5th May, 1843, three years and a half after Perry's entry, and which decision was concurred in by the then Secretary of the Treasury.

Subsequently, in 1847, as we have seen, the plaintiff O'Brien was permitted to make an entry for a part of the same premises, and in 1854 a patent was issued to him.

Upon this state of the case and condition of the title, the court below held that, by virtue of the waiver and relinquishment of his claim under the act of 1832, Perry became thereby entitled to a pre-emption of the land relinquished, and that the subsequent cancellation of his entry by the Commissioner was contrary to law, and void.

By the first section of the act of 1832, a board of commissioners was appointed to examine all unconfirmed claims to land in the State of Missouri, theretofore filed in the office of a recorder, founded upon incomplete grants, &c., under the authority of France or Spain, prior to the 10th March, 1804, and to class the same so as to show, 1, what claims, in their opinion, would have been confirmed according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities, if the government under which the claims originated had continued in Missouri; and, 2, what claims, in their opinion, are destitute of merit in law or equity under such laws, usages, and customs, and practice of the Spanish authorities.

The third section provided that, from and after the final report of the board of commissioners, the lands contained in the *second class* should be subject to sale as other public lands, and the lands contained in the *first class* should continue to be reserved from sale as theretofore, until the decision of Congress upon them, provided that actual settlers, being housekeepers upon such lands as are rejected, claiming to hold under such

rejected claim, or such as may waive their grant, shall have the right of pre-emption to enter, within the time of the existence of this act, not exceeding the quantity of their claim, and which in no case shall exceed six hundred and forty acres, including their improvements. And it is made the duty of the Secretary of the Treasury to forward to the several land offices in said State the manner in which all those who may wish to waive their several grants or claims, and avail themselves of the right of pre-emption, shall renounce or relinquish their said grants.

In the instructions to the board of commissioners by the Commissioner of the General Land Office, under date of 2d November, 1832, he observes, that this 3d section of the act above recited provides that actual settlers, being housekeepers at the date of the act, upon such claims alleged and filed in the mode specified in the first section, as are rejected, and who claim to hold under such rejected claim, and also, *that all claimants who may relinquish to the Government claims of the characters* designated in the first section, prior to any decision thereon by the board, shall have the right of pre-emption. He also directs, that the recorder furnish to the party relinquishing a certified copy of his relinquishment, which shall be evidence of his right to the pre-emption privilege intended to be conferred by the act. The supplementary act of March 2, 1833, extended the provisions of the act of 1832 to all claims for donations of land in Missouri, held in virtue of settlement and cultivation. This supplementary act embraced the class of claims to which the one in question belongs. As the relinquishment was made by Perry in conformity with the third section of this act of 1832 and the instructions of the Secretary of the Treasury, it is difficult to see any well-founded objection to his right of entry of the land as a pre-emptor, which was permitted by the register and receiver upon satisfactory proof of inhabitation and cultivation on the 26th November, 1839. Indeed, according to the instructions from the Commissioner of the Land Office, the certified copy of the relinquishment would seem to be sufficient evidence of the right of pre-emption, even without further proof.

But this entry was cancelled on the 5th May, 1843, by directions of the then Commissioner of the Land Office, and which raises the principal question in the case. As has already appeared, William and John Perry, who then owned the claim, had confirmed to them, in 1825, a town-lot and out-lot at the village of Mine au Breton, embracing some eight or ten acres, under the act of 1812, and the supplementary act of 1824, and which were included within this claim. The dwelling-house and out-houses of the Perrys were situated on this town-lot, and, indeed, had been thus situated since the purchase from Basil Valle in 1806. The Commissioner held, that, upon a true construction of the third section of the act of 1832, no claimant was entitled to the right of pre-emption unless he was an actual settler, being also a housekeeper, on the land at the date of the act, and that the condition applied as well to the party relinquishing his claim to the Government as to him whose claim had been rejected. And as the town-lot, upon which stood the dwelling-house of the Perrys, had been confirmed under the act of 1812, he was of opinion it became thereby separated from the remaining portion of the claim, and, therefore, they were not settlers and housekeepers on the part entered in November, 1839. And this view being concurred in by the Secretary of the Treasury, the register and receiver were directed to cancel the entry of the Perrys.

Now, assuming the construction of the third section, as declared by the Land Commissioner, to be correct, and that the Perrys must prove they were actual settlers and housekeepers on the land at the date of the act, we think the conclusion arrived at not at all warranted. The confirmation of the title to the town-lot in 1812 did not, in any just or legal sense, affect their claim to the remaining portion of the land, or change the character of the settlement or inhabitation. For aught that appears, the occupation and claim continued the same after the confirmation as before, except that, being secure in the title to the town-lot, they were concerned only in their future efforts to obtain the title to the other portion of the land. The act of 1812 was a general act confirming town-lots, out-lots, &c., to the inhabitants of villages, and the argument would seem

to go the length of requiring the inhabitant to reject the confirmation of his village lot upon which his dwelling stood, or forfeit his right to a confirmation of the adjoining plantation, and of holding that his entire claim could not be confirmed in parts by two different acts.

But the conclusive answer to the objection of the Commissioner is, that Perry was an actual settler and housekeeper, on the land he relinquished to the Government, at the date of the act, as the deed of relinquishment embraced the village lot and dwelling-house, as well as the other portion of his claim; and although the entry was permitted only for the portion less the town-lot and out-lot, this was not the fault of the claimant, but that of the register and receiver, and cannot be justly used to his prejudice.

We have thus far assumed that the construction of the third section of the act of 1832 by the Commissioner, at the time of the cancellation of the entry of Perry, was correct, and have endeavored to show that the conclusion arrived at upon his own premises was erroneous, and afforded no justification for setting aside the entry made under the direction of his predecessor.

But this construction differed from the instructions of the Department at the time of the passage of the act, and which were furnished to the land officers, to guide them in its execution. As we have already said, that construction dispensed with the necessity of requiring the claimant to prove that he was an actual settler and housekeeper on the land, in all cases of claims pending before the board of commissioners, and undecided. The rejected claims were declared to be public lands, from the time of their rejection by the board; and, of course, no relinquishment was necessary to vest the title in the Government. The claimants were then in the condition of those who had no claim on the bounty of the Government, except as actual settlers on the land, which furnished a meritorious ground of right to a pre-emption. But the case of claimants whose claims were still under consideration and undetermined was altogether different. They might still be confirmed; and, in that event, the Treasury would derive no benefit from them.

Congress, therefore, proposed to this class, that if they would relinquish their claims to the Government, they should have the right to enter the lands at the minimum price, in preference to all others. This was the inducement held out to them to relinquish their claims. The Government had no pecuniary interest, so far as the pre-emption right was concerned, after the relinquishment, whether given to the claimant or to some subsequent settler. The minimum price was all it could receive for the land. The proposal was a compromise, offered to this class of claimants. Actual settlement and housekeeping on the land, at the time of the passing of the act of 1832, were not essential prerequisites of their claims before the board as Spanish claims; they depended upon the settlement right, under the act of 1807, and subsequent acts relating thereto.

Without pursuing this branch of the case further, we are entirely satisfied that the Commissioner of the Land Office erred in cancelling the entry of Perry, made in 1839, and that it was contrary to law, and void, as was also the issuing of the patent to O'Brien, upon his subsequent entry for a part of the same land in 1847. This was so held in *Lyttle* vs. *The State of Arkansas*, (9 How., 314,) and in *Cunningham* vs. *Ashley*, (14 ib., 377;) see, also, *Minter* vs. *Crommelin*, (18 How., 87.) It is true, in the first two cases, bills in equity were filed in the court below by the persons claiming under the pre-emption right to set aside the patent in one of the cases, and a location, which operated to pass the legal title in the others.

But in the present case, which comes up from a decision in the Supreme Court of Missouri, though the action was at law by the patentee, to recover the possession, according to the practice of that court, it is competent for the defendant to set up a prior equitable title in bar of the suit, founded upon the legal title to the premises in dispute.

Judgment affirmed.

Bryan *vs.* The United States.

1. A surety in the bond of a public officer is entitled to credit for all payments made by his principal during the time he remained in office, and is chargeable only with the moneys received by him during the same time.
2. The naked facts that an officer, having public money in his hands, drew on the Government while he was in office for a further sum to pay certain debts and expenses, which draft was met after he went out of office by a requisition on the Treasury in favor of the payee, and that the officer in the mean time paid the debts and expenses mentioned by him, will not authorize a charge against the surety of the sum drawn for, nor deprive him of his right to a credit for the debts and expenses so paid.
3. In an action against the surety in such a case, it is necessary for the United States to prove that the money was actually paid out of the Treasury and came to the hands of the officer during his term of service, and those facts will not be inferred from the draft, the requisition and the Treasury warrant.
4. A transfer of moneys by the Government to an agent of the officer does not affect the liability of the surety as a transfer to the officer himself.
5. The fidelity or responsibility of the agent through whom the Government sees fit to transfer public money is not within the obligation assumed by the surety.
6. Where the evidence shows a state of facts from which the inference is not deducible that the officer received the money sought to be charged against his surety, it is error to leave the cause to the jury upon the hypothesis that he did receive it.

Writ of error to the Circuit Court of the United States for the District of Columbia.

The United States brought an action of debt in the Circuit Court against Joseph Bryan, one of the sureties in the official bond of Samuel D. King, Surveyor General of California. It appeared that King was commissioned by the President on the 29th of March, 1851, and executed his bond with Bryan and others, as sureties, on the same day. On the 19th of March,

1853, John C. Hays was commissioned as his successor. On the 30th of June, 1853, at San Francisco, Hays gave bond and took the oath. On the 31st of May, 1853, a month before Hays took possession of the office, King wrote to the Commissioner of the Land Office an official letter, in which he admitted that the balance against him on the surveying account, on the 1st of April, was (after deducting what was due him on the salary and contingent account) $13,933 32. But he alleged that payments were made on it to the amount of over $11,000, and that disbursements would be made *during that quarter* requiring more than the amount in his hands. He stated that by the end of the quarter there would be needed on salary account $10,000; on contingent account $6,500; and for other purposes $3,500; in all $20,000. He then added, that "the full amounts as above being needed by the time this reaches your office, and long before a remittance could be received, *I have been compelled to draw upon you at one day's sight for the said sum of* $20,000 *in the form enclosed, which please honor.*" On the same day he wrote again to the Commissioner: "To meet balances due me on settlement of my salary and contingent accounts of the first quarter of 1853, and expenditures under both of those heads, and other expenses *during the present quarter*, I have to request that, one day after sight, a warrant for the sum of $20,000, out of the undermentioned appropriations, may be issued in favor of Charles D. Meigs, cashier of the American Exchange Bank, city of New York, and charged to me as follows, per advice of this date." Then follows a statement showing that the amount referred to is to pay the balance of the first quarter, and to pay expenditures of the second quarter, ending on the 30th of June, 1853.

On the 4th of July, 1853, in accordance with the request contained in these letters, a requisition was made by the Secretary of the Interior upon the Treasury for three warrants on account of Samuel D. King, Surveyor General, for $3,500, $6,500, and $10,000, on which requisition corresponding Treasury warrants and drafts were issued, payable to the cashier of the American Exchange Bank, of New York. The accounting officers of the Treasury charged him with the whole amount of

them. Between the 31st of May and the 30th of June he disbursed the sum of $11,295, for which he received credit in his accounts. Allowing him these credits and charging him with the $20,000 for which he drew in favor of Meigs, the balance is against him, as it also is if the credits and the charge be both stricken out. But allowing the credits without the charge, the balance would be in his favor. In the Circuit Court the defendant insisted that he was not responsible as surety for the $20,000 paid on the requisition in favor of Meigs, dated the 4th of July, 1853, because that was after his principal in the bond had gone out of office, and that he was entitled to credit for all payments made previous to that time. For the United States it was claimed that King had raised the money before he went out of office by getting his drafts on the Government cashed, and had applied the money, or part of it, thus raised, to the payment of the debts due by the Government, and it was unjust to the public that his sureties should be permitted to set off his payments out of that money against the balance previously due from him, while they repudiated the charge. The court instructed the jury as follows:

"If the jury shall find from the evidence that Samuel D. King, as surveyor general of California, prior to the 30th day of June, 1853, paid certain amounts due to himself and other creditors of the Government upon the accounts and salaries, and office rents and contingencies, given in evidence in this cause, out of moneys raised by him upon orders or drafts drawn upon the Government, and by him made known to the Government to have been drawn for the accounts to which the said payments were in fact applied, and that said drafts were paid, and said amounts thereby reimbursed to him by the Government after the 30th day of June, 1853, then it is not competent for the defendant in this action to apply the amounts of those accounts thus by him paid, and extinguished, as a set-off against the amount due by him to the Government upon the survey account prior to the 30th of June, 1853, as given in evidence in this cause."

The defendants took a bill of exceptions. The verdict was in favor of the United States for $10,531 43, on which the

court gave judgment, and thereupon the defendant below took this writ of error.

Mr. Bradley and *Mr. Carlisle*, of Washington city, argued the cause here for the plaintiff in error, and contended that there was no evidence upon which the hypothetical charge of the court below could be sustained. The record will be searched in vain for a single word to justify the declaration that "prior to the 30th of June, 1853, King paid himself and other creditors out of moneys raised by him on orders or drafts drawn upon the Government, and by him made known to the Government to have been drawn, for the accounts to which the said payments were in fact applied." On the contrary, all the evidence repels such a theory.

As sureties can only be held for money lawfully placed in an officer's hands, the time when he received it from the Government, or under its authority, is the period on which the liability of the sureties depends. With the date of drafts and transactions between the officer and his correspondents or bankers the Government has no concern; and as they create no charge upon the Government, and are merely private and unofficial acts, they cannot be employed by the Government to charge the sureties.

From the statement of the account, as exhibited by the Government, it appears that King had public money in his hands to make the disbursements credited in his account. It was his legal duty to apply it to that purpose, and there is no evidence that it was not so applied.

The Treasury transcripts show that the payments credited to King must have been made out of the public money in his hands, and could not have been made out of moneys raised on his draft to Meigs.

Mr. Bates, Attorney General, and *Mr. Coffey*, Assistant Attorney General, for the United States.—King owed the Government at the time he drew upon the Treasury, and the Government was in debt to him for his salary, and to other persons on other accounts. With the money he obtained on his

draft while he was still in office he paid those debts. Now his surety claims a credit for the payments made by King between the 31st of May and the 30th of June, and denies the right of the United States to charge him with the very money out of which those payments were made. The defendants in error submit that the payments referred to are in justice and in law applicable, not to the debt which King owed to the Government for moneys previously in his hands, but to the satisfaction of the debt which he incurred by drawing on the Treasury the bill in favor of Meigs, which was afterwards accepted and paid.

The evidence that Meigs cashed the draft, and that King got the money on it and used it, or as much of it as was necessary for the purpose mentioned, is proved by abundant evidence. Certainly it cannot be said that there was not evidence enough to justify the court in submitting it to the jury.

The requisition could not have been drawn in favor of Meigs for any legal or good reason, unless to reimburse him for moneys which before that time he had advanced to King. The letter of King dated the 31st of May, 1853, shows that the money to make the payments which were, in fact, made during the next month could be got only on his draft.

It being unquestionable as matter of fact that King did receive the $20,000 before he retired from office, why are his sureties not as liable for that as for any other moneys received by him from the Government? Can it make any difference that he received the money through a draft from Meigs, and not directly from the Treasury, or that Meigs did not get the money until the 9th of July? To answer this in the affirmative would be to open an easy door to official dishonesty.

The condition of the bond is, that the officer "shall continue truly and faithfully to execute all the duties of the said office according to law." It is broken if he draws for money while he is in office, and receiving it afterwards, refuses to account for it. It has been held that where a collector was chargeable with duty bonds given while he was in office, his sureties and not his successor were entitled to a credit for money paid on them after his term expired. *United States* vs.

Eckford, (1 How., 262.) And why? Because the money thus paid was in consequence of the officer's act while he held the office. On the same principle he and his sureties should be liable for money which he receives after he goes out, in consequence of acts done while he was in.

King's sureties had no right to expect that the money would be withheld because he was going out of office; for, *first*, he had already received the money; and, *secondly*, the Government is not bound to endanger the public interests for the protection of a surety. *United States* vs. *Kirkpatrick*, (9 Wh., 735;) *United States* vs. *Van Zandt*, (11 Wh., 184;) *Dox* vs. *P. M. General*, (1 Pet., 323.)

Mr. Justice NELSON. This is a writ of error to the Circuit Court of the United States for the District of Columbia.

The suit was brought by the United States upon the official bond of Samuel D. King, Surveyor General of the public lands of the State of California, against Joseph Bryan, one of his sureties, for moneys received by the principal in the course of the execution of the duties of his office, and which he has not accounted for. The bond was executed on the 29th of March, 1851.

The plaintiff gave in evidence several Treasury transcripts, by which it appeared that, on 30th June, 1853, when King's term of office expired, which was the end of the second quarter of that year, there was a balance due him to an amount exceeding three thousand dollars, although at the end of the first quarter there was a balance against him of some $14,000. But there appeared, also, on the debit side, charged to him, three Treasury warrants, each dated July 9, 1853—one of $10,000, another of $6,500, and the third $3,500, making an aggregate of $20,000, and which sum, if properly chargeable against the sureties, would leave a balance due the plaintiff of $10,531 43. As these warrants bore date on their face, after the expiration of the term of office, which was, on the 30th June, 1853, unexplained, they were of course not so chargeable.

The plaintiff assumed the burden of this explanation, and for that purpose gave in evidence a requisition by King upon

the Commissioner of the Land Office, dated San Francisco, May 30, 1853, giving, in the communication, a general estimate of the sums of money that would be required to meet his disbursements for moneys due in the first quarter of the year 1853, and to become due in the second quarter. These estimates correspond with the sums for which the three Treasury warrants of the 9th July were drawn. A letter also accompanied the estimates and requisition, explaining somewhat at large the grounds of the estimates, and the necessity for the amount required. They were received by the Commissioner in this city on the 25th June following. The requisition of King contained a request that the drafts of the Treasurer for the advance of the moneys called for should be made in favor of Charles D. Meigs, cashier of the American Exchange Bank in the city of New York.

It was in pursuance of this requisition, and letter accompanying the same, that the three Treasury warrants of the 9th July were drawn for the $20,000; and on the 11th of the month the Treasurer drew at sight upon the Assistant Treasurer in the city of New York three bills in favor of Charles D. Meigs, corresponding in amount with the Treasury warrants.

The plaintiff also proved that the Commissioner of the Land Office, on the 30th June, had given notice to Meigs that he had on that day made a requisition in his favor at the request of King for the $20,000. This referred to the requisition of the Commissioner on the Treasury Department for the advance of the money, and in pursuance of which, doubtless, the Treasury warrants and drafts in favor of Meigs, already referred to, were afterwards drawn. It will be observed, that the Treasury warrants were made out nine days, and the drafts drawn in favor of Meigs eleven, after the office of King had expired.

Upon this state of facts, the court below instructed the jury, if they should find from the evidence that King, the Surveyor General, prior to the 30th June, 1853, paid certain amounts due to himself and other creditors of the Government upon the accounts and salaries, office rents and contingencies, given in evidence, out of moneys raised by him upon orders or drafts drawn upon the Government, and by him made known to the

Government to have been drawn for the amounts to which the said payments were in fact applied, and that said drafts were paid and said amounts reimbursed to him by the Government after the 30th June, 1853, then it is not competent for the defendant to apply the amount of those accounts, thus by him paid and extinguished, as a set-off against the amount due by him to the Government upon the survey account prior to June 30, 1853, as given in evidence.

In order to understand these instructions, it is necessary to refer to some facts already stated, namely, that, according to the Treasury transcripts given in evidence by the plaintiff containing a statement of the accounts between King and the Government, debit and credit, down to the 30th June, 1853, when his office ceased, a balance appeared in his favor of some $3,000; but a requisition had been made by him on the 31st May, 1853, during his term of office, on the Commissioner, for the $20,000, and in pursuance of which the three Treasury warrants were made, and drafts drawn in favor of Meigs, of New York, after the office had expired, and that, at the end of the first quarter, the balance was against King.

Now, in view of these facts, the instructions are, if the jury find that King, prior to the 30th June, 1853, (the period when his office expired,) paid the money for which credits were given in the Treasury transcripts, out of money raised by him upon orders of drafts drawn upon the Government, and which were made known by him to the Government to have been so drawn, and that these drafts were paid and the money disbursed by the Government after the 30th of June, 1853—that is, after his office expired—then it was not competent for the defendant, the surety, to apply the moneys thus paid by King as a set-off against his indebtedness to the Government on the survey account prior to the 30th June, 1853, referring, doubtless, to the balance due by him at the end of the first quarter.

In other and shorter words, if King drew on the Government during his term of office, and notified the Government of the fact, and raised money upon these drafts, by which he obtained the credits in the Treasury transcripts, and the Government paid the drafts even after King went out of office, then the

surety could not claim these credits, and would be liable for all moneys in his hands at the expiration of his term not thus applied.

The first observation we have to make upon these instructions is, that they were given to the jury upon a purely hypothetical case, unsupported by any evidence to which it could be applied.

There is no evidence in the case to show out of what particular moneys King paid the expenses of his office during the period referred to, and obtained the credits, or that he raised any money for this purpose by means of drafts on the Government, or that the Government paid any drafts drawn by him before or after the expiration of his term of office. The only evidence relating to this subject is the requisition of King upon the Commissioner of the Land Office, already referred to, dated the 31st May, 1853, and received the 25th June by the Commissioner, five days before his office expired, and the Treasury warrants of the 9th July, and drafts in favor of Meigs of the 11th for the $20,000. These furnish all the evidence of any drafts upon, or disbursements by, the Government in the case.

The next observation we have to make is, that there is no evidence in the case that the Government has advanced any portion of the $20,000 to King, either during his term of office or since. It is true, the Treasury warrants were made out and charged to him, and drafts drawn in favor of Meigs by the Treasurer upon the Assistant Treasurer in the city of New York for this amount on the 9th and 11th of July, 1853. But there is no evidence that these drafts ever came to the hands of Meigs, or that the Assistant Treasurer was ever called on to pay, or ever paid them. For aught that appears, the money may still be in the Treasury. These are facts which, if material to charge the surety, should have been proved, and not left to presumption or conjecture; and even if we were to presume all this, and believe, without proof, that the Government transmitted the drafts to Meigs, and that he received the moneys from the Assistant Treasurer, there is no evidence that the money came to the hands of King. We are not prepared to

admit that the transfer of moneys by the Government to the agent of the officer is equivalent to a transfer to the officer himself, so far as the liability of the surety is concerned. The fidelity or responsibility of the agent through whom the Government may see fit to thus transfer the public money, is not within the obligation assumed by the surety in the official bond. He is responsible only for all moneys which came into the hands of the officer while in office, and which he subsequently fails to account for and pay over. 12 Wh., 505.

The questions, therefore, put to the jury as to drafts drawn by King upon the Government, and of moneys having been raised upon them during his term of office, out of which he had obtained the credits given in the Treasury transcripts, and of the subsequent payment of the drafts by the Government, were entirely hypothetical, unsupported by the evidence in the case, and, of course, whichever way found, laid no foundation for the inference stated in the instructions, that the surety could not claim these credits, and would be liable for all moneys in the hands of the officer at the expiration of his office not thus applied.

As the case has been very imperfectly tried, and must be sent down for another trial, we shall make no observations concerning it in anticipation of the facts that may be proved on the part of the Government, except to say, that in order to charge the surety for the default of the officer, it must appear from the evidence that the public moneys in question came into his hands, either in point of fact or in judgment of law, previous to the time when the term of office expired.

Judgment reversed, venire de novo.

GREGG *vs.* TESSON.

1. A patent for a quarter section of land subject to French claims, confirmed by Congress in 1823, is not a good title for a lot within the quarter section, as against a French claimant under the confirming act whose survey of the lot was made in 1840 and his patent issued in 1846.
2. But if the patentee of the quarter section was in possession of part and claimed the whole of it under his patent for more than seven years before suit brought, and the claimant of the lot was not in possession at all, the party so in possession is protected by the Illinois statute of limitations.
3. If the title to land be cast by descent on a married woman, her husband having a life estate, may bring ejectment; if he fails to do so for seven years, the statute of limitations will bar his right; and if he and his wife convey their title to another, their grantee cannot recover after the expiration of seven years from the time when the limitation first began to run against the husband.
4. Whether a child born in Missouri before the marriage of her parents, when the civil law prevailed in that Territory, can inherit the lands of her father in Illinois, where the common law was in force at the time of the father's death—*Quere?*

Writ of error to the District Court for the northern district of Illinois.

By an act of Congress approved May 15, 1820, all persons claiming lots in the village of Peoria, Illinois, which had just been destroyed by fire, were required to furnish to the register of the land office at Edwardsville a written notice of their respective claims before the first of the ensuing October. It was made the duty of the register by the same act to report to the Secretary of the Treasury a list of these claims, with the substance of the evidence in support of them, and his opinion of their value; and this report the Secretary of the Treasury was directed to lay before Congress for its determination. On the 3d of March, 1823, Congress confirmed, under certain restrictions, to the persons in whose favor the register at Edwardsville had reported, the lots they claimed. Among the persons

entitled to lots under the act of 1823 was Antoine Roi, who claimed lot 33, the same which is now in dispute. A survey was made of these lots in 1840, and a patent issued to the legal representatives of Roi in 1846. On the 20th of June, 1849, Mary Gendron, claiming to be the only heir of Antoine Roi, by a joint deed of herself and Toussaint Gendron, her husband, conveyed the lot in question to Tesson and Rankin for the consideration of fifty dollars, and in 1854 Tesson brought this ejectment in the Circuit Court against Richard Gregg, who claimed the same lot and held adverse possession of it under Charles Ballance. Ballance had obtained a patent in 1838 for a fractional quarter section of land, comprehending the lot afterwards patented to Roi. But Ballance's patent was expressly "subject to the rights of any and all persons claiming under the act of Congress of 3d March, 1823." Ballance and his tenants had been in possession of the fractional quarter section patented to him about twenty years at the time when this suit was brought.

That Mary Gendron was the lawful child and heir of Antoine Roi was matter of fact asserted on one side and denied on the other. She was born in Missouri, in 1814, and there was some evidence that Antoine Roi acknowledged her and married her mother about three months after her birth.

The court instructed the jury that the title of Ballance, under his patent, did not include, and was not intended to include, the lot in controversy, if there was anybody capable of taking it under the act of 1823; that until there was a survey made and approved of these French lots, the statute of limitations would not begin to run; that Ballance's possession of a part of the quarter was not in law a possession of the whole, and the statute, therefore, did not protect him against the plaintiff's better right; that Mrs. Gendron was legitimate in Missouri if her parents were married there after her birth, and being legitimate in Missouri, she could inherit her father's land in Illinois.

These rulings being excepted to, and the verdict and judgment being for the plaintiff, the defendant took this writ of error.

Mr. Ballance, of Illinois, for the plaintiff in error

Mr. Browning, of Illinois, contra.

Mr. Justice NELSON. This is a writ of error to the Circuit Court of the United States for the northern district of Illinois.

The action was ejectment, brought by Tesson against Gregg, to recover possession of lot No. 33, the claim of Antoine Roi, as reported under the confirmatory acts of Congress of 15th May, 1820, and of 3d March, 1823, in respect to French inhabitants or settlers of lots in the village of Peoria. A survey was made of these lots in 1840, and a patent issued to the representatives of Antoine in 1846.

The plaintiff claims under this title.

The defendant sets up a right to the possession, under Charles Ballance. The latter claims title under a patent from the Government, in 1838, of the southwest fractional quarter section nine, in township 8 north, range two east, in the district of lands subject to sale at Quincy, Illinois. This patent contained the following saving clause: "Subject, however, to 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.'" The French lot No. 33, in question, confirmed by the act of 3d March, 1823, is within this fractional quarter section above patented to Ballance.

If the question in the case stood upon the mere paper title to this lot, there could be no great difficulty in disposing of it; for, although the patent of Ballance is the elder, yet, as he took it subject to the French confirmed title, the latter must prevail.

But this court held, in the case of *Bryan* vs. *Forsyth*, (19 How., 334,) for the reasons there given, that the patent of the fractional quarter section to Ballance, though subject to the saving clause mentioned, afforded ground in favor of persons claiming under it of an adverse possession within the statute of limitation of Illinois, against the French lots, after the sur

vey and designation of them in 1840. Several cases have arisen since that decision in the State courts of Illinois, and also in this court, and the doctrine of the case of *Bryan* vs. *Forsyth* adopted and applied. *Landers* vs. *Kidder*, (23 Ill. R., 49;) and *Williams* vs. *Ballance*, (ib., p. 193;) *Mechan* vs. *Forsyth*, (24 How., 175;) and *Gregg* vs. *Forsyth*, (ib., 179.)

The act of limitations of Illinois, Rev. Stat., 349, sec. 8, protects the claim of persons 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 question contested upon this statute, since the case of *Bryan* vs. *Forsyth*, has been, as to the nature and character of the possession of Ballance, and those claiming under him, required by the statute, which is essential to constitute the bar. On the part of those claiming under the French lots, it has been insisted, that the *actual residence thereon* for the seven years must have been on the French lot; and that an actual residence on the fractional quarter section, under and by virtue of the patent to Ballance, claiming at the time the whole section, did not raise an adverse possession, within the act. But the court of the State of Illinois, in the two cases above referred to, adopted the broader construction; and this court agreed with them in the two cases already referred to.

As we understand the cases, both in this and in the State court of Illinois, they hold that the actual residence of Ballance, by himself or by his tenants under him, upon the fractional quarter section, cultivating and improving the same, and claiming title to the whole under his patent, for the period of seven years since the survey and designation of the French lots in 1840, operate as a bar to the right of entry, within the true meaning of the seven years' statute of limitations. These cases have been so often before the court, and so fully considered heretofore, that we shall do no more than state the principles decided in them.

The suit in this case was commenced in 1854, and the actual residence of Ballance, by himself and tenants, began in 1834, and continued down to the commencement of the suit.

A point has been made on the part of the plaintiff, that the statute cannot run against him, on the ground that, at the time of the commencement of the adverse possession, Mrs. Gendron, the daughter and heir of Antoine, and through whom the plaintiff derives title, was a feme covert, and within the saving clause of the statute of limitations; and that the seven years has not elapsed since she parted with her title. But the answer to this is, that her husband, who joined her in the deed, is still alive; and as he had a life estate in the lot, and was competent to sue for the recovery of it, the statute ran against him; and the purchaser from or through him took the estate subject to the operation of this limitation. Mrs. Gendron and husband conveyed in 1849, while the statute was running against the husband. The grantee, or those coming in under him, should have brought the suit for the husband's interest within the seven years. After the termination of the life estate, the person holding the interest in remainder may then bring a suit to recover the estate of the wife.

The defence in this case was placed, also, upon another ground, which it may be proper to notice. Mrs. Gendron, through whom and her husband the plaintiff derives title, was the daughter of Antoine, the French claimant, and was born, as alleged, some three months before the marriage of Antoine to the mother—was, therefore, illegitimate, and incapable of inheriting the lot from her father, who, it is supposed, died about 1820. The birth and subsequent marriage, however, took place in the Territory of Missouri in 1814, when the civil law prevailed in that Territory, which legitimates the child by a subsequent marriage. But as the lands in question are situate within the State of Illinois, in which State, and in the Territory preceding it, the common law, as alleged, prevailed at the time of the death of Antoine, and the descent cast, it is claimed, within the case of *Birth Whistle* vs. *Vardell*, (5 Bar. & Cross, 430, and 7 Clark & Finnelly, 895,) which held that a child born in Scotland, where the civil law prevails, and which was legitimated by the subsequent marriage of the parents, could not inherit lands in England, as, in case of an inheritance at common law, the child must be born within lawful

wedlock. Mrs. Gendron did not inherit the lot in question, and hence the deed from her and husband conveyed no title to the plaintiff.

How the law may be on this subject in the State of Illinois we do not deem it material to inquire, as the evidence in the case is not sufficiently full nor exact to raise the question. The Territory of Illinois was admitted as a State into the Union in 1818. The time of the death of Antoine is not proved; whether during the territorial government, or the State, is uncertain. Until that fact is established, it would be difficult, if not impossible, to determine the state of the law at the time of the descent cast, on the subject.

This question has been one of great difficulty in England, but was ultimately decided against the Scotch heir, with the concurrence of all the judges. The difficulties attending the question in this country, when it arises, will not be diminished, unless settled by the express law of the State within which the lands may be situate.

As it will be seen, on reference to the instruction given to the jury, that they are in conflict with the views expressed of the law on the question of adverse possession, the judgment must be reversed, and the case remitted for a venire de novo.

*Judgment reversed and venire facias de novo.**

* Mr. Justice *Nelson* also delivered the opinion of the court in the case of *Gregg* vs. *Bryant*, a writ of error to the District Court, southern district, Illinois, in which the same points were decided in the same way as in *Gregg* vs. *Tesson*

NELSON ET AL. *vs.* WOODRUFF ET AL.
WOODRUFF ET AL. *vs.* NELSON ET AL.

1. A bill of lading in which the carrier acknowledges that the goods have been received by him in good order is *prima facie* evidence of that fact; but if a loss occurs, he is not precluded from showing that it proceeded from some cause which was not apparent at the time he received them.
2. When goods in the custody of a common carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he is not responsible.
3. The carrier is not responsible for leakage of a liquid occasioned by the peculiar nature of the article itself, or by secret defects which existed in the casks, but were unknown when they were shipped.
4. Nor is he answerable for diminution or leakage from barrels, though they be such as are commonly used for similar purposes, if the barrels become unfitted to hold their contents by causes connected with the nature and condition of the article which the carrier could not control.
5. Hog's lard having certain qualities which make its leakage from ordinary barrels or wooden casks unavoidable in hot weather, a person who ships it in that condition from a southern port for a long voyage, through low latitudes in midsummer, takes upon himself the risk of all loss necessarily proceeding from that cause.
6. In an admiralty suit, an objection to the deposition of a witness, on the ground of incompetency from interest, must be made at the hearing; it comes too late if it be deferred until the argument.
7. Where a deposition was taken by a person who was both commissioner and clerk of the court, and the proctor of the opposing party knew that the deposition had been taken, it cannot be ruled out on the ground that it was not sealed up, that the preliminary proof of materiality was not made, or that notice of its being filed was not given.

These suits were brought in the District Court for the southern district of New York. They were cross-libels *in personam* on the same maritime contract, and the evidence was

identical in both cases. Nelson and his associates were the owners of the ship *Maid of Orleans*, on board of which a cargo of lard in barrels and tierces was shipped at New Orleans for New York in July, 1854, consigned to Woodruff & Co., at New York. The ship-owners demanded the freight according to the bills of lading, and the consignees claimed damages for the non-delivery of a large part of the lard, which, they alleged, was lost by leakage during the voyage. The question of law raised was, whether the contract of affreightment, under the circumstances, made the ship-owners responsible for the loss.

On the hearing in the District Court, the deposition of the master of the ship was offered by the owners and objected to by the counsel of the consignees on the ground, 1. That no preliminary proof had been made of the witness's materiality. 2. That it was not sealed up; and, 3. That no notice was given of its being filed; but the commissioner who took the deposition being the clerk of the court, and the consignees' proctor knowing that the deposition had been taken, the court (Betts, J.) overruled the objections. At the argument, another objection was taken to the same deposition that the witness was interested. The court held that it was too late; it should have been made on the hearing.

After argument and consideration of the whole evidence in both cases, the District Court dismissed the libel of the consignees, and decreed in favor of the ship-owners for the freight; and these decrees being afterwards affirmed by the Circuit Court, the consignees took appeals to the Supreme Court.

Mr. Dean, of New York, for the appellant, cited: Angel on Carriers, § 210; *Warden* vs. *Greer*, (6 Watts, 424;) Abbot on Shipping, 346; 1 Greenl. Ev., §§ 207, 305; *Dezell* vs. *Odell*, (3 Hill, 221;) *Welland Can. Co.* vs. *Hathaway*, (8 Wend., 483;) *Bradstreet* vs. *Herren*, (2 Blatch., 116;) *Bank of Pittsburg* vs. *Neal*, (22 How., 96;) *Goodman* vs. *Simonds*, (20 How., 363;) *Clark* vs. *Barnwell*, (12 How., 272;) *Ellis* vs. *Willard*, (5 Selden, 529.)

Mr. Goodman, of New York, for the appellees, cited: 3

Kent, 8th ed., 289; Angel on Carriers, §§ 211, 214; *Clark* vs. *Barnwell*, (12 Howard R., 272;) *Downe* vs. *Steam Nav. Co.*, (5 Ellis & Bain, 195;) *Trow* vs. *Vermont C. R. R. Co.*, (24 Vermont, 487;) *Hawkins* vs. *Cooper*, (8 Carr & Payne, 473;) *Button* vs. *Hudson R. R. Co.*, (18 N. Y. R., 248;) *Clark* vs. *Barnwell*, (12 How. R., 272;) 2 Boulay Paty. Droit., Commercial, 309, 313; *The Ship Martha*, (1 Olcott Ad. R., 140;) *Bradstreet* vs. *Herren*, (1 Abbot Ad. R., 209;) *Terega* vs. *Popp*, (ib., 397;) Angel on Carriers, § 211; 3 Kent, 8th ed., 289.

Mr. Justice WAYNE. We are now about to decide two appeals in admiralty from the Circuit Court U. S. of the southern district of New York.

They are substantially cross-actions, and the testimony is the same in both. They have been fully argued, and shall be discussed by us with reference to the rights and liabilities of the parties growing out of their pleadings, and the bills of lading upon which they rely.

William Nelson and others are the owners of the ship Maid of Orleans, and they have filed their libel to recover from John O. Woodruff and Robt. M. Henning, survivors of the firm of James E. Woodruff & Co., eighteen hundred and thirty-eight dollars eleven cents, with interest from the fourteenth of August, eighteen hundred and fifty-four, for the freight, with primage and average accustomed, of a large quantity of lard which was carried in their ship, in barrels and tierces, from New Orleans to New York, for which the master of the ship had affirmed for the shippers in two bills of lading; that they had been shipped in good order and condition, &c., and were to be delivered in like good order at New York, the dangers of the sea and fire only excepted, to James E. Woodruff & Co., or to their assigns, freight to be paid by him or them at the rate of $1 15 per barrel, and $1 50 per tierce, with five per cent. primage and average accustomed; and the libellants declare that the lard, upon the arrival of the ship, had been delivered to the consignees, and was accepted by them.

To this the respondents filed a joint answer, admitting the shipment, claiming that they had been made in conformity

with the bills of lading, affirming the arrival of the ship in New York, and averring that only a part of the lard had been delivered, and allege that the agents of the libellants had taken so little care in receiving the casks and tierces on board of the ship, and in the stowing and conveyance of them, and in the discharge of them at New York, that a large quantity had been lost, about sixty thousand pounds, of the value of six thousand dollars and upwards, and that the loss or diminution in its weight had not been lost by the perils of the sea, or from fire. They further answer, that, relying upon the bills of lading, the consignees, James E. Woodruff & Co., had made large advances upon them to the shippers of the lard. They then declare that, for cause stated by them, they were not liable to pay the freight and primage, but that the owners of the ship were answerable for the loss of the lard, and liable to pay them more than six thousand dollars, and claim to recoup against the freight and primage so much of the damage as they may have sustained as will be sufficient to liquidate and discharge the amount claimed for freight. When they answered the respondents, they at the same time filed a libel against the owners of the ship, propounding substantially the particulars of what was in their answer to the libel—so much so, that we will not repeat them; indeed, there is no addition to it, nor will it be necessary to set out again the articles of their answer to the libel filed against them, for they are a repetition of their own original libel, except in one particular, upon which the controversy was made exclusively to turn by the counsel on both sides in the argument of the case before us. That was, that the lard, as such, had not been in good order for shipping when put on board of the ship, inasmuch as it was then in a liquid state, and had in that condition been put into barrels and tierces, which, with the heat of the weather then and during the passage to New York, had started them, and had caused the leakage complained of before and during its transportation, and that the leakage had not been caused by any neglect or want of care of them, either in shipping the lard at New Orleans, or on the passage thence to New York, or in stowing it in the ship, or in the discharge of it in New York. There is

much testimony in the record in respect to the effect of heat and barreling of lard in a liquid state, in producing more than usual leakage; but it was urged in the argument that such proofs were inapplicable to this case, as the bills of lading affirmed that the lard, when shipped, was in good order and condition, and were conclusive against the allowance of any inquiry being made, or to any other causes of loss or damage than such as may have been caused by the dangers of the sea and fire.

Such is not our view of the effect of the bills of lading we have now to consider.

We proceed to state what we believe to be the law, and will then apply the evidence to it to determine if this case is not within it.

We think that the law is more accurately and compendiously given by Chief Justice Shaw, than we have met with it elsewhere. In the case of *Hastings* vs. *Pepper*, (11 Pickering, 43,) that learned judge says: "It may be taken to be perfectly well established, that the signing of a bill of lading, acknowledging to have received the goods in question in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage the presumption of law is, that it was occasioned by the act or default of the carrier, and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." The same has been decided by this court in two cases as to the burden of proof, where the goods shipped were said to have been impaired in quality by the dampness of the vessel during passage to her port of delivery. *Clark* vs. *Barnwell*, (12 Howard, 272;) *Rich* vs. *Lambert*, (12 Howard, 347.)

The rule having been given, our inquiry now will be, whether or not the owners of the Maid of Orleans have brought them-

selves within its operation, so as to be exempted from all liability for the loss of the lard, by having proved satisfactorily that it had been occasioned by causes existing in the lard, but not apparent when it was shipped, to the extent of the injury which those causes would produce upon the barrels and tierces which contained it; or, in other words, that the causes of the loss were incident to lard when operated upon by a heated temperature of the sun acting directly upon it, or when it shall be stored, and an excessive natural temperature has occasioned its liquefaction. It is alleged that the loss of this shipment was sixty thousand pounds less that the quantity shipped. It must be admitted to be too large for it to be brought under the rule which exempts the carrier from liability for the ordinary evaporation of liquids, or for leakage from casks, occurring in the course of transportation. The implied obligation of the carrier does not extend to such cases, any more than it does to a case when the liquid being carried, if it shall be conveyed with care, is entirely lost from its intrinsic acidity and fermentation, and bursting the vessel which contains it; as it was adjudged that the carrier was not liable when a pipe of wine during its fermentation burst and was lost, it being proved that at the time it was being carried carefully in a waggon commonly used for such a purpose. *Farra* vs. *Adams*, (Bull. N. P., 69.)

We do not know where an adjudged case can be found illustrating more fully the exemption of a carrier from responsibility for loss or leakage from the peculiar and intrinsic qualities of an article, and the inquiries which may be made upon the trial in respect to them, and into the causes of a loss from effervescence and leakage, and we may say for its discriminating rulings, than that of *Warden* vs. *Greer*, (in 6 Watt's Penn. Rep., 424.) Mr. Angel has made all of us familiar with it in his Treatise on the Law of Carriers, ch. 6, 215. The action was brought against the owners of a steamer on account of loss on a cargo of two hundred barrels of molasses, which was affirmed in the bill of lading had been received in good order and well conditioned. Witnesses were examined as to the trade in that article on the western waters; the nature of mo-

lasses and the trade in it; as to its fermentation in warm weather; the effect upon it by heat in its removal and carriage in a dray; also as to the means usually taken to prevent loss of it, and injury to the barrels from the expansive force of fermation; and as to the loss of it from those means and causes on a passage from New Orleans to Pittsburgh; and as to the loss by leakage or warm weather, according to the condition of the barrels in which it might be shipped. It was determined in that case that the defendants were not answerable for loss occasioned by the peculiar nature of the article carried at that season of the year, nor for leakage arising from secret defects in the casks, which existed, but were not apparent, when they were received on board of the steamer.

Nor is a carrier responsible for diminution or leakage of liquids from barrels in the course of transportation, though they are such as are commonly used for that purpose, if it shall be satisfactorily proved that the barrels had become disqualified from containing their contents by causes connected with the nature and condition of the article, which the carrier could not control.

Having stated the law as we think it to be, that a bill of lading for articles shipped, affirmed to be in good order and condition, is but *prima facie* evidence of that declaration, and does not preclude the carrier from showing that the loss proceeded from causes which existed, but were not apparent, we will now examine the testimony, to determine if such was not the fact in this case.

The lard was taken from the warehouse, to be put on board of the ship, in a liquid state, in the month of July, during hotter weather—much hotter, all the witnesses say—than is usually felt in New Orleans at that time. This was known to the shippers, to their agent, who made the freight by contract, and to the captain of the Maid of Orleans. They also knew that the lard was in such barrels and tierces commonly used for the shipment of lard. All the barrels and tierces were put on board of the ship, according to contract, as soon as it could be done, after they were carted to the levee where the ship was, except a few barrels, not more than 20 barrels, which

needed cooperage, and they were left on the levee from Saturday evening until Monday morning.

There is no proof of leakage or loss from them by that exposure, than there would have been if those barrels had been put on board of the ship in the bad condition in which they were sent to the levee. Dix, who made the freight engagement in behalf of the shippers, says it was expressly agreed that the lard should be taken on board of the ship as soon as the same was sent to the vessel, to avoid exposure to the sun; and he testifies that the casks containing it were in good order when they were delivered; but anticipating that some of them might not be, a cooper was sent, for the purpose of packing such of them as might not be in good shipping condition; and the witness Shinkle, the stevedore employed to load the ship, says the lard was promptly taken on board as soon as it was taken from the drays, but that there were about fifteen or twenty barrels leaking, which he caused to be rolled aside, and he put them under tarpaulins, to be coopered, and, as soon as they were coopered by the shipper's employees, it was taken. This is the lard, as we learn from another witness, which had been on the levee from Saturday night until Monday morning. Besides, from answers of Mr. Dix to the cross-interrogatories put to him, we learn that he knew nothing of the good order and condition of the casks of lard, as to its cooperage, when they were carried to the levee to be received for shipment, except from the report of those who had done the work. Under such circumstances, the casks put aside on the levee for cooperage, before they could be shipped, on account of their leaking, were not received by the stevedore, to be put on board, until they were put in a fit condition to be shipped. Until that was done, they were at the shipper's risk. We cannot, therefore, allow the fact of the exposure of these twenty barrels to charge the ship with any loss, or to lessen the weight of the testimony that, in receiving and putting the casks into the vessel, it had been done in conformity, as to time, with the engagement made with the agent of the shippers.

The proof is ample, that it was put on board with care, and in the manner and with all the appliances for doing so mos:

readily. It is in proof, also, that the stowage on the ship was good, both as to position and as to its support and steadiness, by dunnage and cantling, and that there had been no disarrangement of the casks, either by storm or rough seas, on the passage of the ship to New York, although she did encounter some heavy weather. Nevertheless, upon the discharge of the lard in New York, the barrels and tierces were found to be in a worse condition, and leaking more, than had ever been seen by either of the witnesses, whose habit and business had made them familiar with such shipments. It appears that the barrels containing the lard were of the same materials, and coopered with hoop-poles, as barrels for such a purpose are usually made.

When the contents of such barrels are solidified, the leakage will be small; when liquefied, larger. All of the witnesses, who know how such barrels are coopered, say so, particularly as to lard in a liquid state, and as to its effect upon the staves and hoops of such barrels when acted upon by the heat or rays of the sun. They know it from observation and experience; science confirms it from the composition of the article. This lard was of a secondary kind, or, as the witness Magrath says, it was a fair lard—not pure at all, but a good average lot, not a first-rate article. The differences in the qualities of lard may arise from a deficiency of oxigen, or from the inferior quality of the fat of the animal from which it is tried, and not unfrequently from a careless and insufficient melting and expression of the best of the animal fat from its membranous parts. Oils, whether animal or vegetable, are either solid or liquid, and, when in the first condition, are frequently termed fats. These fats are more abundant in the animal than in the vegetable kingdom. But whether liquid or solid, they usually consist of three substances, two of which (the stearine-suit and the margarine-pearl) are solid, and the other (elane or oleine) is liquid at ordinary temperatures. They are all from 6° to 9° lighter than water, and their liquid or solid condition depends upon the proportion in which their component parts are mixed. Thus, in the *fats*, the oleine exists in small quantities, and in the liquid oils it is the chief constituent. A certain degree of

heat is necessary to the mixture, for at low temperatures there is a tendency to separation; the stearine and margarine are precipitated or solidified, and if pressed, can be entirely freed from the oleine. The stearine from the lard of swine is easily separable from the oleine, and it is used in the manufacture of candles. The liquid stearine, known in commerce as lard-oil, is used for the finer parts of machinery; but all of the animal fats—such as those from the hog, the ox, the sheep, and horse—have not a like consistency or proportion of stearine in them; when deficient in either, or comparatively small, and tried into lard, they have not that tendency at low temperatures to precipitate and solidify as the stearine and margarine of the fat of the hog has; and being extremely penetrating from liquidity, there has always been a greater loss from evaporation and leakage from the barrels in which they are ordinarily put for transportation than there would be from hogs' lard under the same temperature; in other words, hogs' lard will solidify at a temperature at which those animal fats will not, and, from their liquidity, they escape from the barrels containing them in larger quantity; and that fact has been remarkably verified by the returns of English commerce with Buenos Ayres and Monte Video, in the importation from them of what is known there as horse or mare's grease, tried from the fat of the horse.

From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes, lined with tin, and the article is now carried without loss. And here we will remark, that a distinguished gentleman, thoroughly acquainted with the commerce of our country and its productions, and with its great lard production from the fat of the hog, has made a calculation of the deterioration of the article and the loss of it by leakage from the barrels and casks in which it is now shipped, and his result is, if we would change it for square boxes, lined with tin, that the cost of them would be a saving of the loss now sustained by barrelling it.

We have now shown that the cause of the leakage of lard is

its liquefaction under temperatures higher than those at which it will solidify when not deficient in stearine. One legal consequence from that fact is, that shippers of that article should be considered as doing so very much as to leakage at their own risk when it is in a liquid state, however that may have been caused, whether from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was the higher ranges of heat, through latitudes where the heat would not be less, until the ship had made more than three-fourths of her passage. Such was the case in this instance. When the lard was shipped, the thermometer had indicated for several days, and continued until the ship sailed, a heat of 97°; the ship itself had become heated by it. Her passage was made in the heat of the Gulf Stream until she made the capes of the Delaware, and the witnesses describe the heat of the hold as unendurable upon her arrival in New York.

We have still to show what were the effects of the liquid lard upon the barrels in which it was, and that we shall do briefly by the testimony of several witnesses, and from what we all know to be the additional pressure of an article upon a barrel when liquefied by heat. The pressure from liquid lard is an expansion of its component constituents by heat into a larger bulk than it occupies when solidified, and its elastic pressure distends or swells the barrel which contains it, until the hoops which bind it are slackened, and its staves are started; just as it would be in a barrel containing any other fluid expanded by heat or fermentation. The consequences must be a diminution of the liquid by an increased leakage and evaporation. Now, it so happens that the scientific explanation of the loss of the lard in this instance is verified by the experience of the libellants' and respondents' witnesses. Benzell, a cooper of forty years' experience in New York, in coopering casks of lard from New Orleans to New York, and who coopered this cargo upon its arrival, says the casks were of a good quality, except being slack—that is, hoops started; hoops were loose upon the casks; does not think there is any quality in lard to injure casks, except it will, when liquid, tend

to shrink them; it requires a great deal of care in such a case; pressure increases the difficulty from heat, conduces to press upon the joints, and produces leakage; these casks were fully wooden-bound, but saw them leaking at bilge and at head; coopered four hundred of them. Ward, the city weigher, and who weighed several hundred casks of this shipment, says that they leaked largely; leakage was from loose hoops. Dibble, another weigher of twelve years' experience in the article of lard, says the lard was in a liquid state, like oil. Wright, who was present all the time when the ship was discharging, gives an account of the stowing of the shipment; says the packages or barrels were slack. Samuel Candler, marine surveyor, surveyed the cargo in August, 1854; made seven surveys on cargo and one on hatch; saw the lard when on board of the ship; says it was stowed in the after lower hold in four or five tiers on bilge, and cantling in ordinary way and best; bilge and bilge stowing not so well; went below; it was very hot there; barrels looked fair, but slack; the staves were shrunk; looked all alike; top casks leaked as well as those on the bottom tier; attributes the great loss to great heat and shrinking of the barrels; has surveyed a great many ships laden with lard in hot weather; this cargo could not have been stowed better; recollects more of this cargo because there was so much leakage; nothing stood on the casks, or on the top tier of them, as is afterwards explained; surveyed ship; she had the appearance of having encountered bad weather. Francis J. Gerean, who has been accustomed for thirty years with stowing cargoes, says: I coopered this cargo for libellants, Woodruff & Henning; when the cargo was discharging, two coopers under his direction, one at gangway on deck, the other in the hold of the ship; he saw the lard in the hold before delivered; the hoops were very loose, and the barrels were leaking from sides and heads; intensely hot below; considerably hotter than on deck; leakage from shrinking of packages; the lard was liquid; that tends to shrink; staves and hoops become loose; only chime hoops were nailed; barrels were well stowed; does not think it possible to stow better; ground tier was damaged, as well as he judged; bilge of barrels did not leak.

no barrel rested on a single barrel, but on others. Fisher, a large dealer in lard, grease, and tallow, and who has received them at all temperatures of weather, says lard brought in vessels in hot weather will naturally leak ten pounds out of a package; lard of reasonable quality, in good packages, will leak about the same as oil; thinks putting liquid lard into barrels will not produce leakage as much as pressure of the barrels upon each other, but stores lard in cellar three to five tiers. Several other witnesses in New Orleans concur in stating that it was very hot weather when the lard was shipped, and that when shipped it was in a liquid state. Others, uncontradicted, testify that it was liquid when the vessel arrived in New York.

There is no testimony in the case impeaching the skill and proper management of the ship on the passage to New York, or in the delivery of the lard there, or that there was any part of her cargo of a nature to increase the heat of the ship, or to liquefy the lard, or to alter or shrink the barrels, though the ship's heat, exposed as she had been to the rays of the sun in New Orleans, was higher than that temperature at which lard will solidify; and it consequently continued liquid, from the time it was received on board until its delivery in New York, as the ship, on her way to it, was never in a temperature low enough to solidify it.

All the witnesses who were examined in respect to the shrunken and slackened condition of the barrels when they were discharged in New York agree. Two or three of them say they were in a worse condition than they had ever seen or handled, and attribute the loss to the agency of the melted lard upon the barrels.

The result of our examination of these cases is, that though the owners of the Maid of Orleans could not controvert the affirmance in these bills of lading, that the lard of the shippers had been received on board of their ship in good order and condition, that they have made out, by sufficient and satisfactory proofs, that the leakage and diminution of the lard was owing to existing but not apparent causes, in the condition of the lard, acting upon the barrels in which it was, which are not

within the risks guaranteed against to the shippers by the bill of lading. In conclusion, that the signing of a bill of lading, acknowledging that merchandise had been received in good order and condition, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing that the loss proceeded from some cause which existed, but was not apparent when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. In case of such a loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier; and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible.

We accordingly, with this opinion, affirm the decree of the District and Circuit Courts, in all particulars, dismissing the libel of Jno. O. Woodruff and Robert M. Henning, and also affirm the decree of the Circuit Court, with costs, to the libellants and appellees, Nelson, Dennison *et al.*, in all things expressed in the same.

We have not considered the point made in the argument, deeming it to be unnecessary, relating to James E. Woodruff & Co. having made advances, in a large sum of money, upon the faith of the bill of lading, as they were not made with any intention of acquiring property in or ownership of the lard.

We also concur entirely with the view taken by our brother Betts, of the District Court, upon the objections made to the admission of the deposition of Capt. Dennis, taken *de bene esse* by the libellants.

Decrees of the Circuit Court affirmed.

THE BRIG COLLENBERG—*Lawrence, Libellant; Denbreens et al., Claimants.*

1. A vessel with a perishable cargo, driven by stress of weather out of her course and into a strange port for repairs, is not liable for such injuries to the cargo as are caused merely by the delay of the voyage.
2. The consignee cannot recover against the vessel for the loss thus occasioned to the cargo without showing some fault, misbehavior, or negligence of the master or crew.
3. If the master was justified in putting into a port for repairs—if he used proper diligence in getting the repairs made—if he exerted himself to preserve the cargo under the best advice he could get—and if he was unable to send the cargo forward by another vessel—his conduct is blameless, and the consignee has no claim against the vessel.
4. When some portion of a perishable cargo has suffered by decay without the fault of the master, and was for that reason left behind on the voyage, the ship-owners are entitled to recover for the freight on all that was duly transported and delivered.

This was a libel in the Circuit Court of the United States for the southern district of New York, filed by John S. Lawrence against the brig *Lieutenant Admiral Collenberg*, for damages suffered by a cargo of fruit shipped at Palermo for New York and injured by decay on the voyage. The owners of the vessel denied the right of the consignee of the cargo to recover the damages he claimed, and filed a cross-libel for freight, primage, general and particular average. The District Court dismissed the libel in the first suit, and in the other made a decree in favor of the ship-owners for the freight, &c. This was affirmed by the Circuit Court, and the consignee took appeals to this court in both cases.

The facts are specially stated in the opinion of Mr. Justice *Clifford.*

Mr. Donohue, of New York, for appellant. The claimants are common carriers, and cannot discharge themselves from loss except by the act of God or the dangers of the seas. An-

gel on Carriers, § 87. They must prove the loss occurred by these perils. Angel, 193; 21 Wend., 190. The nature of the cargo being tender, extra care was required on the part of the carrier. Angel, §§ 5 and 6. The facts show that the delay at Lisbon was protracted unnecessarily, and the management of the fruit improper and ruinous to it. The rule is settled, that if any act of the captain is injurious to the cargo or goods of another he cannot say that other damages helped, or that something else would have injured the goods if he had not. If any distinction is to be made in the nature of the damage, he must clearly show what part of the damage occurred entirely without his fault. 18 How., 233.

All the excuses given for the great delay at Lisbon are insufficient and do not agree with the facts. The log-book of the ship shows that the weather was not unfavorable to work; and had it been stormy, the sails, spars and rigging could have been making ashore under cover. The other reasons for delay are no better founded. Add to this the fact that the fruit was placed in a damp storehouse, exposed to the weather, and picked and handled in a fashion certain to induce decay, and the whole case shows gross carelessness on all points.

Mr. Owen, of New York, for appellees. The decree dismissing the libel for loss and damage to the fruit should be affirmed. Beyond question the brig sustained such sea-damage as compelled her to bear away and put into Lisbon to repair. The evidence shows that the repairs were completed with reasonable diligence, considering the stormy weather, the holiday season, which kept mechanics from their work, and the fact that there was no dock in which a ship could lie up for repairs, but only an open roadstead.

If the repairs were not completed with despatch, and if some unnecessary delay occurred in making them, still that is not sufficient to render the vessel liable for the loss of the fruit. There is no allegation in the libel of any such delay, or that the fruit perished from it. *McKinlay* vs. *Morrish*, (21 How., 343.) The fruit had a strong inherent tendency to decay, and, in the absence of positive proof, it may be inferred that it per-

ished from such cause, and not from the delay. The bill of lading excepts tendency to decay. *Wissman* vs. *The "Howard,"* (18 How., 231;) Angel on Carriers, § 210; Story on Bailments, 492 a. The acts of the master respecting the examination and re-assortment of the fruit were proper and within the line of his duty, which was to do all that he could to arrest decay as soon as he discovered it. Angel on Carriers, §§ 160, 210; *Bird* vs. *Croswell*, (1 Miss. R., 81;) *Choteaux* vs. *Leech*, (18 Pa. Rep., 224;) *Lyn* vs. *Fisher*, (12 Miss. R., 272.)

The survey called by the master was in accordance with usage and his legal duty. There is no question that he acted in perfect good faith, and in the exercise of his best judgment, and the vessel should not be held responsible for the damages. The master was the agent of all concerned in reference to the fruit as well as the vessel, and his acts were therefore binding on the owner of the cargo. *Judson* vs. *Warren Ins. Co.*, (1 Story's C. C. R., 342;) Flanders on Shipping, § 173.

On the question of our claim for freight: Having performed the voyage and delivered the cargo according to the bill of lading, the respondent was entitled to his freight upon the portion delivered, notwithstanding some parts thereof were damaged. The items for general and particular average were properly allowed. The bill of lading expressly stipulates for the payment of freight with "average accustomed," by which it is supposed the parties meant the ordinary general and particular average to which the cargo might become subject in the course of the voyage. It is clear that the expenses of wages and provisions from the time of bearing away to Lisbon, at least for the time allowed by the District Court, were for the common benefit of all, which, by the well-settled law in the United States, were to be contributed for in general average. 2 Phil. on Ins., (2d ed.,) 120, 121; Abbot, (5th Am. ed.,) 596, note; *United States* vs. *Wilder*, (3 Sumn. R., 308.) The expenses of unlading, storing, &c., the fruit were incurred for its special benefit, and was therefore a *particular* average; in other words, a *special charge* thereon, which was recoverable in this action. All these expenses were incurred by the master in good faith and in the exercise of his best judgment for

the safety and preservation of the fruit, and the law gave him a lien for reimbursement. *Mut. Safety Ins. Co.* vs. *Cargo Brig George*, (Olcott's Ad. Reps., 89;) 2 Arnould on Ins., p. 953.

Mr. Justice CLIFFORD. These are appeals in admiralty from the respective decrees of the Circuit Court of the United States for the southern district of New York. Both of the suits were founded upon the same transaction, and depend substantially upon the same facts.

One was a suit *in rem* against the brig L. A. Collenberg, brought by the appellant, in which it was alleged that certain merchandise, consigned to the libellant, was shipped at the port of Palermo, on the twelfth day of December, 1855, on board the brig, in good order and condition, and that the master signed bills of lading, agreeing to deliver the same in like good order and condition to the libellant, at the port of New York; and the charge in the libel was, that he had failed to deliver seven hundred boxes of lemons, and two thousand one hundred and fifty boxes of oranges, constituting a large portion of the cargo.

Service of process was waived, and the claimant of the brig appeared, and, by consent, entered into stipulation, both for the costs of the suit and the value of the vessel. They also made answer to the suit, denying the allegations of the libel, and averring that the merchandise mentioned in the bill of lading, except four hundred and fourteen boxes of lemons and oranges, which perished from their own inherent tendency to decay, had been duly transported and delivered to the libellant in like good order and condition as when laden on board, saving, only, the damage occasioned by the perils of the seas, and such as resulted from the natural decay of the fruit.

On the second day of July, 1856, they also filed a cross-libel against the appellant, as consignee of the cargo, to recover the freight for the transportation of the same, in which they alleged that they had fully performed the contract set forth in the bill of lading, and were entitled to have and receive of the respondent, for the freight and primage, including charges, the sum

of twenty-eight hundred and sixty-two dollars and forty-seven cents.

Most or all the testimony was taken in the first suit, but the same was also used, by stipulation, in the cross-libel; and, after a full hearing, the District Court dismissed the libel against the brig, and in the cross-action entered a decree in favor of the libellants for the freight, or so much of the same as was due for that portion of the cargo which had been transported and delivered. Both decrees, on appeal, were, in all things, affirmed in the Circuit Court; and thereupon the present appellant, who was the libellant in the first suit and the respondent in the second, appealed both cases to this court.

It appears, from the pleadings and evidence, that, on the twelfth day of December, 1855, seven hundred boxes of lemons, and two thousand one hundred and fifty boxes of oranges, together with other merchandise not necessary to be specified, were shipped on board the brig, then lying at Palermo, and bound for New York, and that the master signed bills of lading, undertaking to transport the same to New York, and there deliver the same to the appellant, or his assigns, on payment of the stipulated freight, the dangers of the seas and the liability of the fruit to decay excepted.

According to the testimony of the master, the brig, with her cargo on board, sailed from Palermo on the sixteenth day of the same month, but, while pursuing her voyage, she encountered heavy gales; and on the second day of January following the sea broke over the forward part of the vessel, and carried away the jib-boom, the flying jib-boom, and both topmasts, and they were obliged, in the emergency, to cut away the rigging, to clear the jib-boom from the vessel, and get rid of the broken spars. Both topmasts broke off about halfway between the caps and the cross-bars; and they lost in the disaster the mainsail, the two topsails, the gallant-sail, and the spanker. Crippled and disabled as the vessel was, she was obviously incapable of proceeding on her voyage; and, consequently, the master found it necessary to bear away and put into Lisbon for repairs, which was the nearest port. She

arrived off the bar at that port on the fifteenth of the same month, and two days later was able to come to anchor in the roadstead, about a mile from the shore. Vessels arriving at that port are obliged, as the witnesses state, to anchor in the stream, because there are no docks or piers in the harbor to which, in rough weather, they can be moored. On the following day, the master applied to the consul for a survey of the vessel, to estimate damages and cost of repairs, and the survey was ordered on the same day the application was made, but four days elapsed before the persons appointed to make the survey were able to go on board, in consequence of the storm, and the roughness of the sea.

They made their report on the twenty-second day of the same month, specifying the nature of the repairs required, and estimating the cost; and on the same day the master of the brig, after consulting with the consul upon the subject, applied to him for an examination and survey of the fruit, and it was immediately ordered. Persons experienced in the business were accordingly appointed by the consul for that purpose, and, on the thirtieth day of the same month they went on board and made the necessary examination. By their report it appears that they found the boxes containing the fruit properly stowed in the vessel, and the place of stowage properly ventilated; but, upon opening a certain number of the boxes, they ascertained that some of the fruit was rotten, and other portions of it were beginning to decay. Under those circumstances, the surveyors directed that the boxes should be discharged and placed in a well-aired storehouse, until the vessel could be repaired and made ready to resume her voyage. That order was carried into effect, and on the ninth day of February following the surveyors made a second examination of the boxes, and, finding that the measures previously recommended and adopted were insufficient to accomplish the object, they directed that the boxes should be opened, and the unsound fruit entirely separated from that which was sound and fit for use. Competent and experienced persons were accordingly designated and employed for that purpose; and the testimony shows, that in executing the order, they condemned and threw

away as worthless an amount of the fruit equal to four hundred and fourteen boxes. Those persons entered upon the performance of their duty on the day they were designated, and on the nineteenth day of the same month the surveyors by whom they were selected made a report, approving what they had done for the preservation of the fruit. Throughout this period the repairs upon the vessel were being executed, and, on the twenty-fifth day of the same month the surveyors appointed to examine the brig reported that the repairs were completed, and that she was in a condition to prosecute her voyage. Three days afterwards the master executed a bottomry bond to raise money to defray the expenses incurred in executing the repairs and in carrying out the measures recommended for the preservation of the cargo; and, on the fourth day of March, 1856, the brig sailed for New York, but in consequence of bad weather she did not arrive at her port of destination until the twentieth day of May following. Much of the fruit repacked at the port of distress, in the meantime, had deteriorated, and some of it had become worthless; but it is not pretended that there was any fault in the stowage, or any negligence or want of care on the part of the master during that part of the voyage. On the arrival of the vessel, all of the fruit, except what had been condemned and thrown away, as before sated, was duly tendered to the consignee, but he refused to receive it, claiming that the loss and deterioration were chargeable to the misconduct of the master at the port of distress.

1. It is conceded that the injuries received by the brig on the second of January fully justified the master in bearing away and running into Lisbon as a port of distress to refit the vessel and rendering her capable of continuing and prosecuting the voyage. That concession was very properly made, as the evidence is full to the point and entirely satisfactory. Fault is not imputed prior to the disaster, either to the master or owners; and it would seem that the charge could not be sustained, if made, as the evidence shows that the vessel was staunch, the cargo properly stowed, and every reasonable precaution taken to give it sufficient ventilation.

None of these matters were drawn in question at the argument, but it was insisted by the appellant in the suit against the vessel, that the repairs were not executed with proper diligence, and that the discharge of that portion of the cargo in question, and the opening of the boxes and the taking out and repacking the fruit, were improper and injudicious, and had the effect to promote and increase the inherent tendency to decay. Much testimony was taken on the first point, and in some of its aspects it is conflicting, but when considered in connection with the circumstances, as explained by the witnesses who were present and saw the difficulties which occasioned the delay, it is quite obvious that the proposition cannot be sustained. Some twenty-five or thirty other vessels put into that port about the same time for the same purpose, which created an unusual demand for the labor of mechanics. According to the statements of the witnesses, the mechanics there were few in number, and not very efficient; and what added to the difficulty was, the circumstance that it was the carnival season, and consequently the mechanics refused to work during the festivals and holidays, which for a time included two or three days in the week, and on one occasion they "struck" for higher wages, and refused to work at all for several days. Among the vessels that put into the port for repairs at that time were two bound to New York, and neither of them sailed till after the brig; and all the witnesses who were on the ground, and have any knowledge of the actual circumstances, agree substantially that the repairs were made as soon as they could be in that port at that time. Witnesses, residing in New York, express the opinion that the repairs might have been executed in much less time, and their testimony undoubtedly is correct as applied to any commercial port in the United States; but the master in this case was obliged to refit his vessel in the port of distress where she was anchored, and it must be assumed that those who witnessed his conduct have the best means of judging with what fidelity he performed his duty.

2. Two vessels only were in port bound to New York, and both of those were there for the purpose of repairs, and of course were not in a condition to bring forward the cargo of

the brig. Unable, as the master was, to employ another vessel and send the cargo forward, it was certainly his duty to take all possible care to preserve it. Looking at the whole evidence, it is clear that he sought the best advice that he could obtain, and followed it faithfully; and, notwithstanding the opinion expressed by certain witnesses to the contrary, we are by no means prepared to admit that he did not pursue a judicious course to prevent the fruit from perishing. In view of all the facts and circumstances, we think the point is without merit, and it is accordingly overruled. 3. Having come to that conclusion, one or two remarks in regard to the suit brought by the owners of the vessel will be sufficient. They having established the fact that the loss and decay of the fruit were not occasioned by the fault of the master, were clearly entitled to recover for the freight on all that portion of the cargo that was duly transported and delivered. No question was made as to the amount in the Circuit Court, and it is not pretended that the question ought to be opened here in case the other decree should be affirmed. After a careful consideration of the evidence, we have come to the conclusion that the decision of the Circuit Court was correct, and the respective decrees are accordingly affirmed, with costs.

Carondelet *vs.* Saint Louis.

1. Where suit is brought in a State court by a town claiming part of its common under the act of Congress passed in 1812, and the defence is that there was a survey in pursuance of the federal statute which estops the plaintiff to set up his claim, this court has jurisdiction to re-examine the case, and reverse or affirm the judgment.
2. The true construction of the act of 1812 is, that it granted to the inhabitants of the towns and villages therein named, (and to Carondelet among others,) their lands used in common for pasturage, but reserved the authority to define the limits of those common lands by a survey.
3. A survey made by a Spanish officer under instructions from the Spanish Lieutenant Governor, previous to 1800, which proceeded no further than the running and marking of the northern line of the common, and did not ascertain the southern or western lines, amounted to nothing.
4. Until a survey was made on the west and south the villagers had no title on which they could sue, because their grant attached to no land, nor could a court of equity establish a boundary.
5. If no legal or binding survey was made of the Carondelet common after the act of 1812, then the title remains to this day what it was at the passage of the act, a vague claim for six thousand acres, without boundaries and incapable of being judicially maintained.
6. But if a survey of all the lines was made in 1817 by a deputy surveyor of the United States, under instructions from the Surveyor General, which was traced and remarked by another deputy in 1834, this was a binding survey, though it did not follow the northern line made by the Spanish officer.
7. It being established in the court below as matter of fact that such survey was made and approved in 1817 and 1834, and that the corporation of Carondelet had in various modes recognised, accepted, and held under it, the State court was right in rejecting the claim of the town for lands lying outside of it.

Writ of error to the Supreme Court of Missouri.

This proceeding was commenced by the city of Carondelet against the city of Saint Louis in the Saint Louis Land Court

by a petition, in which the plaintiff (Carondelet) set forth that it was a Spanish town for more than thirty years prior to December 20, 1803, (the date when that country was ceded to the United States,) and the inhabitants of the town for several years before and after 1803 used and possessed a certain tract of land adjoining the town as commons; that between the years 1796 and 1800 the northern line of the Carondelet common was surveyed and marked by Don Antonio Soulard, the Spanish surveyor for the province of Upper Louisiana, pursuant to an order of the Governor, which was published at the church door of Saint Louis; that this line commenced on the bluff bank of the Mississippi at the Sugar Loaf Mound, four miles south of St. Louis, and two miles north of Carondelet, and running thence westwardly; that the line was distinctly marked; that the land south of it continued to be used as commons by the inhabitants of Carondelet until December 20, 1803, and was claimed by them as such until June 13, 1812, on which day it was confirmed to them as their absolute property by an act of Congress. The petition complains that Saint Louis, in fraud of the rights of Carondelet, procured in 1831 a survey to be made of the common lands of the former city, whose southern line is nearly a mile south of the Sugar Loaf Mound, whereas it should have followed the line established by the survey of Soulard, and the respective possessions of the parties in Spanish times. The petition further avers that Saint Louis is in the actual possession of the land covered by the two surveys, and prays judgment that the survey of 1831, so far as it interferes with the claim of Carondelet, be set aside, and the plaintiff be put in possession.

A verdict and judgment were rendered in the Land Court in favor of the defendant, and the cause was removed by writ of error to the Supreme Court of Missouri, where it was reversed and the record remitted, with an order for a *venire facias de novo*. On the second trial the verdict and judgment were again in favor of the defendant, and another writ of error was taken to the Supreme Court of the State, where the judgment was affirmed. A very full report of the case as it stood in the State court will be found in 29 Missouri Rep., 527.

The act of Congress of June 13, 1812, confirmed to the inhabitants of certain towns and villages (among others Saint Louis and Carondelet) "the rights, titles, and claims to town or village lots, out-lots, common-field lots, and commons in, adjoining or belonging" to them, which were "inhabited, cultivated, or possessed" prior to December 20, 1803, "according to their several right or rights in common thereto." The same act made it the duty of an officer to run an out-boundary line so as to include the commons of each village. In 1816 Congress provided for a survey of all claims confirmed by previous acts. Another act, similar in its tenor and object, is dated in 1824, and in 1831 the United States relinquished all their interest in these common lands to the inhabitants of the respective towns and villages, to be held by them in full property and for their own use, according to the laws of Missouri.

Saint Louis was incorporated in 1809, and Carondelet in 1832, both by the County Court. The limits of Saint Louis were described as extending southward to Sugar Loaf Mound. The bounds given to Carondelet extended 2,640 yards on the Mississippi, and west to Fourth street, but did not include the north common, or the fields, or the south commons.

In 1816, or 1817, a survey was made by Elias Rector, a deputy surveyor, under instructions from his superior, apparently in pursuance of the law passed in 1816. In 1834 Joseph C. Brown, another deputy, under similar instructions, retraced and marked the survey of Rector. Brown's work was approved by the Surveyor General. His survey ascertained and marked all the lines of the common land appurtenant to Carondelet, and found its contents to be 9,905 acres, or about 11,642 arpents. The authorities of Carondelet were present at the making of this survey by agents specially appointed for that purpose. They procured a copy of it and directed it to be framed for the benefit of the town. In 1839 they ordered all the commons north of the River des Peres to be leased. The lots on the extreme north were made fractional by Brown's line, and they were leased as fractions. A plot of these subdivisions, filed by themselves in the recorder's office, calls for the Saint Louis common on the north. In several suits be-

tween the town and other parties, Carondelet gave Brown's survey in evidence as the basis of her title. When an attempt was made in the War Department of the United States to annul the survey, Carondelet protested and petitioned Congress to confirm their right according to the survey. The city of Saint Louis in the mean time (1836) proceeded to subdivide her common lands into lots down to the line of Brown's survey and sold them, but not without a formal notice from a committee appointed by Carondelet that the lands were claimed by the latter corporation. This suit was brought in 1855.

The Supreme Court of Missouri held that the evidence given in the Land Court proved the acceptance of Brown's survey by the authorities of Carondelet; that it could not be accepted in part and rejected in part, and that such acceptance estopped Carondelet from claiming any land outside of the survey.

Mr. Hill, of Missouri, for plaintiff in error. The case involves the construction of the act of Congress of 1812, under which Carondelet claims. This act gives the land specifically and unconditionally to the inhabitants of Carondelet. Their title was perfect without a survey, and therefore it could not be divested by the survey of 1834. *Bird* vs. *Montgomery*, (6 Mo., 511;) *Chouteau* vs. *Eckhart*, (2 How., 421;) *Guitard* vs. *Stoddard*, (16 How., 494;) *West* vs. *Cochran*, (17 How., 416;) *Carondelet* vs. *McPherson*, (20 Mo., 192;) *Carondelet* vs. *St. Louis*, (25 Mo., 448;) *Milburn* vs. *Hortez*, (23 Mo., 532;) *Staniford* vs. *Taylor*, (18 Howard.) The out-boundary survey directed by the act of 1812 has been held by the Supreme Court of Missouri not to be conclusive against the claimant of a common-field lot outside of such survey. *Gurno* vs. *Janis*, (6 Mo., 330;) *Page* vs. *Scheibel*, (11 Mo., 167;) *Schultz* vs. *Lindell*, (24 Mo., 567.)

Whether Brown's survey was a survey of all the land confirmed to the inhabitants of Carondelet was a question of fact, but the State court decided it as matter of law, and defeated the act of Congress by giving to the survey an effect which it was not entitled to have. Moreover, Brown's survey was illegal and fraudulent, because it was not made under in-

structions from the Commissioner of the General Land Office, as the act of 1824 requires. Besides, the survey of 1821 did include the land in dispute; there was never any appeal from it; it was duly made, and is conclusively binding on the United States. *Minard's Heirs* vs. *Massey*, (8 How., 294,) which is relied on as sustaining the view of the State court as to the effect of the acceptance of the survey of 1834, has no application to this case.

The Spanish law was in force in Upper Louisiana when this right originated, and continued in force until 1816. By that law the commons could not be alienated without the consent of Congress. 5 Partidas Law, 5, tit. 5. And the same rule prevails under the common law. *Cincinnati* vs. *White's Lessee*, (6 Peters, 432.) The express authority, therefore, of the Missouri legislature was necessary to enable the trustees of the inhabitants of Carondelet to divest their title by accepting a survey.

Mr. Shepley and *Mr. Gardenhire*, of Missouri, for defendant in error. This court has no jurisdiction to revise the judgment of the State court in a case like the present. The validity of no treaty statute or authority, exercised under the United States, is drawn in question. Certainly there is no decision against the right asserted under the United States. The plaintiff claims title to certain lands by virtue of an act of Congress. The court says: "True, the land *was* yours; your title under the law is not to be denied; but you are estopped to show that title against this party, because you have done acts which make its assertion inconsistent with equity and good conscience." This is no more deciding against the right claimed under the statute than it would be to hold that the plaintiff's title was divested by a sale or barred by the statute of limitations. *Montgomery* vs. *Herndez*, (12 Wh., 129;) *Matthew* vs. *Zane*, (7 Wh., 164;) *Harris* vs. *Denny*, (3 Pet., 292;) *Crowell* vs. *Randall*, (10 Pet., 391;) *Nelson* vs. *Lagow*, (12 How., 98;) *Moreland* vs. *Page*, (20 How., 522.) These cases show that this court will not and ought not to revise the judgment of a State court on any but the questions of federal

jurisdiction enumerated in the 25th section of the act of 1789.

The town of Carondelet had no title to the land in dispute by the act of 1812 without the survey, which the same act, as well as subsequent acts, authorized and required. Pasturing cattle or cutting wood were acts which the villagers might do upon lands not appurtenant to the town as commons. A survey was necessary, otherwise it must be supposed that Congress gave to the towns an absolute title to lands, the limits of which might be defined at any future time by parol evidence of the extent to which cattle grazed and men cut wood. Unless the right of Carondelet was defined by the survey, it is not defined at all, and the grant is void for uncertainty. The contradictory and uncertain testimony of the witnesses shows the value of this principle and the necessity of adhering to it.

But here was a survey not only unappealed from, but accepted by many acts of the party who now attempt to repudiate it. The binding effect of a survey of commons under the acts of 1812, 1824, and 1831, upon a party by whom it is accepted, has been established by many decisions of this court. *Chouteau* vs. *Eckhart*, (2 How., 344;) *Le Bois* vs. *Brammell*, (4 How., 456;) *Minard* vs. *Massey*, (8 How., 301;) *Guitard* vs. *Stoddard*, (16 How., 494;) *Willet* vs. *Sandford*, (19 How., 82;) and other cases. It is undoubtedly true, as decided in *Guitard* vs. *Stoddard*, that an individual may recover a common-field lot without a survey; but if he asks for a survey under the act of 1812, has it made by proper authority, assents to it, and accepts it, can he afterwards claim beyond it?

What is alleged to have been a survey of this common in 1821 was not a survey. But Rector's, in 1817, has all the marks of an authentic and approved survey that can be found on any survey of that time. Brown's, made in 1834, was regularly approved by the surveyor general; was adopted by the United States; was accepted by Carondelet, and the parties are mutually estopped to deny its legal validity.

The objection of the plaintiff in error that the court decided the facts connected with the survey as matters of law is not

well founded. The jury found the facts, and the court applied the law by saying that the facts created an estoppel.

The survey having been made and accepted, it is a survey of the whole claim, conclusive and binding as a whole. The reasoning of the State court in this case and in that of *Carondelet* vs. *McPherson*, (20 Mo., 192,) exhausts the subject, and shows clearly how inequitable any other principle would be.

Mr. Ewing, of Ohio, in reply. The denial of jurisdiction in this court rests on no solid foundation. The whole case, in all its points, is made up of the construction of laws of the United States, and acts of Federal officers and of other parties having reference thereto. The Supreme Court of Missouri says in express terms that the case must be governed by the acts of Congress and the laws of Missouri. Both parties assert title under the same acts of Congress, and the actual title depends on the construction of those acts. This gives jurisdiction. *Matthews* vs. *Lane*, (4 Cr., 382;) *Ross* vs. *Doe*, (1 Pet., 664;) *Buel* vs. *Van Ness*, (8 Wh., 324;) *Lytle* vs. *Arkansas*, (22 How., 202.) In *Mackay* vs. *Dillon*, (2 How., 372,) this court reversed a judgment of the State court because it gave to a survey properly admitted an effect to which it was not entitled.

On the passage of the act of June 13, 1812, the title of Carondelet was perfect to all the land which she possessed prior to 1803 by well defined and undisputed boundaries, and that title was not defeasible by any subsequent survey of a Federal officer. *Mackay* vs. *Dillon*, (4 How., 446;) *Guitard* vs. *Stoddard*, (16 How., 508.)

But if a survey be necesary to make valid, or if it be effectual to destroy the title under the act of 1812, then the survey of Brown in 1821 is invoked in favor of Carondelet. Until that survey was set aside there could be none after it.

If titles resting on a survey are once defined thereby, such survey cannot, after a long time, be *disregarded* by the United States, and a new survey made, without considering it or setting it aside, and thus shake or destroy the titles which it had

defined. If this process of demolition could be begun at the end of fourteen years, and consummated at the end of thirty-five years, there is nothing to protect title thus acquired, and a cloud may hang over it forever; the process may be repeated without limit as to number or time.

But the court below held Carondelet *estopped*, under their construction of the laws of the United States, from asserting title to the land in controversy. This point assumes the *title* in Carondelet, and asserts that good faith or some rule of law forbids her to set it up. As between Carondelet and St. Louis the court below did not find an *estoppel*, except through the United States, by virtue of the survey of Brown in 1834, and the acts of Carondelet under it. Indeed, it was impossible that they should so find, for Carondelet resisted from first to last the seizure of her property as fully and efficiently as she was able to resist. And it is difficult to perceive a moment of time when the United States offered and Carondelet accepted the survey of 1834. It was not an approved survey until March, 1855—a month after this suit was brought. To say that Carondelet was *estopped* by the action of the Secretary of the Interior, on the matter then *sub judice* in our courts of law, is absurd. Carondelet, at the moment this *action* which is to *estop* her took place, was prosecuting her title before a court of justice, and she has not for a moment ceased or delayed its prosecution in consequence of the *action* of the Secretary of the Interior, but has continued, and still continues, to resist and repel it. If the United States has forever power over these titles, to enlarge, diminish, destroy, or transfer them, without the consent of the grantee, be it so. It is, in effect, so decided in this case by the court below; but let it not be called by a false name. It is the mere exercise of power, not *estoppel;* and such is the decision in deed, though not in name. It arises out of "the statutes relating to this subject," and not out of any principle of the common or civil law. The error of the court below is in making the survey of 1834 bar the title of Carondelet to lands within her well-defined boundaries, defined by lines and corner-stones, by fences, and by regular survey in 1821. *Jourdan* vs. *Barvalt*, (4 How., 179.) No matter *how* the

court held the title barred by the survey of 1834, whether by direct annulment or by the expedient of an estoppel, it is that survey which is to destroy the title, and it was irregular and illegal.

Mr. Justice CATRON. This cause is brought here by writ of error to the final decision of the Supreme Court of Missouri. The proceeding in the court below was according to the State practice, being by petition partly in the nature of a common law action, and also corresponding in other parts to a bill in equity. One issue was presented by the pleadings which was submitted to a jury. The petition states, that, between the years 1796 and 1800, the northern line of the Carondelet common was surveyed and marked by Soulard, the proper Spanish surveyor for Upper Louisiana, pursuant to an order made by the Lieutenant Governor of the province; that the line was run and duly marked in presence of certain of the inhabitants of St. Louis and Carondelet, and published at the church door. It commenced at the bluff bank of the Mississippi river, at a mound called the Sugar Loaf, about four miles south of St. Louis, and two miles north of Carondelet, and run westwardly to the northeast corner of the common-fields of Carondelet; that monuments were established at each end of the line, and a temporary fence was made of brush-wood along the same; and that the inhabitants of Carondelet held and occupied as their northern boundary of the common up to said line, from 1796 until December 20th, 1803, and continued to claim to said line to the time of passing the act of June 13, 1812, by which act it is averred the petitioners took an absolute and fee simple title to the land bounded on the north by Soulard's line. This is the legal title set up, and a recovery of possession is claimed to that line.

The equity asked to be enforced against St. Louis is, that, in 1831, the Surveyor General of Missouri and Illinois caused a survey to be made of the supposed commons of St. Louis, locating the southern boundary of the St. Louis common about one mile south of the Sugar Loaf, and of Soulard's line above described; that, to this line St. Louis claims title and holds

possession as part of its common, and which survey is declared to be in fraud of the rights of the inhabitants of Carondelet, and throws a cloud over their title as confirmed by the act of 1812, and they pray to have it set aside and held for naught, because it was made by the Surveyor General without any warrant or authority of law. Defence was made under the general issse.

A question has been raised whether this court has jurisdiction to re-examine the decision of the Supreme Court of Missouri.

The 25th section of the judiciary act provides, that where there is drawn in question the construction of any statute of the United States, and the decision is against the title set up and claimed under the statute, the case may be re-examined in this court, and the decision reversed or affirmed.

Here, title was set up and claimed by Carondelet to a part of its common, according to a true construction of the act of 1812. The claim depends solely on this act of Congress, taken in connection with Soulard's survey; and the decision being adverse to the claim, jurisdiction exists.

Soulard run a single short line from the mound to the east side of the common-fields, and did nothing further. He may have obtruded on the claim of common appertaining to St. Louis, and so the department of public lands must have adjudged, as a different line was adopted. At that early day the land was of too little value to attract attention to this proceeding.

The act of 1812 granted to the inhabitants at the place known as Carondelet their lands used in common, for the pasturage. But the power was reserved by Congress to the Executive authority to survey this common property, by including it in an out-boundary survey, reserving from the common property such portion as the Government saw proper to withhold for military purposes, which was done.

A tract of some nine thousand acres was claimed by this hamlet of people lying south of the village, as commune property, with a comparatively small exception. The southern portion was wholly undefined; it was in the condition of Cere's

claim, investigated by this court in the case of *Minard's Heirs* vs. *Massey*.

Had the out-boundary line been run according to the reserved power in the act of 1812, the boundary of the common would have been established, there being no other claims to be included. Until a survey was made on the west and south, the villagers had no title to the common on which they could sue, because their grant attached to no land, nor could a court of equity establish a boundary. This court so held in the case of *West* vs. *Cochran*, (17 How., 416.) The case is different, under the act of 1812, as to town lots and out-lots, as there stated. Such lots, and the possession of them, could be shown and identified, as matter of evidence. Ib., p. 416. The proposition is, of necessity, true, as respects all grants of specific tracts of land. If there be no boundary, the grant is vague, and cannot be identified, and the grantee takes nothing. The survey here was the completion of the title, although it succeeded the act of granting the land. It defined the grant.

In opposition to this doctrine, it is insisted that, by the act of 1812, a title in fee was taken, and that no public survey was necessary to give title. Such is the established doctrine of this court, as will be seen by the case of *Chouteau* vs. *Eckhart*, and *Bissell* vs. *Penrose*.

The first of these cases involved the St. Charles common; it had been officially and carefully surveyed, and the boundaries marked by Soulard, the Spanish surveyor. 2 How., 350. No question of boundary was involved in the controversy; and in the case of *Bissell* vs. *Penrose*, (8 How.,) there had been a private survey, which was filed with the board of commissioners, as descriptive of the land claimed, and which was held to have been reserved from location by a New Madrid certificate. It is, however, conceded, in the opinion of the court and in Mr. Justice *McLean's* dissenting opinion, that if no marked boundary had existed, the confirmation would have been vague, and the opposing entry valid.

This being the condition of the Carondelet common south of the village, a survey and line-marks entered into the title, and were necessary to *create* one; as to the survey, the land

granted must attach. To this end, Elias Rector, a deputy surveyor, in 1816 or 1817, under instructions from the Surveyor General at St. Louis, made a survey of the Carondelet common, fixing the upper corner at the west bank of the Mississippi river, about a mile below and south of the Sugar Loaf Mound; thence running westwardly to the common-fields, southwardly with them so far as they extended; and then completed his survey below the village and fields. On the west and south the lines adjoined public lands, and on the east the tract was bounded by the Mississippi river. It has many lines and corners. The public lands and private claims lying north, west, and south of Rector's survey had to be connected with it, for the purpose of ascertaining the fractions in the townships lying adjoining; and for this purpose, the Surveyor General, in 1834, ordered Joseph C. Brown, a deputy, to trace and remark the lines of Rector's survey, and connect them with the public lands and private claims. This was carefully done; the line marks of Rector's survey were found, and it was remarked. Under Rector's survey, thus identified by Brown's resurvey, Carondelet has claimed title, and now holds in fee a very large portion of its common lands. Its contestation has been as vigorous to uphold Rector's survey on the south as it has been to overthrow it on the north. It must be admitted, that if, when Rector was sent into the field to survey the village common, he had reported to the Surveyor General that, after beginning at a certain point on the river, he had run a mile west, and made a second corner at the fields, and there broke his compass, and did nothing more, that such a survey and return would have amounted to nothing. And this is all that Soulard did, acting under similar general instructions from the Spanish Lieutenant Governor with those given to Rector by the Surveyor General. Both were directed to survey the common, and make due return of their work. No instructions were given where either should begin, or how he should proceed afterwards. The correctness of the survey was to be ascertained, and the work approved by higher authority.

It is objected that the field-notes of Rector's survey were not platted or recorded, and were found in an obscure box in

the Surveyor General's office, and that, in fact, there never was an approved survey. Wm. Milburn, who was a clerk in the office as early as 1817, and had been Surveyor General, proves this objection to be groundless. But suppose it was true; then how does the title of the plaintiffs stand? Soulard never made a survey that any authority did or could recognise, as one of the common; if Rector's be a fiction, and Brown's remarking equally void with the survey he traced, then the Carondelet common has no boundary on the north, west, or south, and stands as the village title did when the act of 1812 was passed, which was a vague claim set up by the villagers for 6,000 acres before the board of commissioners; and to which quantity Mr. Secretary Steuart ordered them to be held, but gave no directions how the land should be laid off; and the matter having been brought to the consideration of Secretary McClelland, he adjudged, and properly, that Rector's survey and Brown's remarking of it concluded the Government, and bound the corporation of Carondelet to the whole extent of the survey.

This proceeding having the features of a suit in equity, and also of an action at law to ascertain the better title in one action, and the defendant having relied on the general issue to sustain the defence, offered Rector's survey in evidence, to prove the bounds of the land granted by the act of 1812. It was established as matter of fact, that the survey had been made, and the field-notes duly returned, and that Brown remarked the lines 1834. It also appeared, as matter of fact and of law, from the records of the General Land Office, by the decisions of the officers there, that the department administering the public lands had settled the question in regard to the regularity of Rector's survey, its due return, and approval. And the jury having found that the corporation of Carondelet had, in various modes, recognised, accepted, and held under Rector's survey, as identified by Brown in 1834, we are of opinion that the State court properly rejected the claim set up by the petition, and order the judgment below to be affirmed.

Judgment of the Supreme Court of Missouri affirmed.

HODGE *vs.* COMBS.

1. If one person constitutes another his "general and special agent to do and transact all manner of business," this does not necessarily authorize the agent to sell stocks or other property of the principal.
2. If the agent sells public stocks under such vague and indefinite authority, it is at least necessary for the purchaser, when his title comes in controversy, to show that he bought in good faith and paid a fair consideration.

Appeal from the Circuit Court of the United States for the District of Columbia.

Leslie Combs brought his bill in the Circuit Court against John L. Hodge, administrator of Andrew Hodge, deceased, William L. Hodge, and James Love, complaining that Love, having in his hands certain bonds of the Republic of Texas which belonged to the plaintiff, sold and transferred them for his own benefit, and without authority or consent of the plaintiff, and that he, the plaintiff, had since learned that they were in possession of and claimed by the other defendants. The bill prays that the defendants be restrained from receiving any money on the bonds, and that the bonds be surrendered to the plaintiff as the true owner, and for further relief.

The answer denies all the main facts set forth in the bill, asserts that Love had authority to make the transfer, and that the plaintiff has no title or just claim to the bonds.

When the cause was first heard the Circuit Court dismissed the bill, but that decree was reversed by the Supreme Court on appeal, and the record remanded for a further hearing. 21 How., 397. Afterwards a decree was made below that the bonds be surrendered to the plaintiff. From this decree the present appeal was taken by the defendants. At the last hearing the evidence was the same as on the first, except the paper embodied in the opinion of Mr. Justice *Grier*, which was not produced until after the cause had been remanded.

Mr. Reverdy Johnson, of Maryland, for the appellants. The

power of attorney, dated the 13th February, 1840, takes the case out of the principle decided on the former appeal. It is a general power, and gave the attorney all the control over the bonds which the principal himself could have exercised.

Mr. Bradley, of Washington city, for the appellees. The instrument relied on is wholly insufficient to justify the tranfer of the plaintiff's stock. By the law of Texas it could be transferred only on the books of the stock commissioner. 1 Tenn. R., 334. A general authority like this is not sufficient for any special purpose. Paley on Agency, 2; 15 East., 408. If it were, it would authorize the attorney to sell all the property of his principal, or to apply for a divorce in the name of his principal if he had a wife living in Texas.

But even if the paper were sufficient, the defendants have failed to come within the requirements of the law in other respects. This court has decided that they must show the consideration paid to the attorney for the bonds; and they have not done so.

Mr. Justice GRIER. This case was before this court at December term, 1858, and may be found reported in 21 Howard, 397. It was then remanded to the Circuit Court, with directions to allow the parties to amend their pleadings, and take further testimony.

The important question of the case was, whether Love had any authority to transfer the Texas bonds of Combs, and whether Hodge, who claimed them, had given value for them.

This court, in remanding the case, there say: "It appears that the plaintiff did not direct the sale or transfer of the stock in question, and that they were not disposed of on his account; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love."

The defendants were thus required to establish two facts in order to support his defence: first, a sufficient power of at-

torney to Love to convey the stock; and, secondly, payment of a *bona fide* consideration by Hodge.

Of the latter of these he has given no evidence at all; and of the former, a paper which, as a power of attorney, may be construed to confer almost any or no power. It is brief and comprehensive, and is as follows:

"I, Leslie Combs, do hereby constitute and appoint James Love, of Texas, my general and special agent to do and transact all manner of business in which I may be interested there, hereby ratifying and confirming the acts of my agent as fully as if done by myself.

"Witness my hand and seal, the 13th day of February, 1840.

"LESLIE COMBS. [SEAL.]"

It is clear, from the correspondence between the parties to it, that Combs, by this agency to "transact all manner of business," never supposed that he had authorized his agent to sell his property, and apply the proceeds to his own use. Nor did the agent so construe it till it became necessary to find an excuse for his abuse of his trust.

On the first trial of this case the respondent did not produce this very vague and carelessly drawn instrument as his authority for selling the stock, but relied on a blank endorsement of the payee upon the bonds. No prudent man would accept a title to property executed by an attorney in fact, under a power in such very general and equivocal terms; a man may have "a general and special agency to transact all manner of business," without necessarily including therein a power to sell. If it had appeared that this paper had been presented to the treasurer of Texas as a power of attorney to Love to transfer the stock on the books, and if a transfer had been made on the faith of its sufficiency to Hodge, who had paid a valuable and full consideration, he would have presented a case which might have called for a liberal construction of this vague and indefinite instrument. But as none of these facts appear, we are not called upon to speculate on the possible construc-

tions this paper might be constrained to yield under other circumstances. It is sufficient to say, that, by the previous decision of this court, the defendant was permitted to amend his pleadings in order to prove two facts, both of which were necessary to constitute a good defence. The testimony to support one of them, to say the best of it, is doubtful, and the other is wholly without proof.

Decree of the Circuit Court affirmed.

MAGWIRE *vs.* TYLER ET AL.

1. Surveys under confirmations of Spanish titles in the Upper Louisiana country are, in regard to their correctness, within the jurisdiction of the Commissioner of the General Land Office, and that officer has power to adjudge the question of accuracy preliminary to the issuing of a patent.
2. The Secretary of the Interior has the power of supervision and appeal in all matters relating to the General Land Office, and that power is co-extensive with the authority of the Commissioner to adjudge.
3. The Secretary, in the exercise of his supervisory powers, may lawfully set aside a survey made under a confirmed Spanish grant, order another to be made, and issue a patent upon it.
4. Where the construction of the acts of Congress, defining the powers of the Secretary of the Interior, is drawn in question in a State court, and the decision is against the title set up by maintaining the validity of the Secretary's decision, this court has jurisdiction to revise the case on writ of error.

This case came up on writ of error to the Supreme Court of the State of Missouri. It was commenced in the St. Louis Land Court, (equity side,) by petition and summons, agreeably to the code of Missouri. The plaintiff, John Magwire, claimed four arpents by four of land lying in the county of St. Louis, of which the defendants, Mary L. Tyler and others, were wrongfully in possession. The petition prayed a decree for title in them—for possession--for an account of profits, and an injunction against waste. The defendants answered at length,

denying the material facts set forth in the petition, and asserting that they were rightfully in possession. The Land Court heard the cause, found the facts specially, and made a decree in favor of the defendants, dismissing the petition, which was affirmed afterwards by the Supreme Court of the State, and the plaintiff took this writ of error. What the facts in dispute were, and how they were found by the court of original jurisdiction, will appear by reference to the opinion of Mr. Justice *Catron*. The defendants in error moved to dismiss the writ for want of jurisdiction, and the court heard the argument on that motion, and upon the errors assigned by the plaintiff in the judgment of the State court at the same time.

Mr. Ewing, of Ohio, for plaintiff in error. The two confirmations were connected in the same concession and included in one survey. That survey was recognised by the United States and acquiesced in by the parties for more than fifteen years. It vested an inchoate legal title in both according to their respective interests. It never was appealed from. Though the patent was irregular, yet, having issued, the legal title attends it. *Kissell* vs. *St. Louis*, (18 How., 22;) *Elliott* vs. *Pierson*, (1 Pet., 341.) But it did not affect the *equitable* rights of parties under the confirmation and survey. No appeal lay to the Secretary of the Interior. The Surveyor General is alone responsible for it, and he acts under no directions but those of the law and the judgment of the commissioners who confirmed the title. The survey of 1851, under which the patent issued, was a gross violation of right; it was made under the order of the Secretary, who had no authority against the expressed opinion of all the officers who had authority. This court has decided, and it is not denied, that the plaintiff cannot sustain ejectment against the patent. *West* vs. *Cochran*, (17 How., 416.) *Wilcox* vs. *Jackson*, (13 Pet., 517.) But the equity of the plaintiff (and that is what he now claims) was complete by the confirmation and survey.

This court has jurisdiction to review the State court in a case like the present.

Brazeau claims an equitable *title* to a specific tract of land,

described in his bill. He claims it under a statute of the United States, and the acts of public officers under that statute; and the decision of the State court was *against his title.* This gives jurisdiction; and it is quite immaterial whether it was decided "*upon a question of fact or law.*" *Lytle* vs. *The State of Arkansas*, (22 How., 202, 203;) *Chouteau* vs. *Eckhart*, (2 How., 372;) *Mobile* vs. *Eslava*, (16 Pet., 234;) *Martin* vs. *Hunter's Lessee*, (1 Wh., 357–8–9;) *Smith* vs. *The State of Maryland*, (6 Cr., 280.)

Mr. Hill, of Missouri, and *Mr. Stanton*, of Washington city, for defendants, claimed that the legal merits of the case were against the plaintiff on many grounds.

1. The confirmation to Brazeau was void, not being within the act of Congress.

2. If not void, Brazeau's representatives are concluded by the patent.

3d. The patent of 1852 was conclusive and regular, being founded on what was in fact a resurvey of Soulard's survey.

4. Brazeau's grant was unauthorized because it came from the Lieutenant Governor, who had no power to make it; it was not definitely located; there was no survey nor plat of it on record.

5. A court of equity, after this lapse of time, cannot change the rights recognised heretofore, and especially where it will disturb the possession of innocent purchasers after the lands have greatly risen in value.

6. The plaintiff, who claims under Pierre Chouteau, is estopped by the boundary line established between Labeaume and Chouteau in 1799.

7. This case is settled by the decision in *West* vs. *Cochran*, (17 How., 416.) The plaintiff has no right to go into equity and there claim that his land shall be located where the legal title cannot be located.

But this court has no jurisdiction. It must appear from the record, either expressly or by necessary intendment, that some question which this court has a right to re-examine has been decided by the State court, otherwise the writ must be dismissed. *Medbury* vs. *Ohio*, (24 How., 414;) *Crowell* vs. *Ran-*

dall, (10 Peters, 368;) *McKenney* vs. *Carroll*, (12 Peters, 66;) *Ocean Insurance Company* vs. *Polly*, (13 Peters, 157;) *Coon's Lessee* vs. *Gallaher*, (15 Peters, 19;) *Armstrong* vs. *Treasurer, &c.*, (16 Peters, 281;) *Fulton* vs. *McAfee*, (16 Peters, 149;) *Commercial Bank* vs. *Buckingham's Executors*, (5 Howard, 317;) *Smith* vs. *Hunter*, (7 Howard, 738;) *Lawler* vs. *Walker*, (14 Howard, 149;) *Robertson* vs. *Coulter*, (16 Howard, 107.)

Mr. Justice CATRON. In 1794, Joseph Brazeau had granted to him, by the Lieutenant Governor of Upper Louisiana, a tract of land, four arpents in front by twenty arpents deep, which extended in a N. N. west course, from the foot of the hill where stands the Grange de Terre, ascending to the vicinity of Stony creek, bounded on one side by the bank of the Mississippi; on the opposite side by the public domain; and on the southern side the tract was bounded by the concession to the free mulattress Esther, made in 1793.

In 1798, Brazeau sold and conveyed to Labeaume part of his concession. The deed includes four arpents, "to be taken from the foot of the hill or mound commonly called the Grange de Terre, by twenty arpents in depth, bounded by the Rocky branch on the extremity opposite the said mound; reserving to myself (says Brazeau's deed) four arpents of land, to be taken at the foot of said mound, in the southern part of the aforesaid tract; selling only sixteen arpents in depth to the said Labeaume."

In 1799, Labeaume applied to the Governor, and got his tract of 4 by 16 arpents enlarged, including the land conveyed to him by Brazeau, extending north to the Rocky Branch, calling for twenty arpents in depth. This enlarged tract the Governor ordered Soulard to survey for Labeaume, and to put him into possession; which the surveyor did, in April, 1799.

Labeaume applied to have his claim confirmed by the board of commissioners, and, in 1810, it was confirmed for 356 arpents; and at the same time, acting on Brazeau's concession of 1794, the board confirmed to him his 4 by 4 arpents, adjoining Labeaume's tract on the south.

The board ordered that Labeaume's concession should be

surveyed, in conformity to the order of survey made by the Lieutenant Governor; and that Brazeau's tract of sixteen arpents "should be surveyed, agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume." This survey was to be made conformably to the reservation in the deed, and that reservation was at the foot of the mound.

Patents were ordered to be issued to the parties respectively; but, owing to litigation before the department of public lands and in the courts of justice, between the parties claiming the reservation, and the proper mode of surveying the tract, was not settled till 1852, when the surveys were approved, and patents issued to each of the parties, locating the southern boundary of Brazeau's claim at the foot of the mound, and the opposite line, adjoining the southern boundary of Labeaume, four arpents further north, at an old ditch. Brazeau's representatives refused to accept the patent for the sixteen arpents, and caused it to be recalled at the General Land Office. His claim, therefore, stands before the court as it existed in 1810, when the board of commissioners confirmed it as valid.

The assignees of Brazeau brought an action of ejectment, to recover possession of 4 by 4 arpents above Labeaume's southern line, and within his survey; but this court held, that the power to survey and fix definite boundaries, and issue a patent for Brazeau's tract, was a sovereign power, reserved to the executive branch of the Government, and that a court of justice had no jurisdiction to locate the claim. *West* vs. *Cochran*, (17 How.)

The unsuccessful party then filed his bill in a State Circuit Court, and insists that equity can do what was declared could not be done at law, on the assumption that the court only decided in the former case that Brazeau's incipient but equitable title would not sustain an action of ejectment.

In the year 1817, "by authority of the United States and under the direction of the Surveyor General for the district of Illinois and Missouri," the tract of land confirmed to Brazeau was surveyed by Joseph C. Brown, a deputy surveyor, conjointly with Labeaume's enlarged tract. The surveyor certifies that he had "surveyed for Louis Labeaume two tracts in

one: the one confirmed in his own name for 356 arpents; the other, under Joseph Brazeau, for four arpents;" together, 360 arpents—equal to 306¼ acres.

The courses and distances of the lines are given. At one of the corners the call is for a stone at the mouth of an old ditch, the lower corner of the survey on the river. The next line runs westwardly with the ditch. This survey was returned to the Surveyor General's office, and duly approved shortly after it was made. It purported to include Brazeau's tract of sixteen arpents, and, of course, it was located in the southeast corner of the survey.

When this survey was presented to the recorder of land titles to obtain a patent certificate, he refused to issue one, because both tracts were included in one survey; whereas, the recorder held that the confirmation certificates required separate surveys. Thus the matter stood till 1833, when Brown made another survey of Labeaume's tract, maintaining the ditch as the southern boundary, and throwing off on the west a surplus to reduce the tract to the quantity confirmed to Labeaume.

The representatives of Brazeau claimed to own the tract of four by four arpents north of the ditch, as indicated in Brown's survey of 1817, and a contest was carried on before the department of public lands as to the proper location of Brazeau's claim, according to his confirmation, for nearly twenty years. Finally, the Secretary of the Interior ordered that the tracts should be surveyed separately—set the surveys of Brown of 1817 and 1833 aside—and ordered that Brazeau's claim should be surveyed south of the ditch and next to the mound, and that Labeaume's tract should be located north of the ditch.

The representatives of Labeaume hold the land in the southeasterly corner of Brown's survey, and this is the land the bill prays may be decreed to the complainant—first, on the assumption that the confirmation certificate locates it there; and, secondly, that there was no authority in the Secretary of the Interior Department to set the survey of 1817 aside.

Labeaume's survey of 1833 was merely a reformation of the survey of 1817, excluding Brazeau's four by four arpents.

In 1847 the matter as regarded these surveys was reported by the Surveyor General to the General Land Office, where it was held that Brazeau was entitled to his four arpents square in the southeasterly part of Soulard's Spanish survey of 1799, which embraced both Labeaume's and Brazeau's tracts. This decision was overruled by Secretary Stuart in 1851, under whose order a survey was made for Brazeau outside of Labeaume's survey, as made by Brown.

This decision we are called on, in effect, to overthrow, by holding that Brazeau's land is covered by the patent to Labeaume, and the legal title vested in his representatives. And it is insisted that if it is, then a court of equity may decree that it shall be conveyed by the legal owner to him having the better equity. And this raises the question whether the Secretary was authorized by law to reject the survey of 1817, order another, and overthrow Brazeau's claim of title. That the General Land Office has, from its first establishment in 1812, exercised control over surveys generally, is not open to discussion at this day.

By the act of March 3, 1807, the board of commissioners was required to deliver to each party whose claim was confirmed a certificate that he was entitled to a patent for the tract of land designated. This certificate was to be presented to the Surveyor General, who proceeded to have the survey made and returned, with the certificate, to the recorder of land titles, whose duty it was to issue a patent certificate; which, being transmitted to the Secretary of the Treasury, entitled the party to a patent. Act of 1807, S. 6.

This duty of the Secretary of the Treasury, by the act of 1812, is transferred to the Commissioner of the General Land Office.

The act of April 18, 1814, S. 1, requires that accurate surveys shall be made, according to the description in the certificate of confirmation, and proper returns shall be made to the Commissioner of the certificate and survey, and all such other evidence as may be required by the Commissioner.

These acts show that the surveys and proceedings must be,

in regard to their correctness, within the jurisdiction of the Commissioner; and such has been the practice. Of necessity, he must have power to adjudge the question of accuracy preliminary to the issue of a patent.

By the act of July 4, 1836, reorganizing the General Land Office, plenary powers are conferred on the Commissioner to supervise all surveys of public lands, "and also such as relate to private claims of land and the issuing of patents."

By the act of March 3, 1849, the Interior Department was established. The 3d section of the act vests the Secretary, in matters relating to the General Land Office, including the powers of supervision and appeal, with the same powers that were formerly discharged by the Secretary of the Treasury.

The jurisdiction to revise on the appeal was necessarily coextensive with the powers to adjudge by the Commissioner. We are, therefore, of the opinion that the Secretary had authority to set aside Brown's survey of Labeaume's tract, order another to be made, and to issue a patent to Labeaume, throwing off Brazeau's claim.

A preliminary motion was made to dismiss this cause for want of jurisdiction, which was brought on with the final hearing.

The survey made by Brown in 1817 for Labeaume included both the tracts confirmed to Labeaume and Brazeau. This survey was duly approved, and so continued for fifteen years. A patent might have been issued on it, either singly to Labeaume or jointly to the two owners, Brazeau's sixteen arpents being granted to him in the southeast corner of the survey.

Standing on the original concession, Brazeau's tract had no specific boundary, and attached to no land; but Brown's survey identified its locality and boundary, and vested a title to land, subject to be sued for and recovered by the local laws of Missouri, and the bill was filed to assert this title, on the ground that the Secretary of the Interior Department had no authority to set the survey aside, divest Brazeau's title, and locate the land elsewhere. The construction of the acts of Congress, conferring power on the Secretary to do the acts

complained of, were prominently drawn in question, and the decision below rejected the title set up by maintaining the validity of the Secretary's decision.

The case falls within the principle declared in Lytle's case, 22 How., 202. The finding of the State court, and the decree founded on that finding, show that the question necessary to give this court jurisdiction was raised and decided. *Craig* vs. *Missouri*, (4 Peters, 425–6.)

Mr. Chief Justice TANEY. I think the court has not jurisdiction in this case. The only point in dispute appears to be upon the true location of the land reserved by Brazeau in his deed to Labeaume. And that question depends altogether upon the description of it in the deed, and not upon the survey made by the Surveyor General of the United States, nor upon the judgment or decision of the Land Office. It is a judicial question, belonging exclusively to a court and jury of the State, and not embraced in any one of the provisions of the 25th section of the judiciary act of 1789, in which appellate power over a judgment of a State court is conferred upon this court. But as a majority of the court are of a contrary opinion, and have taken jurisdiction, I concur in affirming the judgment.

Mr. Justice GRIER. I concur with the Chief Justice.

Decree of the Supreme Court of Missouri affirmed.

BATES *vs.* ILLINOIS CENTRAL RAILROAD COMPANY.

1. In ejectment for land bounded by a river which has changed its bed and formed a new channel since the date of the survey, it is proper for the court to let the jury find whether the land in controversy is within the tract surveyed and granted.
2. The jury is bound to find the river boundary to be where the plat of the survey and the field-notes have designated it, though in fact the river had at the time of the survey another channel through which its waters generally flowed.
3. It is not material in such a case where the most usual channel of the river was, nor whether the channel recognised in the survey and field-notes was natural or artificial, constant or occasional.
4. The public, by the act of the proper officer, had a right to fix and declare the place of the river for the purposes of a survey and sale of the lands, and a grantee cannot contradict the survey and claim beyond it by showing that the true channel of the river was really at another place.
5. This court will not decide what are the rights of lake shore proprietors whose fronts are swept away by the currents, nor to what extent they still own the lands covered with water, except in the case of one who proves that he owned the land before the decretion took place. Until the party shows his ownership of the shore all inquiry respecting his rights in or under the waters adjoining is speculative and useless.

Writ of error to the Circuit Court of the United States for the northern district of Illinois.

This was ejectment in the Circuit Court brought by George C. Bates against the Illinois Central Railroad Company for a parcel of land called the "Sand Bar," now covered with water, and which the plaintiff alleged in his declaration was a part of the north fraction of section 10, town 9, in the city of Chicago.

The plaintiff's title to the north fraction of section ten was not contested. The section was surveyed by public authority in 1821. This fraction was pre-empted in 1831 by Robert A. Kinzie, to whom a patent for it according to the survey was issued in 1837. The plaintiff held Kinzie's title.

But the defendant denied that the Sand Bar in dispute was within the proper limits of the plaintiff's fraction. The Chicago river is one of the boundaries called for by the survey and patent. Great changes have taken place in the bed and mouth of the river during thirty years. What these changes were, and when they took place, were subjects on which much evidence was given by both parties. If the bed and mouth of the river were at the place where they are laid down in the plat of the survey and mentioned in the field-notes, then the plaintiff's tract did not include the Sand Bar for which he brought suit. The Circuit Court left it to the jury to say, as matter of fact, what were the true boundaries of the tract, and whether the Sand Bar was or was not included by them.

Previous to the erection of the piers in Chicago harbor, (which commenced in 1833,) the land in controversy was dry, but afterwards the currents created by those piers washed it away, and it gradually sunk beneath the waters of the lake. The plaintiff asserted, as matter of law, that his title was not changed or divested by that fact. The court charged the jury that, assuming the plaintiff to be the owner of the land when it was above water, if he suffered it to be gradually washed away until it was entirely covered, and then permitted it to remain an open roadstead for more than seven years, the title became vested in the public, and he could not recover.

To these rulings of the Circuit Court exceptions were taken, and the verdict and judgment being for the defendant, the plaintiff brought the cause up to the Supreme Court by writ of error.

Upon the point last mentioned—namely, the destruction of the plaintiff's title by the action of the water and by his failure to reclaim it from the bottom of the lake for more than seven years—the arguments here were very elaborate. But it will be seen by the opinion of Mr. Justice *Catron* that the cause turned entirely on the question of boundary, which was submitted to the jury, and found against the plaintiff on evidence regarded as conclusive.

Mr. Wills, of Illinois, for plaintiff in error.

Mr. Joy, of Michigan and *Mr. Noyes*, of Illinois, for defendant in error.

Mr. Justice CATRON. This cause comes here by writ of error to the Circuit Court of the United States for the northern district of Illinois. The railroad company is sued in ejectment by Kinzie's representatives for land lying under water at the city of Chicago; the end of the road running into Lake Michigan. The controversy depends on the following charge of the court to the jury:

"By the act of Congress of July 1, 1836, entries of the character of Kinzie's were confirmed, and patents were to be issued therefor, as in other cases. A patent accordingly issued to Kinzie on the 9th of March, 1837. There can be no reasonable doubt, I think, that *this title, thus perfected, related back to the entry of Kinzie in May*, 1831, and the law gave it effect from that date precisely as if it had been made in the proper land office.

"The land had been surveyed in 1821, and on the plat of the Government survey the north fraction of section 10 is represented as having the Chicago river on the south, and Lake Michigan on the east. The river is represented as flowing out in *nearly a straight line into the lake.* The fact seems to be, that from 1816 to 1821 the river, instead of flowing out, as represented on the survey, just before it entered the lake, made a sharp curve to the south, and thereby formed a sand-bar or spit of land between it and the lake, which has given rise to this controversy. This sand-bar existed in 1821, but it is not noticed in the plat of the survey. In 1821, the river seems to have run into the lake, according to the plat, but it is said this was in consequence of an artificial channel cut through the sand-bar. This channel was stopped up in the winter of 1821–2, but was opened again in the spring of 1822 by a freshet, and water continued to flow out there in the summer of 1822; but during 1821 and 1822 more or less water passed from what had been the mouth prior to 1821. After 1822, the direct channel was stopped up, and, with an occasional exception, caused by the act of man or by a freshet, the river flowed

into the lake up to 1833 in its original and natural bed. In 1833 and in 1834 the Government constructed piers across the sand-bar, and the river from that time has flowed through those piers; the old channel south of the pier having ceased to bear the waters to the lake, because the south pier was run across it, as well as across the sand-bar. In the construction of the piers, the Government of the United States did not purchase or condemn the land, but Kinzie seems to have acquiesced in the act; and, indeed, as already stated, it was not till 1836 that Kinzie's title was confirmed."

An exception was taken to the concluding part of the charge, which is as follows:

"Under this state of facts, the substantial truths of which are not denied, the land of Kinzie, covered by his entry and purchase, would be the tract within the following boundaries, as they existed at the time of the entry, (there being no question made, but that the Government plats, by which sales were made, show that the whole land north of the river and south of the north line of the fraction was sold as one parcel,) and are the north line and west line of fractional section 10, according to the public survey, and the Chicago river and Lake Michigan, as they existed; that is, it would include all the dry, firm land there was at that time between the west line of the section and the lake, and the north line of the section and the river. The river, the lake, and the two lines of the fractional section 10 constituted the boundaries. Whether the land in controversy was within these boundaries is a fact to be found by the jury, depending upon the evidence before them."

The facts as recited were not disputed; nor is any exception taken to the statement made, preceding the court's conclusion on the law and facts of the case.

The land trespassed on and sued for, as described in the plaintiff's declaration, lies south of the south pier, is now covered with water, and a part of the bottom of the lake; on which land the end of the railroad is located. It was formerly overlaid with the sand-bar, which was swept away by the current the piers created. It is situated outside of fractional section ten, as its boundary was described by the judge to the jury. And this raises the question, by what rule is the pub-

lic survey to which the patent refers for identity to be construed? The land granted is 102 29-100 acres, lying north of the Chicago river, bounded by it on the south, and by the lake on the east. The mouth of the river being found, establishes the southeast corner of the tract. The plat of the survey, and a call for the mouth of the river in the field-notes, show that the survey made in 1821 recognised the entrance of the river into the lake through the sand-bar in an almost direct line easterly, disregarding the channel west of the sand-bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of the water only temporary at particular times, and this flow produced to some extent by artificial means, by a cut through the bar, leaving the water to wash out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land. And the court below properly left it to the jury to find whether land on which the railroad lies is within the boundary of the tract surveyed and granted. According to the judge's construction of the plat and calls, and the patent bounded on the survey, the jury was bound to find for the defendant, and therefore this ruling was conclusive of the controversy.

In regard to the matter so much and so ably discussed in the argument here, as to the rights of proprietors on the lake shore, where their fronts were swept away by currents, and to what extent they still owned the lands covered with water, undoubtedly theirs before the decrease took place, we do not feel ourselves called on to decide, because this plaintiff was not the owner of the land sued for before the decrease occurred, and could have no proprietary rights in the bottom of the lake. Before a proprietor can set up his claim to accretions and the like, he must first show that he owns the shore; and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless.

Judgment of the Circuit Court affirmed.

JOHNSTON *vs.* JONES ET AL.

1. A bill of exceptions should contain only so much of the evidence as is necessary to present the legal question raised. When more than this is inserted in the bill it is an irregularity to be condemned as a departure from established practice, inconvenient and embarrassing to the court.
2. Where a series of propositions are embodied in the instructions of the court which are excepted to in a mass, the exception must be overruled if any one proposition be sound.
3. The right which the owner of a water-lot has to the accretions in front of it depends on its condition at the date of the deed which conveyed him the legal title, and cannot be carried back by relation to the date of a title-bond previously assigned to him, and under which he procured the deed.
4. Maps, surveys, and plats are not necessarily and of themselves independent evidence, and are therefore to be received only so far as they are shown to be correct by other testimony in the cause.
5. Where a lot had no water front, and the plaintiff who was the owner of it had therefore no right to any part of the accretions for which he was suing, and it is apparent from the record that the fact was so found by the jury, this court will not reverse for an error committed by the court below with respect to the rule by which the alluvium should be divided among those who *are* owners.
6. *Jones* vs. *Johnston*, (18 How., 150,) and *Deerfield* vs. *Arms*, (17 Pick., 45,) affirmed as laying down the rule to which this court adheres for measuring the rights of riparian proprietors in the accretions formed along the water line.
7. Where a lot was conveyed by A to B as having a water front, and reconveyed by B to A as having no such front, and afterwards conveyed by A to the plaintiff, a deed from B to the plaintiff made after suit brought cannot be given in evidence to show the right of the plaintiff to a water front, and consequently a title in the alluvium.
8. If there was a mistake in the original deed, the remedy should have been sought in chancery, by a proceeding against all parties interested; the rights of third persons cannot be affected by a private agreement and a deed made in pursuance of it.

9. A witness cannot be permitted to make a calculation founded upon a map which is not itself original and reliable evidence, and permission to ask a question calling for such a calculation is properly refused by the court.

10. The extent to which a cross-examination may be carried beyond what is necessary to exhibit the merits of the case, must be guided and limited by the discretion of the judge who presides at the trial, and is not the subject of review in a court of error.

11. This court will not interfere with the practice of the Circuit Courts concerning the order and time of introducing evidence, nor reverse a judgment for the rejection of evidence as rebutting, which ought to have been given in chief.

Writ of error to the Circuit Court of the United States for the northern district of Illinois.

William S. Johnston brought ejectment in the Circuit Court against John A. Jones and another for a part of the land formed by accretion on the shore of Lake Michigan, north of the north pier of the harbor of Chicago. The cause was tried in the Circuit Court, and a verdict and judgment were given for the plaintiff, when the defendant brought it up to this court by writ of error, where it was reversed, and a *venire facias de novo* awarded. The facts as they appeared upon the record at that time are fully stated in the opinion of Mr. Justice *Nelson*, 18 How., 150. On the second trial the same evidence was given, with no new additions, except the two documents pertaining to the plaintiff's title which are mentioned in the opinion of Mr. Justice *Swayne*. That opinion also contains a statement of the facts upon which the several rulings of the Circuit Court upon the admissibility of evidence were based, and quotes at sufficient length the instructions which were given to the jury. The verdict and judgment were in favor of the defendant, and the plaintiff took this writ of error.

Mr. Wills, of Illinois, for plaintiff in error, argued that the errors of the Circuit Court apparent on this record entitled the plaintiff to a reversal of the judgment on such radical

grounds as would insure to him the ultimate recovery of the property in dispute.

The defendant has always insisted that lot 34 never had a lake shore front. This has been his favorite line of defence. It is the fundamental question in the case, and if the fact be as the defendant alleges, then the plaintiff had no right from the beginning to the land he claims. This, however, is a question of fact not to be argued here, except as it arises incidentally in the discussion of the points of law ruled by the court.

If it be established that the lot (34) had originally a lake front, was it not conveyed with the accretions to the plaintiff by the deed of October, 1835? Was it intended to reserve any part of the land which had become attached to its eastern border? The whole of the accretions passed by the description, "Water lot 34, and the tenements and hereditaments thereunto belonging." Such was the manifest intent of the parties.

But if the deed of October, 1835, does not bear on its face the evidence of the parties' intentions to pass the accretions, then the deed of July, 1857, was admissible as evidence of the original intention to do so, and it was error not to receive it for that purpose.

If the accretion did not pass by the deed of 1835, and the deed of 1857 is not admissible for the purpose mentioned, then in falling back upon the deed of 1835 just as it is, it becomes important to know when the title of the plaintiff under that deed commenced. It began not at the date of the deed, (October 22, 1835,) but at the date of the title-bond of June 10, 1835. This raises a new question of fact—raises it fairly—and the instruction which compelled the jury to exclude it from their consideration was erroneous. The jury should have been charged to inquire whether the lot had a lake front at the date of the title-bond; and if it had, to find a verdict for the plaintiff. The title which the plaintiff took under the deed related back to the date of the title-bond.

Even if all these points were against the plaintiff, he is entitled to recover against this defendant by virtue of his claim of title and his prior possession under his deed. The defend

ant is a mere intruder upon the previous possession of the plaintiff.

The court did not allow the proper value to be given to the maps and surveys. A map referred to in a deed is part of the deed, and as much to be considered as if expressly recited.

The court should not have refused to let the plaintiff's counsel ask the witness Jones (a brother of the defendant) whether the defendant had paid him anything for lot 35 when it was conveyed. The power of cross-examination is the great test for the discovery of truth. The plaintiff was deprived of a clear right.

The testimony of Greenwood was rebutting, and it was erroneously regarded by the court as evidence in chief. But aside from this the court erred in excluding it when there was no allegation of trick, surprise, or injury which the plaintiff could suffer by receiving it out of the regular order.

The rule given to the jury for dividing the accretions among the several owners of the lots having lake fronts was entirely wrong.

Mr. Fuller, of Illinois, and *Mr. Carlisle*, of Washington city, for defendants in error. This cause has been tried by a jury under instructions from the judge who presided in the court below, couched in the very words of the opinion delivered in this case by Mr. Justice *Nelson*, and upon the issue which this court there determined was the only proper issue for the consideration of the jury. On that trial a verdict was rendered for the defendants below.

The plaintiff brings the case here, and directly questions the former decision of this court in this very case. He likewise assigns seven specific errors in the rulings of the court on the trial below, in the course of the trial.

Except a deed made by John H. Kinzie to the plaintiff in 1857, the titles of the respective parties are precisely the same as they were on all the former trials; and the facts out of which the controversy arose having occurred twenty-five years ago, are, of course, unchanged.

In the opinion of the court, in 18 Howard, 150, is a full

statement of the material facts in the case; and it will appear by examination of that opinion that the following propositions were stated and decided by this court as the law of the case:

First. That both plaintiff's and defendant's lots were conveyed with express reference to the recorded plat of Kinzie's addition to the town of Chicago, which description was conclusive upon the parties until that reference was reformed. 18 Howard, 153.

Second. That the true issue to be tried by the jury was, whether or not, at the time of the deed to the plaintiff, lot 34 (plaintiff's) had a water line upon the lake north of the north pier of the Chicago harbor. 18 Howard, 157.

Third. That in dividing the accretion, the pier front of the accretion should be taken into account. 18 Howard, 157–8.

With these points decided by this court as the law of this case, the parties again went to trial, and the court below gave the instructions to the jury which are found in the record.

The issue of fact, indicated by this court as the only important question to be tried by the jury, was distinctly presented to the jury, who found the defendants not guilty; or, in other words, that the plaintiff's water lot 34, Kinzie's addition to Chicago, had not a water line on the east side north of the north pier of the Chicago harbor at the date of his deed, October, 1835.

This finding of the jury is conclusive upon the parties as to the question of fact, and leaves the plaintiff without any right or interest to question the rule of division of the accretion laid down by the court.

It is immaterial to him what that rule is; for he has nothing to be divided, and he should not trouble this court or these defendants to review the former decision upon this point, for a merely abstract and speculative purpose.

He is not harmed or helped by any decision of any question that does not, when decided, apply to his interests in this case; and for this, as well as other obvious reasons, we shall not discuss the former decision of this court upon this part of the case, holding it to be settled law.

The facts being unchanged, the law of the case, once declared, remains the law.

With the exception of the deed made since the commencement of this suit, every link in the chain of title, every deed of either party to the record, and every fact, remain the same.

Yet the plaintiff's counsel insists, in a voluminous printed argument of about one hundred pages, that this court should review and change its opinion upon those identical facts and deeds, already fully considered and solemnly pronounced.

This will not be allowed. In the language of Mr. Justice *Grier:* "It has been settled by the decisions of this court, that after a case has been brought here, and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate." *Roberts* vs. *Cooper*, (20 Howard, 481,) where several similar decisions of this court upon this point are referred to, all to the same effect.

So much for the general question; now examine the points peculiar to the last trial below.

1. It is an inflexible rule that the plaintiff in ejectment must recover, if at all, upon his legal title, as it stood at the commencement of the suit, or, at least, at the date of the demise laid in the declaration. *Goodlitle* vs. *Herbert*, (4 Term., 680;) *Wood* vs. *Martin*, (11 Illinois, 547;) *Pitkin* vs. *Yaw*, (13 Illinois, 251;) *Binney's Lessee* vs. *The Canal Co.*, (8 Peters, 218.)

If, therefore, the deed from Kinzie of 1857 was necessary to give the plaintiff the legal title to the premises sued for, it could not help him in this suit, because it was made since the action was brought. It was, however, offered as a volunteer reformation of the deed from John H. Kinzie to Robert A. Kinzie, made in 1835—not as conveying a title of itself, but as an enlargement of the estate and premises conveyed by that deed—to get rid of the decision of this court that the parties were bound by the references in their respective deeds to the recorded plat, until that reference was reformed, if it needed and was susceptible of reformation.

Instead of going into chancery to reform the deeds, where the mistake would be alleged and proven if it could be, and

all parties in interest brought before the court, the plaintiff went to a person who, twenty-two or three years before, had made a deed to defendant, Jones, of lot 35, and all "his interest east thereof," and under which deed Jones had ever since occupied and claimed to own the premises in dispute, and who had, at a subsequent date, conveyed to Robert A. Kinzie lot 34, according to the "recorded plat of Kinzie's addition," and from whom (Robert A. Kinzie) plaintiff had acquired his title, by the same description, and gets from him an instrument reciting that he intended to convey to said Robert A. Kinzie "all the accretions formed on the water line of lot 34," and that "disputes had arisen about the title to those accretions;" therefore, "to settle the same," he conveys them all for twenty-five dollars to the plaintiff, who then seeks to recover them by virtue of this deed made without notice to the defendants, or any one in interest with them, by means of an action of ejectment begun eight years before the deed was made.

2. Another exception arises upon the ruling of the court below, that it was incompetent for the witness Greeley to compute the rate and amount of growth of the accretion in 1834 and 1835, by his own calculations, based on Lieutenant Allen's maps and diagrams.

There was no error in this, because it was not alleged that there was any ambiguity in those maps themselves; and being admitted in evidence, it was for the jury to say what light they threw upon the issue on trial, and not for the witness. And besides, the maps themselves, not being positive, original evidence, could not properly be made the foundation of such evidence from the witness, which, at most, could only be matter of opinion based on hearsay testimony, or, *res inter alios acta*. The witness had no personal knowledge of either Lieutenant Allen, his maps, or of the accretion; and his opinion upon those matters was not competent testimony to go to the jury, who alone should draw any proper influences from the maps and reports which were in evidence.

3. The court refused to allow Captain J. D. Webster to testify what were his duties as superintendent of the harbor in 1841 and 1842, with a view of proving what were Lieutenant

Allen's duties as such officer in 1834–5, and thus adding to the weight, as evidence of Lieutenant Allen's reports and maps. In this the court below was right. It was not the proper way of proving what were the official duties of an officer of the Government, nor would it tend to prove what were Lieutenant Allen's duties eight years before, while superintending the building of the piers, or in any degree to prove whether plaintiff's lot had or had not a water line north of the north pier at the date of his deed.

4. The court below did not err in refusing to allow plaintiff's counsel to cross-examine Benjamin Jones in the manner proposed. Jones had testified in chief for the defendants; and plaintiff's counsel on cross-examination put the questions objected to, not to show that he was an incompetent witness, but to affect his credibility with the jury. This was wholly within the discretion of the judge who tried the cause. It is always within his discretion to control the cross-examination of witnesses, designed to affect their credibility. Ample opportunity was afforded plaintiff's counsel in this case; but whether or not a certain question should be put, and if answered, what its effect might be, was solely for the judge who tried the case to decide; and having exercised his undoubted authority to direct and control the cross-examination, his decision is not subject to revision here. *Teese et al.* vs. *Huntington et al.*, (23 Howard, 2.)

5. The court refused to allow the plaintiff to examine S. S. Greenwood upon anything not rebutting to the proof made by defendants. Plaintiff had closed his case, except the right specially reserved to examine G. S. Hubbard, as appears on page 194, printed record. But when it became his turn to offer rebutting evidence to defendant's proof, he proposed to accumulate testimony upon the main issue, by asking the witness Greenwood where the water line was, east of or upon lot 34. The court refused this, because it was not rebutting testimony; it related to the very point the plaintiff was bound to prove in the first instance, and having proved it as far as he desired, except as to the introduction of Hubbard, he rested, and, according to all rules, the door was closed against cumu-

lative proof from him on the points at issue, unless the court saw fit to open it. "The mode of conducting trials, the order of introducing evidence, and the times when it shall be introduced, are properly matters belonging to the practice of the Circuit Courts, with which this court ought not to interfere." *The P. & T. R. R. Co.* vs. *Simpson*, (per Story, J., 14 Peters, 448.) If the plaintiff wanted Greenwood's testimony on this point, he should have called him at first, or reserved the right to have done so later in the trial. Not having done this, he has no right to complain that the court applied to him the ordinary rules of practice in all common law courts.

6. The only remaining exception which we propose to consider, is the objection to the charges of the court relating to the weight which the various maps and plats were entitled to, as instruments of evidence. Except Lieutenant Allen's maps or diagrams, every map and plat offered and admitted in evidence was made by a living witness, present on the stand at the trial of the case; and every fact in controversy was within the memory and knowledge of a cloud of living witnesses. Manifestly the maps were only properly admitted in evidence to explain, illustrate, and apply the testimony of the witnesses. Where was the water line, with reference to the east line of plaintiff's lot, at date of his deed? was the issue on trial. A witness could not make a map that would determine that issue more effectually than his statement on oath; and a map made anywhere, or at any time, was only valuable as proved to have been made by one competent to do so, and present to verify his work. It had no inherent, intrinsic weight as evidence. This disposes of all the maps allowed to go to the jury for any purpose except certain diagrams made by Lieutenant Allen in the years following 1834 down to 1839; and of these it seems sufficient to say, that it does not appear that his reports of soundings were within the sphere of his official duty, for what his official duty was nowhere appears in the case; and so they were not evidence according to the decision of this court, in *Ellicott et al.* vs. *Pearl*, (10 Peters, 412;) and, even if done officially, his acts could not bind or affect the rights of the parties to this suit.

But the issue was, where was the water line with reference

to the east line of plaintiff's lot 34 at the date of his deed, and not how deep the water of Lake Michigan was somewhere else; and neither the soundings nor reports of soundings at other places tended to determine the issue on trial. Besides, the maps were before the jury, to be judged of by them, in connection with the other evidence in the case. 1 Phillips on Evidence, Cowen & Hill's Notes, 236, 282, and 283; 1 Greenleaf on Evidence, sec. 139; 7 Carrington & Payne, 483; *Morris et al.* vs. *The Lessee of Hamus Neils*, (7 Peters, 554.) In the last case the court said that an ancient plat of the city of Cincinnati, though the only one in existence, and the only recognised plat of the city, was not conclusive upon the questions of boundary of lots in that city. This part of the case may be dismissed with the remark that when the exact and single issue of fact before the jury is kept in view, it becomes apparent that maps and plats of other places, and points relating to other dates and periods of time, could not, in the very nature of them, throw any light on that issue, and could only serve to apply the testimony of the witnesses to the premises in question. Not a single one of the maps or plats offered in evidence was referred to, as in any way connected with the titles of the parties, except the recorded plat of Kinzie's addition, and by that this court decided the parties are bound until it is changed. 18 Howard, 153.

Mr. Justice SWAYNE. This case was before this court at December term, 1855. It is reported as then presented, in 13 Howard, p. 250. The judgment of the Circuit Court was reversed, and the cause remanded for further proceedings. The action below was ejectment, brought to recover a part of the land formed by accretion on the shore of Lake Michigan, north of the north pier of the harbor, in the city of Chicago. The land in controversy was claimed to belong to water lot No. 34, in Kinzie's addition to that city. The plaintiff in error sought to recover it, in virtue of his ownership of that lot. Upon the last trial, many days were consumed in submitting to the jury the parol and documentary evidence of the parties. The former was printed as the cause proceeded.

At the close of the argument, prayers for instructions to the

jury were submitted by both parties. All the testimony given in the case, the instructions asked for by both parties, and the entire charge of the court as given, are embodied in the record. They make an aggregate exceeding four hundred and fifty printed pages. The bill of exceptions embraces all this matter It commences with an introduction, setting forth that the whole of the printed evidence was made a part of it, and terminates with a supplement containing the exceptions taken by the plaintiff in error. Six of these exceptions are to the rulings of the court in excluding testimony. They are in this form:

"2. Also to the ruling of the court in excluding the testimony of Samuel S. Greeley, as stated on pages 133 and 134 of the printed report." The pages of the "printed report" do not agree with the pages of the printed record. The reference, therefore, affords no aid in finding the matter referred to.

The 8th exception is as follows: "Also to the charge of the court as contained on page 453, and as stated on page 462."

It is then stated that, in compliance with the rule of this court, and for the sake of greater caution, the plaintiff below "specially excepted on the trial, and the exceptions were allowed by the court," to the parts of the charge which follow.

The first part of the charge, as thus set out, contains a distinct, legal proposition. To this the plaintiff distinctly excepted. This was proper. Then follows nearly two pages containing the views and reasonings of the court, comments upon the evidence, and several legal propositions. They are followed by this exception: "To the instructions as given by the court to the jury, the plaintiff then and there excepted." Exception was also taken to the refusal of the court to give to the jury the instructions prayed for by the plaintiff.

It has been found irksome and inconvenient to the court to look through this record and find the parts that are necessary to be considered. The necessity of performing this office has imposed upon us a labor which would have been avoided if the bill of exceptions had been properly framed. In 2 Peters, 15, *Pennock and Sellers* vs. *Douglas*, Mr. Justice Story remarked upon the irregularity, inconvenience, and expense of putting

the entire testimony in a case into the bill of exceptions, and expressed the regret of the court that such a practice should prevail.

In 4 Howard, 297, *Zeller's Lessee* vs. *Eckert and others*, Mr. Justice *Nelson*, in delivering the opinion of the court, said: "This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice." "Only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted, should be carried into the bill of exceptions. All beyond serves only to encumber and confuse the record, and to perplex and embarrass both court and counsel."

The court desires to put on record again its condemnation of this irregularity, and to express the hope that a better practice may prevail hereafter in all cases intended to be brought before this court for revision.

The 38th rule of this court, adopted at January term, 1832, directs that thereafter "the judges of the Circuit and District Courts do not allow any bill of exceptions which shall contain the charge of the court *at large* to the jury, in trials at common law, upon any general exception to the whole of such charge, but that the party excepting be required to state distinctly the several matters in law in such charge, to which he excepts, and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."

The rule was not observed in this case. It is questionable whether the exceptions, in respect of the greater part of the charge, are so distinct and specific that this court, if the point had been made, could consider them. It is well settled, that if a series of propositions be embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions be correct, the exception must be overruled. 3 Seld., 273, *Hunt* vs. *Maghee*; 2 Kernan, 313, *Decker* vs. *Matthews*.

The point was not made by the defendants. We have, therefore, not thought it necessary to consider it. As it may arise hereafter in other cases, we have deemed it proper thus to call attention to the subject.

The same evidence substantially was given upon this trial which was given upon the former trial, as reported in 18 Howard. It would unnecessarily encumber this opinion here to repeat it. The only features claimed to be new by the plaintiff in error are—1st, the title bond of Robert A. Kinzie to Gordon S. Hubbard, of June 10, 1835, for lot 34, and other property therein described. Johnston, the plaintiff, became the assignee of this bond, and under it procured his deed of October 22, 1835, from Robert A. Kinzie, for lot 34. 2d. The deed from John H. Kinzie to the plaintiff, dated July 1, 1857. This deed was offered, but not received in evidence.

The plaintiff in error relies upon the following exceptions. They will be considered as we proceed:

1. The court instructed the jury "that the controversy turned upon what the fact was, on the 22d October, 1835, as to this water front. Had lot 34 a water front *at that time* north of the north pier?"

The instruction was according to the ruling of this court, when the case was formerly here. 18 How., 157.

The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kinzie to Hubbard, and that this was a new element in the case, which required a change of the rule, as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. It is a legal fiction, invented to promote the ends of justice. It is a general rule, that it shall do no wrong to strangers. It is applied with vigor between the original parties, when justice so requires; but it is never allowed to defeat the collateral rights of third persons, lawfully acquired. 4 J. R., 234, *Jackson* vs. *Bard*; 3 Caine's Rep., 262, *Case* vs. *DeGoes*; 18 Vin. Abr., 287, Relation B.; 13 Coke, 21 Menville's Case; 7 Ohio S. R., 291, *Wood* vs. *Furguson*.

The plaintiff could recover only upon a legal title. That title was vested in him, if at all, by the deed from Robert A. Kinzie of the 22d of October, 1835. The equities subsisting

at any time between those parties could not in any wise affect the result of the action.

We are satisfied with this instruction. Under it the jury found a verdict for the defendants.

2. It is objected that the court did not instruct the jury correctly as to the value, as evidence, of the surveys, maps, and plats exhibited by the plaintiff upon the trial; but that, on the contrary, it was stated that they were not independent evidence, and that the jury were to receive them only in so far as they were shown to be correct by the other testimony in the case.

The facts touching these maps and plats are not stated in the bill of exceptions. We have been compelled to look over much of the testimony in our search for them. Without intending to lay down any general rule upon the subject, or to question the soundness of the authorities relied upon by the counsel for the plaintiff in error, we content ourselves with saying, that we are not satisfied that the court below committed any error in what was said in this connection.

3. It is insisted, that the court erred in laying down the rule for the partition of the alluvium. It would be sufficient to say, that the jury having found that lot 34, at the time referred to, had no water front north of the north pier, the question did not arise. The instructions given and those refused were, in this view of the subject, abstract and speculative propositions. Those given, whether right or wrong, could not have injuriously affected the plaintiff. A party cannot be allowed to complain of an error which has done him no harm. 9 Gill, 61, *Ramsey et al.* vs. *Jenkins.*

But as the views of the court have been misapprehended, and that misapprehension may mislead in other cases, we prefer to deal with the subject as if it were properly before us. The court below instructed the jury in the language used by this court when the case was here in 1855. Upon that occasion, it was intended to adopt the rule laid down by the Supreme Court of Massachusetts in 17 Pickering, 45, 46, *Deerfield* vs. *Arms.* That court said: "The rule is—1, to measure the

whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line; 2, the next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this *new* river line as he owned rods on the *old*. When, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the *old*, to the points thus determined, as the points of division on the newly formed shore. The new lines thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the *new* shore line of the river equals, or exceeds, or falls short of the old." It is further said: "It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the *general* line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections. In such case, it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river."

To this rule we adhere. With the qualification stated, it may be considered as embodying the views of this court upon the subject. In this case, if lot 34 had been found to have had a water front north of the north pier at the time stated, the pier front would have had nothing to do with the partition to be made. The lake front, where the accretion occurred, only could have been regarded. The whole of *that front* should have been taken as the basis of the adjustment.

4. The court refused to instruct the jury as prayed upon the subject of the possession of the alluvium in controversy by the plaintiff in error. It is sufficient to say, that both the prayers upon that subject assume as an element, that lot 34 had, to some extent, a front on the lake north of the north pier. The verdict of the jury, for the purposes of this case, is conclusive upon that subject. It is frankly admitted by the counsel for

the plaintiff in error, that if the lot had no such front, his propositions had no application to the case.

5. The court rejected the deed of John H. Kinzie to the plaintiff, when offered in evidence.

Robert A. Kinzie was the patentee of the land upon which his addition to the town of Chicago was laid out. He conveyed lot 34 to John H. Kinzie by a deed which, in describing the lot, referred to the *original plat* of the addition. John H. Kinzie conveyed the lot back to Robert by a deed describing it, with a reference to the plat *as recorded*. The original plat showed a water front to this lot. On the plat as recorded, this fact was wanting. The deed from John H. Kinzie to Johnston was executed for the consideration of twenty-five dollars, to correct the alleged error in the deed from John H. to Robert A. Kinzie, in pursuance of a covenant for further assurance in the deed of Robert A. Kinzie to Johnston, and thus to give the plaintiff a title to the alluvium claimed to belong to that lot, if he had not such title already.

If there were any mistake in the original deeds, of which Johnston had a right to avail himself, the remedy should have been sought by a proceeding in chancery had for that purpose, with all the proper parties before the court. The agreement of the parties themselves that there was such error, and a deed made in pursuance of that agreement, cannot affect the rights of third persons. A further and fatal objection to the admission of the deed in evidence is the time at which it was executed. It bears date more than seven years after the filing of the declaration in this case. In ejectment, the plaintiff must recover, if at all, upon the state of his title as it subsisted at the commencement of the suit. Evidence of any after acquired title is wholly inadmissible. 4 Term R., 680, *Goodlitle* vs. *Herbert*; 11 Illinois, 547, *Wood* vs. *Martin*; 13 Illinois, 251, *Pilkin* vs. *Yaw*; 8 Pet., 218, *Binney* vs. *The Canal Co.*

6. "The ruling of the court, in excluding the testimony of Samuel S. Greeley, as stated on pages 133 and 134 of the printed report."

This, we suppose, refers to the following passage in the

testimony of this witness, as it appears in the printed record:

"2. (Presenting Allen's map of 1838.) Look at the accretion at the north side of the north pier, and tell me whether the ratio of increase between what is represented there in '34 and '37, and what was made from '37 to '38, call for any accretions made in '34 and '35; and if so, to what extent and in what year?"

The facts disclosed in the testimony show that Allen's map was not itself original and reliable evidence. A calculation founded upon it was therefore clearly inadmissible. The admissibility of this evidence, as regards other objections, would depend upon a proper foundation being laid for it. As it is not necessary, we have not gone into any inquiry upon that subject.

7th. "The ruling of the court, in excluding the testimony of Capt. J. D. Webster, as shown on page 191 of the printed report."

It appears, in the testimony of this witness, that he went to Chicago, in 1841 or 1842, as an officer of the United States. The following also appears:

"Question. Did you hold the position of superintendent of harbors here—the same that Captain Allen did once?

"Answer. Yes, sir, I did, for a while.

"Question. State whether it was any part of your duty, as superintendent of the harbor, to report to the Government the changes that were occurring in and about the harbor?"

The latter question was objected to, and the objection sustained.

The testimony which the question objected to sought to elicit would, in itself, have been immaterial and irrelevant. If intended, as part of the evidence proposed to be drawn out, to prove the duties of Lieut. Allen at a former period, as the language of the court, in deciding the point, seems to imply, it was inadmissible also upon that ground. The official duties of Lieut. Allen could not be proved in that way.

8th. "The rulings of the court, in excluding evidence tending to affect the credibility of one of defendant's witnesses,

viz., Benjamin Jones, as stated on pages 360 and 362 of the printed record."

The witness Jones was the brother of the defendant Jones, and had been examined in chief for him. In his cross-examination, he stated that his brother formerly owned lot 35, adjoining lot 34; that it had been sold at sheriff's sale; bought in by Dennison; by Dennison conveyed to him, and afterwards by him back to his brother.

He was asked: "Did you pay Dennison anything?"

This question was objected to by the defendants, and overruled by the court.

We estimate at its highest value "the power of cross-examination." The extent to which it may be carried, touching the merits of the case, was defined by this court in 14 Peters, 445; *The Philadelphia and T. R. R. Co.* vs. *Simpson.* The rule there laid down, this court has since adhered to. A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the cause. The exercise of this discretion by a Circuit Court cannot be made the subject of review by this court. We have looked through the long and searching cross-examination to which this witness was subjected. There would have been no error if the objection had been overruled. There was none in sustaining it.

9. "The ruling of the court, in excluding the evidence of Theophilus Greenwood, offered by the plaintiff, as rebutting evidence to the evidence of possession of the alleged accretion by defendants, at the date of the deed to the plaintiff, as stated on page 424 of the printed report."

Upon looking through the testimony of the witness, we find he was allowed to testify fully upon the subject of possession. The court expressly held, that he should be permitted to do so. The plaintiff in error then proposed to prove by him where, at a certain time, "the actual water line east of or upon water lot 34 was, in reference to the east line of said lot 34;" * * "which the court refused, on the ground that it should have been introduced as evidence in chief, not as rebutting." That this evidence was of the former and not of the latter character, seems to us too clear to admit of discussion.

"The mode of conducting trials, the order of introducing evidence, and the times when it shall be introduced, are matters properly belonging to the practice of the Circuit Courts, with which this court ought not to interfere." 14 Peters, 448, *P. and T. R. R. Co.* vs. *Simpson.*

These are substantially all the points pressed upon our attention by the counsel for the plaintiff in error, in his able and elaborate argument. They are all to which we deem it necessary to advert.

We find no error in the record. The judgment below must be affirmed, with costs.

Decree of the Circuit Court affirmed.

UNITED STATES *vs.* KNIGHT'S ADM'R.

1. A complete espediente in a land title according to the laws and customs of Mexico consists of a petition with deseño annexed, order of reference, decree of concession, and copy of the grant.
2. Where there is no map annexed to the petition, no order of reference, or informé, but the decree of concession follows immediately after the petition, the inference is a reasonable one that no order of reference or informé was ever made in that case.
3. Where the decree of concession appears to have been made without an informé *upon that petition*, and yet recites an informé as having been made by a certain alcalde, and that alcalde did actually make an informé *upon another petition* to a former governor, the presumption is that the recital refers to the informé actually made.
4. If the informé was originally *adverse* to the petitioner, but was altered after the conquest so as to make it a *favorable* report, and it is recited in the decree as a favorable report, the inference is that the decree was not made until after the alteration, and consequently not until after the conquest of the country.
5. The fact that an espediente is included in an index made by an American officer in 1847 and 1848 shows that it was in the archives when that index was made, but it shows nothing more. The index cannot in any sense be regarded as a Mexican record.
6. The papers of the espediente in question not being previously filed,

numbered, or indexed by Mexican authority, and no fact appearing to show when or by what means they came into the Surveyor General's office, evidence that the grant was recorded is entirely wanting.

7. The fact that a grant bearing date 4th May, 1846, was not sent by the Governor to the Departmental Assembly for approval among the others which were so sent on the 3d and 10th of June, is entitled to very considerable weight as a circumstance against the authenticity of the grant.

8. Assuming it to be competent to establish a title without record evidence, still the burden is on the claimant to prove that the grant was issued, and he cannot give parol evidence of its contents without first proving its existence and loss.

9. But a claim cannot be confirmed without record evidence.

10. To maintain a title by means of secondary evidence, the claimant must show that the grant was obtained and made in the manner required by law, and that it was recorded in the proper public office.

11. Evidence that a book or other record is lost cannot avail a claimant unless it be also proved that the grant under which the claim is made was duly and properly entered on the lost record.

This was an appeal by the United States from the decree of the District Court for the northern district of California. The appellee (Morehead) was administrator of Wm. Knight, and in that character he presented his petition on the 3d day of March, 1852, to the board of commissioners for the investigation of private land claims, agreeably to the act of Congress passed March 3, 1851. The commissioners rejected the claim, and the petitioner appealed to the District Court, where it was confirmed. The claim was for ten leagues (*sitios de gañada mayor*) of land, situate on the western bank of the Sacramento, including the region lying between that river and the arroyo Jesus Maria, and being a large part of what is now the county of Yolo.

The title averred in the petition as the basis of the claim was a grant from Pio Pico, Governor or Political Chief of both the Californias, dated on the 4th of May, 1846. The claimant produced certain papers from the Surveyor General's office.

The first purported to be a petition addressed by William Knight to the Governor, bearing date at Sonoma, on the 1st day of February, 1846, describing the land, setting forth the necessities of his family as a reason for the appropriation of it to him by the superior authority, and soliciting the concession in the ordinary form. On the margin of this was written a short note, "Granted as prayed by the petitioner," with an order that a title be issued. This was signed "*Pico.*" Immediately following the petition was a formal and very full decree of concession, dated Angeles, May 4, 1846, to which was attached the full name of *Pio Pico*, with his rubric; and it was attested by *José Matias Moreno*, as secretary. To these documents was added a borrador of a grant, also dated May 4, 1846. Several lines of this borrador had been written and a break made, when the writer (the same, or some other) commenced again at the beginning and wrote to the end of it. The names of the Governor and secretary at the foot of the borrador were admitted not to be in their hands; but Nicholas Den, who had been a magistrate in California before the conquest, and John W. Shore, a clerk in the Surveyor General's office, testified that they were acquainted with the handwriting of Pio Pico, and believed his signature to the marginal order and decree of concession to be genuine. Moreno himself was also called, and he swore that he recollected Knight's presentation of his petition in May, 1846. He was shown a copy of the espediente, and said he believed it was a copy of the decree of concession and of the original grant. The decree he declared was made and signed by the Governor, and the title was *issued* and delivered to Knight by himself as secretary, in which occupation he continued until 1848. But he assigned no dates to the making of the decree or the issuing of the title, or to the delivery of it, nor did he say that the grant was signed by the Governor, or recorded in any book, or that the espediente had been filed in the secretary's office. There was no map, no order of reference to any local magistrate or subordinate officer, and no *informé* in the espediente. But the petition refers to a map, and the decree of concession, as well as the borrador of the grant, recites a report from the first alcalde of Sonoma.

These papers were among the espedientes arranged, numbered, and indexed in the years 1847 and 1848 by W. E. P. Hartnell. Mr. Hartnell was the clerk or assistant of Capt. Halleck when the latter was secretary for the military government established by Gen. Kearney after the taking of Monterey. Capt. Halleck was a witness in this cause, and deposed that, besides the records which were brought up from Los Angeles, a large quantity were found lying on the floor of the custom-house at Monterey and piled up against the wall, which were by himself and Mr. Hartnell placed among the records of the office. Private individuals also brought papers there and had them filed, but he or Hartnell always endorsed on these private papers the time at which they were deposited. Capt. Halleck's testimony does not disclose his reasons nor those of Hartnell for believing that the papers found in the custom-house were land records of the Mexican Government.

To prove the loss of the original grant and excuse its non-production, the claimant took the deposition of Samuel Brannon, who testified that in 1847 Knight came to San Francisco from the lower country, where he had been bearing despatches for the Government, and that he told the witness of an attempt made (he did not say when or where) by the Sanchezes (native Californians) to lasso him, in consequence of which, and of his fast riding to escape them, he had lost his title papers. But he did not describe or allude to any particular paper as being lost.

The evidence showed that Knight was a native of the United States, had gone to New Mexico as early as 1830, where he had married "a daughter of the country," and emigrated thence to California about 1842. In 1843 he seated himself and his family on the right bank of the Sacramento, at a place since called "Knight's Landing," and within the limits of this claim. In that year, or the year after, he built himself a house, and in 1845 he had a wheat-field of five or six acres under cultivation. In 1846 he had a garden of two or three acres near his house planted with corn and melons. He left his home early that summer, was in the Bear Flag insurrection, and joined the American army soon after its first appearance

on the coast. He served during the war, and died in 1849, at the gold mines on the Stanislaus river.

Knight's relations with the Departmental Government of California before and after Pico's accession to power were shown by testimony taken in the cause, and by reference to historical and official documents. In 1842, very soon after he came into the country, he solicited Micheltorena for a concession of the same land which is now claimed. His petition was successively referred to the Prefect of Monterey, the judge of New Helvetia, and the First Alcalde of Sonoma, the last of whom reported against him on the ground that the land solicited had been previously conceded to, and was then occupied by, Don Thomas Hardy. Micheltorena never gave him any grant. He joined the standard of that chief in the autumn of 1844, when his authority was resisted by Pico and his partisans in the south. But he was not included within the terms of the general title which Micheltorena made to his followers, through Captain Sutter, at Santa Barbara, on the 22d of December, because he had no report from Sutter, and the report which he had from the Alcalde of Sonoma was adverse to him. Nevertheless Sutter, on the 15th day of April, 1845, gave him a copy of the general title, believing him (as he swore) entitled to the land for his military services under Micheltorena against Pico, the latter of whom was in power as political chief of the Department at the time when the copy was so delivered. After receiving this copy of the general title, and after the conquest of the country by the Americans, Knight, on the 8th October, 1847, got Jacob P. Leese (who had been the First Alcalde of Sonoma in 1844) to alter his informé by inserting into it the words "*una parte de ella*," and procured from Hardy and Leese certificates that the land solicited by him in 1844 did not interfere with Hardy's ranch, as Leese had then reported. He sought the advice of several friends on the value of this title, and often incidentally spoke of it to others, but to none of them did he show or mention any except the Sutter title, unless to *Colonel Fremont*, who does not recollect the papers he exhibited nor the Governor under whose grant he claimed, but "thinks he rather spoke of Pio Pico." The papers from Micheltorena

and Sutter were found in the possession of his family after his death. They knew of no others. The hostility of Knight to the Pico government was like that of the other American settlers in the north—uniform and consistent. Captain Gillespie stated in his deposition that the causes of the Bear Flag war were in operation from the time of Fremont's appearance on the frontier in March, 1846, and Colonel Fremont himself testified that Knight was prominently engaged in the insurrection from the beginning, but not ostensibly so, for he was employed in the month of May as a spy.

Harrison Gwinn deposed to a conversation with William McDaniel, (who, at one time, prosecuted this claim,) in which the latter said that when he took hold of the case there were no papers, but he had made out as good a set of papers as there was to any grant of land in California. McDaniel being produced by the claimants, positively contradicted the testimony of Gwinn. He said that he had seen certain papers at Benicia with Knight's name upon them, but not being able to read Spanish, he could make nothing of them.

James M. Harbin swore that Knight was at Los Angeles three weeks in the spring of 1846, and left there the first week in May. Nicholas Den declared in his deposition that he had seen him at Santa Barbara in March, April, or May, going to and returning from Los Angeles. Both these witnesses say that Knight told them he had received a title from Pio Pico. On the other hand, Major Bidwell, Captain Sutter, Major Gillespie, Samuel Neal, Colonel Fremont, William Bartee, S. W. Chase, William Gordon, Nicholas Algier, John Grigsby, testified more or less directly to facts wholly inconsistent with the probability that he could have been at Los Angeles at the date of the alleged grant. The unusual height of the waters (they swore) would have made the journey extremely difficult. The hostile relations between the government at Los Angeles and the American settlers on the Sacramento would have made it perilous for one of them to travel in the South, and some of the witnesses swore that they knew him to be at home during the months of April and May. It did not appear that he ever spoke of having made such a journey.

Mr. Shunk, of Pennsylvania, for the United States. 1. Without record evidence this claim cannot be confirmed. The papers produced by the claimant, and called an espediente, are not records. No witness has ever traced them to the custody of the Mexican officials, who kept the archives of California before the conquest. They are indexed, it is true, by Hartnell, who was a translator in the office of the Secretary of State in 1848. But Hartnell was nothing but an American clerk, and the fact that he covered these papers with a wrapper, endorsed them as an espediente, gave them a number, and noted them in an Index, goes no farther to prove them records than would the like scribbling of any clerk in the Surveyor General's office of our own day. Hartnell's endorsement proves that these papers existed at the time he made his Index, but nothing more. They bear no official impress, made by Mexican hands during the days of the Mexican rule. All the dignity and value they have they got from Hartnell, whose endorsement could not transmute worthless papers into records.

2. Granting them to be records, they do not prove that a valid title was issued to Knight. There is no order of reference, no informé, no map. Knight asks for ten leagues of land; Pico grants it. The papers, if they prove anything, simply prove that Pico defied the law. Mexican Colonization Law of 1824; Regulations of 1828; *United States* vs. *Cambuston*, (20 How., 59;) *United States* vs. *Fuentes*, (22 How., 443.)

3. There is no evidence that any grant was ever delivered to Knight. Moreno, the secretary, who is the only witness to this point, is laid out of the case by Judge Hoffman as being unworthy of belief. Moreover, it is proved that Knight was not and could not have been in Los Angeles at the time it is pretended this grant was delivered.

4. Knight was the most unlikely person in the world to get such a grant from Pio Pico. He had been an active and open follower of Micheltorena, and belonged to a class of people who hated Pico, and were hated by him in return. Only a year before the date of this pretended grant, he was in arms

against Pico, under Micheltorena, and within two weeks after its date, was in arms against him under Fremont. Pico made no grant to any adherent of Micheltorena, and to this rule Knight was the last man to be made an exception.

5. Knight never occupied the land after the date of this grant in compliance with its terms. He cultivated a few acres very carelessly, and at long intervals. But he even ceased this little farming from the date of his grant, and virtually abandoned the ranch.

6. All Knight's acts and declarations from the date of this pretended grant to the day of his death are utterly at variance with the idea that he had any such title. He never claimed under it, spoke of it, or exhibited it; but claimed under, spoke of, and often exhibited another title. Even his wife does not appear ever to have heard of it until after his death.

Mr. Stanton, of Washington city, and *Mr. Sunderland*, of California, for the appellee. 1. The espediente is found among the archives, and bears every mark of genuineness. The signatures of the Governor and Secretary are proved to be genuine, and paper, ink, and every mark by which forgery can be detected, in this case bear comparison with papers in the archives of the same date and of undoubted authenticity. The fact that the espediente is incomplete is a strong circumstance in its favor. If manufactured, the papers, in form, would have been perfect. The grant itself would have been found, or a new one made from the copy on file.

2. This espediente was in the archives early in 1847, as is shown by Hartnell's Index, and by the testimony of Halleck in relation to the method of making that Index. It would have been difficult and almost impossible to introduce papers into the archives by stealth while they were in the custody of Halleck and Hartnell, and where documents were deposited by private persons the fact and date of such deposit were endorsed upon them at the time. The papers in this case bear no such endorsement. The Hartnell Index is a document of high authority. Mr. Hartnell was a man of unquestionable integrity,

an accomplished Spanish scholar, and no man in California, with the exception of his brother-in-law Jimeno, was better acquainted with the Mexican laws and Mexican records.

3. It is not unlikely that Pio Pico would have made a grant to Knight on the 4th of May, 1846, but very improbable that he would have made one after that time. Knight had married a Mexican woman, was almost a Mexican himself, and had frequently been employed by the Government. Pico was, therefore, likely to conciliate him and endeavor to secure his friendship by a grant, in view of the difficulties which surrounded the Government in May, 1846. After Knight had joined the Bear Flag and helped to drive Pico out of the country, the idea that he would reward him with an ante-dated grant for these services against himself is preposterous. Moreover, Pico and Knight never met after May, 1846. Knight never had access to the archives after the time when he might have got a grant from Mexico if Pico had sent him one; nor did he introduce the espediente in this case among the archives, because he never referred to it. Having lost his grant, he seemed ignorant to the last that there was any record which might serve him in its stead. The opponents of the claim ought to present some theory of their own to show when, by whom, and how the grant was made, if not made as the claimant alleges.

4. The delivery of the grant is proved by Moreno, and the fact that Knight was in Los Angeles on the 4th of May, 1846, by Harbin. Den saw him on his way there and back, and Davis saw him at the "Buttes" on his return. Moreno, unfortunately for many honest claimants whose grants he attested, is unworthy of belief. But in this case he is fully corroborated.

5. The attempt of the Government to prove that Knight was at home at the date of his grant, and could not have made the journey to Los Angeles on account of the floods, is a failure. Those witnesses who swear that he was at home in May fix the time by circumstances which have no connection with the year 1846, and may have happened just as well in 1847. The rest contradict each other and themselves. The testimony touching the floods avails nothing, for Knight went by the coast route, which was open beyond dispute. The alleged hostility

of the Californians to the American settlers is equally futile as an argument. Knight was a bold and skilful horseman, knew everybody on the road, and carried an unerring rifle. To such a man the dangers of the journey were as nothing.

6. The loss of the original grant is proved by the deposition of Samuel Brannan, to whom Knight told the fact immediately after it occurred, and told it under circumstances which confirmed the truth of his statement.

7. Knight did repeatedly speak of his grant from Pico. He mentioned it to Colonel Fremont, to Davis at the Buttes when he came into the camp, to Harbin at Los Angeles when he got it, and to Den at Santa Barbara on his return home. His omission to speak of it to other witnesses with whom he conversed on the subject after the spring of 1847 is easily explained. He had then lost the grant; he did not know of the espediente in the office, and thought he had no other resource but to fall back on the Micheltorena papers.

Mr. Black, of Pennsylvania, in reply. The United States are not bound to explain how or by whom the fraud was concocted or executed. It is sufficient that we show the theory of the claimant to be false. *United States* vs. *Luco*, (23 How., 515.)

Knight's silence concerning a title from Pico can be accounted for in only one of three ways: (1,) The papers must have been fabricated after his death; or, (2,) before his death, without his knowledge; or, (3,) if they existed in his lifetime, and he knew it, he must also have known that they were false, and was therefore afraid to speak of them, lest he should provoke an inquiry which might result in his detection or exposure.

The mere occupancy of land, without a grant from the nation, gives no title under the Mexican law. It is true that where the record of the grant is lost, and the claimant is driven to secondary evidence, the fact of occupancy, with boundaries marked by the proper officers and permanent improvements in the face of the Mexican authorities, may be strong evidence in aid of the presumption that the title was originally regular.

United States vs. *José Castro*, (24 How., 346;) *United States* vs. *Teschmaker*, (22 How., 392.) But where a party comes into court with a grant which he cannot prove, or where he produces one which, on examination, turns out to be spurious or void, there the occupancy of the claimant only shows that he was dishonestly trying to possess himself of that which was not his own. This case, like others of the same class, must turn on the question of title.

Did Knight obtain a grant from Pico on the 4th of May, 1846? If he did, and if he has proved it by evidence from the Mexican records, then there is an end of this controversy; for such evidence is and ought to be conclusive. But these papers have no pretensions to be regarded as records. It is true they are now in the Surveyor General's office, and may have been there as early as 1848, when Mr. Hartnell finished making his Index. That shows only that they were not forged since 1848. They exist now in the office, and existed when they were first seen there, merely as loose papers, not recorded or numbered, and wholly unconnected with any other papers or books which are known to be records. The mere fact that a loose paper is found in a public office does not give to that paper the dignity or entitle it to the faith of a public record without some evidence, intrinsic or extrinsic, to show that it is properly a part of the records. Besides, Captain Halleck's testimony in this case shows that there are many papers now in the Surveyor General's office which never had a place among the Mexican archives. All the real records of land titles are known to have been in the Secretary's office at Los Angeles when the country was taken by the American army. But Captain Halleck lets us know that he and Mr. Hartnell and General Kearney mingled with them a large quantity of other papers found in the custom-house at Monterey, and that their bulk was further swelled by private contributions. It is notorious, too, that many false papers were placed among them at different times by dishonest claimants, for their own fraudulent ends. It is impossible, therefore, to tell whether a loose paper found in the Surveyor General's office comes from the sweepings of the custom-house floor, from the documents

openly deposited by private persons, or from the felonious droppings of those who fabricated them. Limantour's papers were found in a public office. Benito Diaz had his, by some means, placed in the Surveyor General's office. Francisco Pico's espediente was found there; and Osio appealed, like the present claimant, to what he called "*the archives.*" But those men have been gibbeted in the face of the world as the fabricators of false titles.

Jimeno's Index is a catalogue of genuine espedientes, made before the conquest, by a Mexican officer, who had the means of knowing, and did know, the false from the true. Hartnell's is a list in which the genuine are mingled and confused with the fabricated by an American clerk, who knew not how to distinguish the one from the other. It and its author are alike unworthy of the eulogy pronounced on them by the learned counsel for the claimant. Mr. Hartnell could read, write and speak Spanish. That was his sole qualification. He knew nothing of Mexican laws or records. He was wholly without experience, and the egregious blunder he committed in taking the false papers at the custom-house for land records, shows that he was utterly destitute of judgment.

The journals of the Departmental Assembly prove that this pretended espediente did not exist as a Mexican record. If it had, it would have been included in the forty-five sent into that body on the 8th of June, 1846. There is no reason to believe that any unapproved grant then in the office was withheld by the Governor. *United States* vs. *Bolton*, (23 How.)

No living witness pretends to have seen these papers among the records in the Secretary's office. Pico was not called at all, and Moreno was not asked a question on the subject.

These papers, then, are not records, and that brings the case to a close; for, as a record, if the claimant had one, would be conclusive in his favor, so the want of a record is conclusive against him. This court has pledged itself to confirm no California title on anything short of record evidence.

But it may be worth while to look at the parol evidence in the cause, for the mere purpose of vindicating the wisdom of the rule which excludes it altogether.

Conceding, for the argument's sake, that a public grant for ten leagues of land may be proved by any kind of evidence which will produce a moral conviction on the mind of an impartial judge that the fact is true, how much ought to be required in a case like this? There are several considerations which must be borne in mind here:

1. This belongs to a very suspicious class of California land grants. It bears the name of Pio Pico, and is dated on the eve of the conquest. In *Cambuston's case* the court said that all grants of that kind should be carefully scrutinized. They have been so scrutinized, and not one of them has stood the test. Of nine grants bearing that name, and dated between December, 1845, and July, 1846, and contested here on the ground of fraud, not one has been confirmed. Outside of the forty-five confirmed by the Departmental Assembly this court has never seen a genuine grant of Pio Pico. It will be remembered that Dalton's title was dated the first year of Pico's administration; was found recorded in the Toma de Razon; was among the forty-five, and was admitted to be genuine.

2. Knight was an American settler on the Sacramento, thoroughly identified with the other settlers there, and actively engaged with them in all their movements, political and military, before and at the time, and immediately after the date of this pretended grant. Between Pico's government and the chiefs of his party on the one hand, and those settlers on the other, there was no sentiment but that of bitter hostility. Three times within the space of eighteen months they confronted one another with arms in their hands. The enmity was intensified in March, 1846, by the appearance of Fremont on the frontier, and the readiness of every American (Knight among the number) to join him. At the date of this decree of concession, Knight was in actual rebellion against the authority of the Governor, whose name is signed to it.

3. There are many and obvious marks of falsehood upon the face of the papers. There is no map. The want of an informé is a fatal objection in law to the validity of the grant, and it is also a strong circumstance to show that the whole title is a fabrication. Would Pico have made a grant to a per-

son in such relations with his government without the usual investigations? The recital of an informé is manifestly false. The informé is not on the back of the petition. Suppose it to have been written on a detached paper, it should be in the espediente. If it was lost, its loss might have been proved. The Alcalde who made it might have been called. In the absence of such proof the court is bound to believe it never existed.

To establish the honesty and good faith of the title in the face of this strong circumstantial evidence against it will require clear evidence, overwhelming in amount, free from serious contradiction, and perfectly pure in the source from whence it comes. And what have they produced to show the execution, the delivery, or the recording of the grant?

Covarrubias proves nothing about it. Den and Shore swear only to their opinion of the handwriting, which this court has declared to be inadmissible. The whole weight of the case rests upon Moreno. The value of his testimony need not be discussed, for the counsel of the claimant candidly admit him to be unworthy of belief. There is no other evidence that the grant was executed, delivered, or recorded. If Den and Harbin were believed, it would only show that it was *possible* for Knight to have got a grant in May, 1846. Shall the mere naked possibility that he *might* have got a grant, stand for proof that he *did actually* get one?

But even this possibility is swept away from the claimant by the powerful and irresistible proof that Knight was not at Los Angeles, but at home in the valley of the Sacramento, during the whole spring.

If such a grant was ever delivered to Knight, why is it not produced? There is no scintilla of evidence to show its loss. Brannan proves only that Knight told him he had *lost his title papers.* This declaration is not evidence of the fact declared; much less does it prove the loss of a particular paper, which was not mentioned. That he lost any papers at all must be untrue, for all the title papers he ever had or ever pretended to have were found safe in the custody of his wife, after his death.

This case has all the bad features in it of the worst cases

that ever came from California. Like *Santillan*, the claimant asserted his right to the land under a different title from that now set up; like *Luco*, he is without record evidence; and like *Diaz*, he is met by a clearly proved *alibi*.

If the claimants had been content to rest the cause upon the papers alone, the claim would have been rejected, not as a manifest forgery, but on the ground of insufficient, illegal, and unsatisfactory proof. But they chose to name the place and the time at which the grant was delivered to Knight—at Los Angeles, on the 4th of May, 1846—and they called Den and Harbin to prove it. This gave to the Government the opportunity of demonstrating the falsehood of the whole story by showing that Knight was not there, but seven hundred miles away, at the time. There cannot be an earthly doubt that the papers are fabricated.

Mr. Justice CLIFFORD. This was a petition for the confirmation of a land claim under the act of the third of March, 1851, and the case comes before the court on appeal from a decree of the District Court of the United States for the northern district of California, reversing the decree of the commissioners, and confirming the claim. William Knight died in October, 1849, and, of course, never presented any claim under that law for confirmation. Administration on his estate was granted to the appellee on the sixth day of November, 1851, and, on the third day of March following, he, as such administrator, filed a petition before the commissioners, claiming a tract of land, called Carmel, situated on the borders of the Sacramento river, and containing ten square leagues. Said tract, as the petitioner represented, was granted to his intestate on the fourth day of May, 1846, by Governor Pio Pico, in the name of the Mexican nation; and was afterwards, during the lifetime of the decedent, possessed and occupied by him pursuant to the grant under which the claim is made. Copies of certain documentary evidences of title were also presented and filed at the same time, and the petitioner represented in effect that he relied on those documents, and such other evidence as he might be able to obtain, to show that the claim

ought to be confirmed. Assuming that the theory of claimant is correct, the title is one, undoubtedly, that ought to be protected; but it is denied by the United States that any such grant was ever made, and that is the principal question in the case. Vacant lands in California belonged to the Supreme Government, and the laws for the disposition of the same emanated from that source. General rules and regulations upon the subject were accordingly ordained, authorizing the Governors of Territories, under certain specified conditions, to grant such lands to such empresarios, families, and single persons as might ask for the same for the purpose of settlement and cultivation; but it was expressly provided that grants made to families or single persons should not be held to be definitively valid, without the previous consent of the territorial deputation. By those rules and regulations, every person soliciting such lands was required, in the first place, to address a petition to the Governor setting forth his name, country, profession, and religion, and also to describe the land asked for as distinctly as possible, by means of a diseño or map, which is usually annexed to the petition. He was not required to prove his representations, but it was made the duty of the Governor to obtain the necessary information to enable him to determine whether the case, as presented in the petition, fell within the conditions specified in the regulations, both as regarded the land and the applicant. Petitions and grants, with the maps of the land granted, were required to be recorded in a book kept for that purpose, and a circumstantial account of the adjudications was directed to be forwarded quarterly to the Supreme Government. To bring the claim within these rules, the claimant introduced the following documents before the commissioners:

1. A petition, in the usual form, signed by his intestate, bearing date at Sonoma, on the first day of February, 1846, and addressed to Governor Pio Pico.

Recurring to the material parts of the instrument, it will be seen, that the petitioner asked the Governor to grant him "the tract set out in the annexed map," meaning the map annexed to the petition, containing ten sitios de gañada mayor, more

or less; and after describing the tract, and giving the outboundaries of the same, stated that, according to the annexed report of the magistrate of Sonoma, "there seems to be no obstacle on the part of any one to its concession." No such map, however, as that referred to was annexed to the petition at the time it was introduced; and the espediente contained no report of the Alcalde of Sonoma, or of any other such magistrate.

2. Two decrees, signed by Governor Pio Pico, both dated Angeles, May 4th, 1846, were also introduced by the claimant. One was written, as usual, in the margin of the petition, and was as follows: "Granted, as prayed by the petitioner. Let the title be issued by the Secretary of the Department." But the other, which is signed also by the Secretary, was appended to the petition, without any intervening informé, or order for the same; and yet the recitals of the decree plainly import that the action of the Governor, in making it, was based not only upon the petition, but also upon a report of the Alcalde of the district, as set forth in the petition. Like the preceding decree, it directs that a proper title be issued to the petitioner; and, also, that the espediente be kept, to be submitted to the Departmental Assembly.

He also introduced another document, which was appended to the last named decree, and which purports to be a copy of the "titulo" or grant on which the claim is based. It is dated at the city of Los Angeles, on the fourth day of May, 1846, and is in the usual form.

Failing to produce the original grant, the administrator introduced his own affidavit, to show that he had made diligent search for the same among the papers of the deceased, and elsewhere, and that he was unable to find it. Three witnesses were examined by the claimant before the commissioners; but the commissioners rejected the claim, and the claimant appealed to the District Court. Testimony was taken on both sides in the District Court, and the claimant also introduced certain additional documentary evidences which it becomes important to notice.

Nearly three years before the petition was presented to Governor Pio Pico, the same party, as appears by these documents, had presented a similar petition to Manuel Micheltorena, then holding the office of Governor of California, asking for a grant of the same tract of land. This petition, as then presented, was dated at Monterey on the eighth day of May, 1843, and on the same day the Governor referred it to the Prefect of the district for a report. John A. Sutter was at that time the principal civil officer in that section of the department, and the Prefect accordingly referred the petition to him, directing him to furnish the necessary information; but he referred it to the Alcalde or justice of the peace of Sonoma, for the reason, as stated, that the land was in that district. On the twenty-sixth day of January, 1844, the last named officer reported, to the effect that the land solicited was occupied by virtue of a concession from the Governor in favor of another individual.

That report was duly transmitted to the Governor; and, on the twenty-seventh day of March following, he referred the whole case to Manuel Jimeno, who, on the same day, made a report, recommending that the petition in question, and all similar cases, should be suspended, until the Governor could visit that frontier. Here the matter dropped; and, for reasons which will presently appear, the petition was never again considered.

Certain prominent persons belonging to the department, of whom Pio Pico was one, in the fall of 1844, revolted against the authority of Micheltorena; but John A. Sutter supported the constitutional governor, and was sent by him to collect the militia of the northern frontier, to put down the rebellion. Some of the adherents of the latter had certain claims to lands, and he suggested to the Governor, in the emergency, that grants should be made to them, probably as the most available means to secure their services. Pursuant to that suggestion, the Governor sent to that officer the document known as the "Sutter general title," promising grants to all such claimants as had previously obtained from him a favorable report. According to the testimony of Sutter, the claimant's intestate was prop-

erly included in that category; and he accordingly, on the fifteenth day of April, 1845, gave him the copy of that document, which is exhibited in this record.

Such is the substance of the documentary evidences of title introduced by the claimant. All those relating to the proceedings on the petition presented to Micheltorena, together with the copy of the Sutter general title, were found among the papers of the deceased; but those appertaining to the Pio Pico espediente, except the alleged copy of the grant, are traced copies of originals, now on file in the office of the Surveyor General of California.

It is not pretended that the Sutter general title has any validity, or that the claim in this case can be upheld by the proceedings that took place on the first named petition. Such pretensions, if made, could not be supported, as this court has determined, on several occasions, that the former was invalid; and it is quite obvious that nothing was done by Governor Micheltorena to give any pretence of title whatever to the claimant's intestate.

But it is insisted that the parol proofs, taken in connection with the espediente of 1846, clearly show that Pio Pico, on the fourth day of May in that year, actually issued the grant to William Knight; and that, having proved its execution, delivery, and loss, the claimant is entitled to introduce secondary evidence, to show its contents. Great reliance is placed upon the espediente, as furnishing a ground of presumption that the grant was issued; and, indeed, it is contended, that if it appears that the espediente is genuine, then the grant must be confirmed. Whether the proposition, as stated, be correct or not, it may properly be admitted that the question, as to the *bona fides* of the espediente, is one of very considerable importance in the case. When complete, an espediente usually consists of the petition, with the diseño annexed; a marginal decree, approving the petition; the order of reference to the proper officer, for information; the report of that officer, in conformity to the order, the decree of concession, and the copy or a duplicate of the grant. These several papers—that is, the petition, with the diseño annexed, the order of reference, the

informé, the decree of concession, and the copy of the grant, appended together in the order mentioned—constitute a complete espediente, within the meaning of the Mexican law.

Three defects are obvious in the document exhibited in the record. There is no map annexed to the petition, and there is neither an order of reference nor an informé; and the inference from the fact that the decree of concession immediately follows the petition is a reasonable one, that no order of reference or report were ever made.

Those defects, however, are by no means the principal circumstances that tend to create distrust as to its genuineness. Much graver difficulties than any suggested by the defects of the document arise, from what appears affirmatively, on its face. Both the petition and the decree of concession refer to the report of the Alcalde of Sonoma; and the language of the latter plainly imports that it was founded, in part at least, upon a report of that magistrate. No such report, so far as appears, was made by that officer, in connection with the espediente under consideration. He never made but one report, and that, as clearly appears, was adverse to the application, and was made to Micheltorena on the twenty-sixth day of January, 1844, in which he stated that the land solicited was occupied by virtue of a concession from the Governor in favor of another individual.

Looking at the terms of the report, it is clear that it is not to that report, as originally framed, that reference is made, either in the petition or the decree of concession. On the contrary, it is evident that they both refer to a *favorable* report, and not to one that was *adverse*, which entirely negatives the theory that the informé previously made and on file was carried into this espediente. To suppose that the Governor referred to an informé that never had any existence, is a theory that cannot be adopted, as it would impute to him an inconsistency little better than a fraud upon the Government. Some other theory, therefore, must be adopted, to explain the transaction. Referring to the record, it appears that Jacob P. Leese was the Alcalde who made that report, and he was examined as a witness in behalf of the United States. He testified that

the words *una parte de ello*, translated, a part of it, now appearing at the close of the report, were inserted by him on the eighth day of October, 1847, at the solicitation of the claimant's intestate. That alteration in the informé was made, as he states, in the presence of the individual who, according to his original report, was in the occupation of the land by virtue of a concession from the Governor. Two certificates were also introduced by the claimant, which go very far to confirm the statements of the witness, both as to the time when the addition was made to the informé, and the attending circumstances. One of those certificates is signed by the witness himself, in which, after referring to the informé, he states, in effect, that he has discovered, since he made that report, that the statement therein made, that the land was occupied by another individual, was erroneous; and the other certificate is signed by the person referred to in the informé as the occupant of the land; and he certifies that the land solicited, if "regulated to the plan," would not interfere with his possession. These certificates bear date on the eighth day of October, 1847, and the witness testifies that he made the alteration in the informé at the time he gave that certificate. Micheltorena was driven from power in 1845, and on the tenth day of August, 1846, Pio Pico fled from the city of Los Angeles, and never afterwards had possession of the archives or records of the department. Before his flight, he placed them in boxes, and deposited them with Luis Vignes for safe-keeping. On the thirteenth of that month, Commodore Stockton entered the city of Los Angeles, and on the next day Colonel Fremont took possession of the archives, and kept them until the eighth day of September following, and then took them to Sutter's fort, on the American river, where they remained until 1847, when they were sent to Monterey. They remained at Monterey until February, 1850, when they were sent to Benicia, and thence to the office of the Surveyor General. Whatever might have been the motive for making the alteration in the informé, it is clear that it could not have been done to influence the official action of the Governor, for he had long before gone out of office; and yet the circumstances strongly support the hypothesis that it was to

that same report, as altered on the eighth day of October, 1847, that the reference is made, both in the petition and the decree of concession embraced in the espediente. Assuming that to be so, then it is clear that the espediente is ante-dated and fraudulent; and the circumstances, when taken together, tend so strongly in that direction, that we think the espediente is not entitled to much weight. When the jurisdiction of that department was transferred to the United States, the motive to fabricate titles to real property became strong and active, and the evidence in this case is abundantly sufficient to show that opportunities occurred to enable the unscrupulous to foist simulated evidences of such titles into the depositories of the archives, after they were seized at Los Angeles, in spite of any vigilance that those intrusted with their safe-keeping could possibly employ to preserve them from such fraudulent practices. Interested parties were necessarily allowed to consult the contents of the packages while they yet remained in very considerable disorder, and without any permanent custodian. Among those who had such opportunities was one of the witnesses of the claimant, and the evidence tends to show that he had an interest in the claim, and that he had stated that when he took hold of it there were no papers in the case, but that he had procured a set as good as any that could be found in the State. True it is that he denies ever having made that statement; but he admits that he went to Benicia in 1850, and that he examined the archives for the purpose of ascertaining whether any grant had been made to the claimant's intestate. He says he saw papers there with the name of William Knight on them, but neither he nor the clerks in charge of them could translate them. Whether the espediente in this case was in the boxes that fell into the possession of Colonel Fremont at Los Angeles, or was among the loose papers subsequently found in the custom-house at Monterey, or when or by what means the espediente was deposited in the archives, does not appear, except that it was there in 1847, or the first part of the year 1848, when an officer of the United States, in charge of the archives, made and completed an index of certain espedientes, not previously indexed, numbered, or filed, by Mexican au

thority. Sixty-seven, including all those found in the custom-house at Monterey, were then added to the previous list. Mexican numbering stopped at five hundred and twelve, and the author of the new index commenced to number where the other closed. That index includes the espediente in this case as number five hundred and fifty, and it shows that the espediente was in the archives when that index was made; but it shows nothing more, and cannot in any sense be regarded as a Mexican record. Evidence to show that the grant was recorded is entirely wanting; and there is no pretence that the espediente was ever submitted to the Departmental Assembly for its approval. Absence of such approval, under the circumstances of this case, is entitled to very considerable weight. More than forty espedientes were presented to that assembly on the third and tenth days of June, 1846, and received its approval. Several of the grants were dated in April, 1846, and one was dated on the first day of May of that year, and the inference is a reasonable one, that if the espediente in this case had really been completed, and the grant actually issued, the former would have been included in that list. Taken together, these various considerations throw great distrust upon this document, and justify the conclusion that it is entitled to little or no weight. Rejecting the espediente as unsatisfactory and wholly insufficient, under the circumstances, nothing remains to support the claim in this case except the parol proof. Claimant's theory is, that the grant was issued by Governor Pio Pico at Los Angeles on the fourth day of May, 1846, and was then and there delivered to his intestate. At that time William Knight lived in the valley of the Sacramento, some seven hundred miles distant from the seat of Government, where it is assumed that the grant was issued; but it is insisted that he visited that place the last of April or early in May of that year, and that the grant was delivered to him in person by the Secretary of the Department. José M. Moreno was the Secretary at that time, and he testifies that the grant was issued by the Governor on that day, and that he, the Secretary, delivered the same to the claimant's intestate. But it is a sufficient answer to the testimony of that witness to say, that it is con-

ceded by the claimant, that his character for truth is worthless.

Another witness, James M. Harbin, testifies, that he saw William Knight in Los Angeles about that time, and that he said he was there for the purpose of getting a grant for ten leagues of land on the Sacramento river; that Governor Pio Pico told him that he had issued the grant, and that he, the witness, saw papers in the possession of Knight when he started to return, but did not know what they were. Proof was also introduced by the claimant to show that the signatures to the marginal decree and the decree of concession were genuine; and he also introduced an affidavit of J. C. Davis, in which the affiant states that, on the 5th day of June, 1846, he heard Knight say, in the camp of Colonel Fremont, that he had just returned from the lower country, where he had procured his title papers; and the affiant also stated that he exhibited certain papers, calling them title papers, but the witness did not examine them, because he could not read the language. Other declarations of Knight were also introduced without objection—such as, that he, at one time, said he was going to Los Angeles, concerning the title to his land, and that, on his return, he said he had received it; and that, in March, 1847, he said he had lost his grant, and expressed his fears that he should lose his land in consequence of the loss of the grant. It was denied by the United States that he made any such visit to Los Angeles as is alleged; and they also insisted that he never claimed to have any other title to the land than the copy of the general title, which was furnished him on the fifteenth day of April, 1845; and a large number of witnesses were examined to establish these points. They prove that, whenever he spoke of having a title to the land, he uniformly spoke either in vague terms, or else referred directly to the general title, and never, in a single instance, declared that he had a grant of the land from the last-named Governor. They also prove that he was at home during the winter and spring of that year, and that in the month of April he was engaged, to some extent, in agricultural pursuits. One witness states, that he saw him on his ranch about the eighteenth or twen-

tieth of that month; and another, that he saw him at his house about the first of May of the same year, and states the circumstances that enable him to fix the time with certainty. Two other witnesses, one a boarder in his house, and the other a neighbor, state, with great positiveness, that he was at home in the early part of May, sometimes hunting and sometimes farming, until he joined Colonel Fremont on the twenty-sixth day of that month. Testimony was also introduced by the United States, showing that great difficulties would have attended such a journey at that season of the year, on account of the swollen state of the streams and the condition of the roads; and some of the witnesses, who were well acquainted with the usual route, express the opinion that the journey, in the ordinary course of travelling, could not have been accomplished short of a month. These and many other facts were given in evidence to show that he did not visit Los Angeles at the time alleged; and clearly the weight of the evidence, to say nothing of the improbability that the Governor would bestow such a bounty upon one so recently in arms against him, is clearly against the theory set up by the claimant. Suppose it were competent for the appellee to prove his claim without record evidence, still the burden is upon him to show that the grant was issued; and surely he must first show its existence and loss before he can be allowed to give secondary evidence of its contents. Applying that elementary rule to the facts of this case, and it is clear that the claimant has no standing in court. But a more decisive answer to the claim remains to be stated, and that is, that there is no record evidence that the grant was ever issued, and without such evidence the claim cannot be confirmed. That rule is founded upon the Mexican law, and has been so repeatedly announced by this court that it seems unnecessary to adduce any argument in its support. To maintain a title by secondary evidence, say the court, in *United States* vs. *Castro et al.*, (24 How., 350,) the claimant must show that the grant was obtained and made in the manner the law required, at some former time, and that it was recorded in the proper public office; to which it may be added, that such was undoubtedly the Mexican law, and that the rule

there laid down is plainly applicable to the present case. Similar views have been expressed by this court on so many occasions that it would be a work of supererogation to do more than to refer to the decided cases. *United States* vs. *Teschmaker*, (22 How., 392;) *United States* vs. *Fuentes*, (22 How., 443;) *United States* vs. *Cambuston*, (20 How., 59;) *United States* vs. *Osio*, (23 How., 279, 280.)

Evidence was also introduced by the claimant tending to prove that a book of records appertaining to land titles in California, for the year 1846, was lost; but no attempt was made to show that the grant in question was ever recorded in that book. All we think it necessary to say upon that subject at the present time is, that proof of such a loss cannot avail a party in a case like the present, unless it also be shown, at least by circumstances which will justify the court in finding the fact, that the grant was duly and properly entered in the lost record. In view of the whole case, we are of the opinion that the District Court erred in confirming the claim. The decree must accordingly be reversed, and the cause remanded, with directions to dismiss the petition.

Mr. Justice WAYNE. I content myself now with saying that I do not concur with the court in its conclusion in this case. I think it a severer exclusion of a right of property in land secured by treaty than has been hitherto adjuged by this court in any case from California.

Decree of the Circuit Court reversed and cause remanded, with directions to dismiss the petition.

ROGERS *vs.* LAW.

1. A claim for money lent where no demand for payment was made of the borrower in his lifetime against his executors until thirty-three years after the date of the loan, is properly rejected by a court of equity on distribution of the borrower's estate.
2. L. and wife conveyed to trustees the interest of the wife in certain estates, to be converted into money and invested by the trustees for the use of the wife during life, after her death for the use of the husband, and after the death of both to their daughter; and L. covenants that whenever it shall be ascertained and known what sum will thus be secured to the daughter, he will immediately thereupon secure to her a like sum to be paid out of his own estate. *Held*, that the value of the interest conveyed to the trustees for the ultimate use of the daughter must be ascertained by the conversion of the property into money or its equivalent, and such conversion is a condition precedent to the obligation of the father to secure a like sum to the daughter.
3. Testator gave certain legacies to his grandchildren, annexing to the legacies the condition that if either of the legatees shall claim, ask, or demand, sue for, recover or receive any part or portion of his estate, rights, or credits, either in his lifetime or after his decease, under or by virtue of certain deeds, (particularly describing them,) then and in that case the bequest, &c., should be void. One of the grandchildren died under age. Upon the distribution of the testator's estate the two surviving grandchildren set up a claim under the interdicted deeds, and in the same proceeding they demanded the legacies. The claim under the deeds was finally disallowed on its own demerits. *Held*, that by setting up that claim the grandchildren forfeited their right to the legacies.
4. A condition annexed to a legacy that the legatee shall make no claim or demand upon the testator's estate for a debt which, if not relinquished might be recoverable, is lawful, and if the legatee accepts the testator's bounty he must take it *cum onere*.

Appeal from the decree of the Circuit Court of the United States for the District of Columbia.

This was a proceeding for the distribution of the estate of Thomas Law, deceased, among his creditors and legatees.

The same cause was here before, and is reported as *Adams et al.* vs. *Law*, in 17 Howard, 417. It was then remanded, and was further proceeded in according to the opinion of this court. The questions which arose afterwards were on the following claims:

1. Lloyd N. Rogers made a claim as creditor for money lent in 1822. It was not shown that this debt had ever been demanded of the decedent in his lifetime, nor of his executors before 1855.

2. Lloyd N. Rogers also claimed as creditor under the deed which will be found described in the opinion of Mr. Justice *Nelson.*

3. The two children of Lloyd N. Rogers and the administrator of a third one, deceased, (grandchildren of the testator,) claimed legacies of $8,000 each. These legacies were given upon the condition that the legatees should not claim or demand, sue for, or receive any portion of the testator's estate under certain deeds mentioned and described in the will.

Mr. Mason Campbell, of Maryland, for the appellants. 1. The fact of the loan by Mr. Rogers to Mr. Law in 1822 is established; the only objection worthy of notice is that arising out of the lapse of time. The statute of limitations is not interposed by the residuary legatee, but by Mr. May, administrator of two specific legatees. They have no interest in the question. Enough will be left to pay them, whether this claim be allowed or not. But by the law of Maryland (which is the law of the District) it can be set up only by the executor, who in this case has not pleaded it. *Bowling* vs. *Lamar*, (1 Gill, 362;) *Spencer* vs. *Spencer*, (4 Mar. Ch., 465.)

2. The validity of the claim of Mr. Rogers under the deed to Calvert and Peter was affirmed by this court on the first appeal; but assuming that it was not, it should be affirmed now. The auditor has overlooked the evidence on this point, which shows that the value of the property secured to Mrs. Rogers by that deed was $36,552 45; and Mr. Law's covenant pledged his estate to an equal amount.

3. The claims of the legatees were erroneously rejected by

the court. In this the court committed the grave error of supposing that the case was one of election. The claims of these legatees, under the deeds mentioned in the will, are as creditors, and creditors are never put to an election. *Kidney* vs. *Coussmaker*, (12 Ves., 154;) *Deg* vs. *Deg*, (2 P. Wms., 418;) 2 Wms. on Exrs., 888; 2 Story Eq., § 1075. The doctrine of election is wholly inapplicable here. It is founded altogether upon an implied condition that he who accepts a benefit under an instrument must renounce all inconsistent benefits, and as the courts imply the condition they give the party affected by it his right of choice between the two. 1 White's Lead. Cas. in Eq., 233. But where the testator himself expresses the condition none can be implied, and such is this case. This condition has not been broken. Eliza P. Rogers, one of the legatees, died under age and unmarried, and never received a dollar. The acts of her brother and sister cannot affect her interests. Ward on Legacies, 139. The other two legatees claimed nothing prior to this suit. What they claimed here was declared by this court to be without foundation. The other claims, under the marriage settlement, are made exclusively by their father. There has been no money received by any of the family from Mr. Law's estate, on any of the accounts interdicted by him. Suppose, however, the condition to have been broken, there is no bequest over, and so the condition is merely *in terrorem*, and will not work a forfeiture. 2 Wms. on Exrs., 790; 2 Jarm. on Wills, 46; Ward on Legacies, 139; *Wheeler* vs. *Bingham*, (3 Atk., 368.)

Mr. May and *Mr. Brent*, of Maryland, for appellees. 1. Mr. Rogers withheld his claims, as creditor, until this cause was remanded. His claim for money lent to Mr. Law in 1822 is altogether stale. The plea of limitations is sufficiently relied on by the residuary devisee, and the auditor sc reports. This is sufficient in equity. *McCormick* vs. *Gibson*, (3 Bl., 499;) 1 Mary. Dig., 411; *Binney's case*, (2 Bl., 99;) *Warfield* vs. *Banks*, (11 Gill & Johnson, 98.) It is true that in actions by creditors against the executor or administrator, in re-

spect to personal estate, the statute can be pleaded only by the personal representative. But this contest practically relates to the proceeds of Mr. Law's real estate. Besides this, the objection of staleness need not be made by exception or plea. *Lingan* vs. *Henderson*, (1 Bl., 236;) *Salmon* vs. *Clagett*, (3 Bl., 125;) 1 Md. Dig., 411; *Hepburn's case*, (3 Bl., 95;) 2d Md. Ch. Dec., 231.

2. These remarks apply equally to Mr. Rogers's claim under the deed, and that claim must also fail on its merits. Mr. Law did not covenant to pay any sum until he had notice of the ascertained value of the funds received by Peter and Calvert, as trustees for the use of his daughter. There is no proof which tends to show that any property ever came to the trustees for the purposes of that trust. Nor is there any proof of his ever having had the enjoyment of the residuum of his wife's trust estate, for which he had stipulated.

3. It is too clear for argument that the testator designed to give those legacies to his grandchildren, on the express condition that neither they nor any one of them should claim anything out of his estate by reason of those deeds. Such an intention is legal. 6 Page, 388; 1 Eden., 492; 2 Amb., 157; 8 Gill, 203; 5 Md. Rep., 306; 2 Gill, 181.

Mr. Justice NELSON. This is an appeal from a decree of the Circuit Court of the Unites States for the District of Columbia.

The appeal is from a decree of the court below, entered there upon the going down of the mandate of this court, in pursuance of its decision when the case was formerly here, on an appeal by the executor and trustee of the estate of Thomas Law, the settlement of which is the subject of litigation.

The case is reported in the 17 How., 417. This court reversed so much of the decree in the court below as gave to the grandchildren of the testator by Eliza, his daughter, wife of Lloyd N. Rogers, an interest, under certain limitations, in the deed of marriage settlement of the 19th March, 1796, amounting to the sum of $66,154 81, and affirmed the residue of said

decree. This sum, by the decision, fell, of course, into the residuum of the estate of Law, for distribution among the creditors, legatees, and distributees.

When the case came again before the auditor appointed by the court below, several claims were presented for allowance, which were heard and examined by him, and his decision thereon reported to the court; and, after exceptions and argument, the report was confirmed. These several claims are now the subject of review by this court, upon the present appeal.

The first is a claim by Lloyd N. Rogers, as a creditor of the estate, and is founded upon an alleged loan of money to the testator, Law, as early as 1822. This claim was rejected by the auditor, upon the ground the proofs were not satisfactory that the loan had ever been made by Rogers. The lapse of time, also, since it was alleged to have been made, some thirty-three years, without, for aught that appears, presenting it to the testator in his lifetime, or against the estate since his death, strongly confirms the conclusion of the auditor. We think the item was properly rejected.

The next claim is also by Lloyd N. Rogers, as a creditor of the estate, and is founded upon a deed executed by Thomas Law, the testator, and Eliza Parke Law, his wife, on the 9th August, 1804, to George Calvert and Thomas Peter. The deed conveys to the grantees all the right and interest, real or personal, of Eliza P., the wife, and of Thomas Law, the husband, in right of his wife, to which she might or would be entitled from the estate of George Washington, or from the estate of her father, John Parke Custis, in trust, to convert the same into money, &c., &c., and to apply the interest or income of $10,000 to the sole use of the said Eliza P. during her lifetime. This sum was also made subject to her absolute disposition by will, or, in case of dying intestate, to be conveyed to her heirs; and, after deducting the $10,000 from the fund, to apply the rents, issues, and profits of the residue to the sole use and benefit of the said Eliza P., for and during her life, and, after her death, to pay the said income to Thomas Law, the husband, (if then living,) for and during his life; and after the death of both, then to convey the whole of the residue to

Eliza, the daughter. And then comes the covenant of Thomas Law, which constitutes the ground of the present claim. The said Thomas covenants, to and with the trustees, that whensoever the full amount and value of the funds shall be ascertained and known, which may or shall come to their (the trustees') hands, in virtue of this trust, and it can be thereby ascertained what sum shall be secured, to come ultimately therefrom to his said daughter, Eliza, after the death of her father and mother, *that he will immediately thereupon secure to his said daughter a like sum, to be paid to her out of his estate at the death of her said father and mother.*

It will be seen by this deed that it was made the duty of the trustees, as soon as practicable, and without sacrifice of the interest of Mrs. Law in the estates of George Washington, and her father, John Parke Custis, to convert the property into money, and invest the same in stock or other securities; and, after setting apart the sum of $10,000, assigned to her absolutely, the income of the residue was to be applied to her for life, and, after her death, to the husband, if he survived, for life; and, at his death, the whole, principal and interest, to be transferred to Eliza, the daughter. And it was this residue, thus ultimately to be transferred to her, which, when ascertained and known, the father covenanted immediately thereupon to secure to her a like sum, to be paid out of his estate at the death of both parents. The conversion of the residue of the estate thus limited, and ascertainment of the amount of it in money or stocks or other securities, as prescribed in the deed, are, by the very terms of the covenant, a condition precedent to the obligation of the father to secure a like sum to the daughter. An appraisal or valuation of this residue of Mrs. Law's interest in the two estates will not answer the condition. The amount must be ascertained by a conversion of the property into money, or its equivalent. This is not only the fair meaning of the terms of the covenant, but the obvious intent of the parties in the connection in which it is found.

This being, in our view, the true construction of the covenant, it is only necessary to say, that there was no evidence before the auditor that its condition had been complied with,

either in the lifetime of the testator or since his death. We are of opinion, therefore, that the claim was properly rejected.

The third claim arises upon a codicil to the will of the testator, Thomas Law, which bequeaths to the three grandchildren, the children of his daughter Eliza by Lloyd N. Rogers, $8,000 each, upon this express condition, that if the grandchildren, as heirs or devisees of their late grandmother, Mrs. Law, shall claim or demand, &c., any portion of his estate, rights, or credits, under or by virtue of certain indentures in the said codicil specially enumerated, then, and in that case, the bequest in the codicil to be null and void.

The other legatees under the will of the testator object to the allowance of these three legacies, for the reason that the condition upon which they were to become null and void has happened, namely, a claim against the estate of the testator as heirs or representatives of their grandmother, Mrs. Law. The auditor, after stating the facts of the case as presented to him, and the question of law arising out of them, referred it to the court below for their direction.

The court held, that the sum of $32,585 76, which had been awarded to Lloyd N. Rogers, as administrator of Eliza, his wife, and which was claimed and allowed under one of the interdicted deeds, and which belonged to her children, as distributees, if claimed, or received by them, would be inconsistent with their right to the legacies according to the condition of the bequest, and by the decree gave the choice to the legatees to take the legacies under the will, or the distributive shares of the fund. The court were of opinion that no claim had yet been made for the distributive shares; but that, according to the true meaning of the bequest, the legatees were not entitled to both funds, and that, for the purposes of the settlement of the estate, they should be put to their election within a time mentioned. We are inclined to think, upon the facts in the case, a claim had already been made of the fund by the legatees and those representing them, which came from the estate of the testator through their grandmother, under and by virtue of one of the interdicted deeds, and which operated to annul the legacies; but, as the views of the court

below, and the decree in pursuance thereof, lead to the same result substantially, it is unnecessary to interfere with them.

The condition upon which the legacies were to fall is very specific and explicit: that "if the said children," "or either of them, or any person or persons on their behalf or account, or in behalf or on account of either of them, as heir or heirs-at-law, or devisees or devisee of their grandmother," "shall claim, ask, or demand, sue for, recover, or receive any part or portion of my estate, rights or credits, either in my lifetime or after my decease, under or by virtue of certain indentures —enumerating three—or under or by virtue of any other indenture," "which the said Thomas Law and E. P. Law, or E. P. Custis, meaning Mrs. Law, may have been parties, or to which any other person or persons with the said Thomas Law may have been parties for the benefit of E. P. Law, or E. P. Custis, or her heirs; then, and in that case, the bequest, &c., shall be null and void."

Besides the distributive shares to the grandchildren, which the court below held as coming from one of the interdicted deeds, and inconsistent with the condition upon which the bequests of the legacies were made, the two surviving grandchildren had set up a claim in that court to an interest amounting to the sum of $66,154 84, under the interdicted deeds of 1796, 1800, and 1802, and which sum was awarded to them by the decree of the court. On an appeal to this court the decree was reversed, and the claim disallowed, as will be seen in the report of the case already referred to. We are of opinion this claim and litigation were in violation of the condition annexed to the bequest of the legacies. The legatees are forbidden to claim, ask, demand, sue for, recover, or receive any portion of the estate of the testator under these deeds, as the representatives of their grandmother.

The testator in his will had stated his fears that he had settled upon the children of his daughter—these grandchildren —more than the other grandchildren would receive from his estate, unless his property should rise in value, in which case he would make another will. This impression, doubtless, led to the stringent condition annexed to the bequest in the codicil

which was executed nearly two years later. The condition is not put upon the possession, recovery, or receipt of any portion of his estate under these deeds, but upon a claim or demand, or suit for the same; and the testator directs, if the terms of the bequest are not acceptable to the grandchildren, that his executor shall contest with them to the utmost their right to claim the legacies. It may well, we think, be doubted, if the judgment of the court against their claim, under these deeds, after a long and expensive litigation, can save the legacies from a breach of the condition. The very special terms of it would seem to have been intended to save the estate from any such litigation, so far as regarded the right to the enjoyment of the legacies.

An objection was taken, on the argument, to the legal effect and operation of this condition, but we entertain no doubt as to its force and validity. The condition is lawful, and one which the testator had a right to annex in the disposition of his own property. The legatees are not bound to accept the bequest, but, if accepted, it must be subject to the disabilities annexed; it must be taken *cum onere*, or not at all.

There are some other items of minor importance, to which exceptions have been taken, but we see no well-grounded objection to them.

The decree of the court below affirmed.

ATTORNEY GENERAL *vs.* FEDERAL STREET MEETING-HOUSE.

1. This court has no jurisdiction to review the proceedings of a State court merely on the ground that the defendant is a body politic, incorporated by an act of the State Legislature.
2. To sustain a writ of error from this court to the State court in such a case, it must appear from the pleadings, evidence, or decree, that the validity of the act of incorporation was drawn in question.
3. The validity of the act is not drawn in question where the defendants assert that they and those under whom they claim were owners of the land in dispute before the passage of the act, as well as afterwards, and where the plaintiffs assert title in themselves under a deed in no way connected with the act.
4. Where the act incorporating the defendants was a mere enabling act, passed while they were in possession, and intended for their convenience as owners, and other persons claim to be the true owners, the issue is on the original rights of the parties, without respect to the defendant's charter.

Writ of error to the Supreme Court of the State of Massachusetts.

The Attorney General of Massachusetts, at the relation of the Associate Reformed Presbyterian Synod of the State of New York, and others, ministers, elders, and members of the Presbyterian Church, filed an information in the Supreme Judicial Court of Massachusetts against the proprietors of the Meeting-house in Federal street, Boston, alleging that the land on which said meeting-house is built was conveyed in 1735, by its then proprietor, to trustees, to be held as a place for the preaching and maintaining of the doctrine, worship, and form of government of the Presbyterian Church of Scotland, which was Calvinistic and Trinitarian, teaching the Westminster confession of faith and catechisms; that the meeting-house continued to be used according to the trust expressed in the deed until 1786, when various changes were introduced into the Society, and it became *Congregational;* that this lasted until 1815, when the trust was wholly perverted and abused by the conversion of the congregation into a *Unitarian* Society.

In 1805, (while it was a Congregational Church,) the Legislature of Massachusetts incorporated "all persons who now are or who may hereafter be the proprietors of pews in the Congregational meeting-house situate on Federal street, Boston," by the name of "The Proprietors of the Meeting-house in Federal street, in the town of Boston," and declared that the said corporation should be deemed seized of the meeting-house, with its appurtenances, &c. The answer of the defendants sets forth, among other things, the act of incorporation, and avers that they were in possession long before the passage of that act; that they were in possession at the time of its passage, and have remained in possession ever since, as the undisputed owners of the premises. The State court dismissed the information, (3 Gray, 1,) and this writ of error was taken by the relators.

Mr. Bartlett, of Massachusetts, for the defendants, moved the court to dismiss the writ of error for want of jurisdiction. The judgment (he said) is sought to be reversed, and the power of this court to do it rests solely on the ground that the act incorporating the defendants was unconstitutional, whereas it does not appear that the validity of that act was in any manner drawn into controversy. Even if the validity of the act had been a question in the court below, and its validity had been sustained, there are various other grounds within the exclusive cognizance of the State court upon which this judgment must be affirmed.

The doctrine is now firmly established, that to give this court jurisdiction, it must appear by the record, or by clear and necessary intendment, that the question on which the jurisdiction is founded *must* have been raised, and *must* have been decided, in order to have induced the judgment. *Crowell* vs. *Randall*, (10 Peters, 368, 398.) That the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed without deciding it. *Armstrong* vs. *Treasurer, &c.*, (16 Peters, 281, 285;) *Mills* vs. *Brown*, (16 Peters, 525;) *Smith* vs. *Hunter*, (7 How., 738;) *Neilson* vs. *Lagow*, (12 How., 98, 109;)

Williams vs. *Oliver*, (12 How., 111, 124;) *Grand Gulf R. R.* vs. *Marshall*, (12 How., 165, 167;) *Lawler* vs. *Walker*, (14 How., 149, 155;) *Maxwell* vs. *Newbold*, (18 How., 511, 515;) *Christ Church* vs. *Philadelphia*, (20 How., 26, 28.) It must appear either on the bill or answer, or decree of the court. *Mich. Cent. R. R.* vs. *Mich. South. R. R.*, (19 How., 379.) In this case the *bill* refers to the act of 1795 but once, and there avers in substance that it is valid. The *answer* avers that the defendants were owners before the date of the act, and continued to be in possession as owners afterwards. The *decree* simply orders the bill to be dismissed.

Mr. Cushing, of Massachusetts. The act of 1805 purports to transfer the seisin of the lands in dispute to the corporation, and thus impairs the obligation of the trust contract by which the premises were devoted to the religious uses of the Scottish Presbyterian Church. This wrong the State court refused to redress, and this court is bound to reverse the decree for that reason. *Fletcher* vs. *Peck*, (6 Cranch, 87;) *New Jersey* vs. *Wilson*, (7 Cranch, 164;) *Jackson* vs. *Lamphere*, (3 Peters, 280;) *Providence Bank* vs. *Billings*, (4 Peters, 514;) *Charles River Bridge* vs. *Warren Bridge*, (11 Peters, 490;) *Gordon* vs. *Appeal Tax Court*, (3 Howard, 183;) *Maryland* vs. *Baltimore and Ohio Railroad Co.*, (3 Howard, 576;) *West River Bridge Co.* vs. *Dix*, (6 Howard, 507;) *Bronson* vs. *Kenzie*, (1 Howard, 111;) *Planters' Bank* vs. *Sharp*, (6 Howard, 301;) *Phalen* vs. *Virginia*, (8 Howard, 163;) *Woodruff* vs. *Trapnall*, (10 Howard, 190;) *Poup* vs. *Drew*, (10 Howard, 218;) *Baltimore & Susquehanna Railroad Company* vs. *Nesbit*, (10 Howard, 395;) *Butler* vs. *Pennsylvania*, 10 Howard, 402;) *East Hartford* vs. *Hartford Bridge Company*, (10 Howard, 511;) *League* vs. *De Young*, (11 Howard, 105;) *Pennsylvania* vs. *Wheeling & Belmont Bridge Co.*, (13 Howard, 518;) *State Bank of Ohio* vs. *Knoop*, (16 Howard, 369;) *Ohio Life Insurance Co.* vs. *Debolt*, (16 Howard, 416;) *Christ Church* vs. *County of Philadelphia*, (20 Howard, 28;) *Terrett* vs. *Taylor*, (9 Cranch, 43;) *Clark's Executor* vs. *Van Reinsdyk*, (9 Cranch, 133;) *Sturges* vs. *Commonwealth*, (4 Wheaton, 122;) *Farmers & Mechanics' Bank* vs. *Smith*, (6 Wheaton,

131;) *Ogden* vs. *Saunders*, (12 Wheaton, 213;) *Mumma* vs. *Potomac Co.*, (8 Peters, 181;) *Beers* vs. *Haughton*, (9 Peters, 329;) *Gantley's Lessee* vs. *Ewing*, (3 Howard, 707;) *Cook* vs. *Moffat*, (5 Howard, 295;) *Crawford* vs. *Bank of Mobile*, (7 Howard, 279;) *Curran* vs. *Arkansas*, (15 Howard, 304.)

It is not necessary that it should be *expressed* on the record that the validity of the act was in controversy; it is sufficient that it appear by clear and necessary *intendment* that a question which this court has jurisdiction to re-examine was actually decided by the State court. *Medberry* vs. *Ohio*, (24 How., 413;) *Commercial Bank of Cincinnati* vs. *Buckingham's Executors*, (5 How.. 317, 341;) *Smith* vs. *Hunter*, (7 How., 738;) *Neilson* vs. *Logan*, (12 How., 98;) *Williams* vs. *Oliver*, (12 How., 111;) *Grand Gulf Railroad* vs. *Marshall*, (12 How., 165;) *Lawler* vs. *Walker*, (16 How., 149;) *Maxwell* vs. *Newbold*, (18 How., 511;) *Christ Church* vs. *Philadelphia*, (20 How., 26.)

Mr. Justice GRIER. The writ of error in this case suggests, as a foundation for the jurisdiction of this court, "that there was drawn in question the validity of a statute of said Commonwealth, to wit, an act of the legislature, passed the 15th day of June, 1805, entitled 'An act declaring and confirming the incorporation of the proprietors of the meeting-house in Federal street,' in the town of Boston, being repugnant to the Constitution of the United States, and the decision of the court was in favor of the validity of said statute."

Is this suggestion of the writ supported by the record, either by direct averment, or by any necessary intendment?

We think it is not.

1. The decree of the court is, simply, that the bill be dismissed without any reasons alleged for such dismissal.

2. The bill itself raises no such issue; it refers to the act in question, only as conferring the privilege of a corporation on the defendant. It does not aver that the defendants pretend to have title to the property in question by virtue thereof, and challenge its validity.

The answer alleges that respondents were incorporated by the act of 1805, and that, "under it, they are the true and sole

owners of the premises, and that said act was passed on the application and petition of parties who, prior thereto, were owners of pews, or tenants in common of the land and the house thereon." It is not alleged that the act "*proprio vigore*" divested the plaintiff's title and vested it in the corporation, but that the title was vested in the corporation at the request of the owners.

The only questions, therefore, which could arise on these pleadings were, whether the persons who obtained the act of incorporation were the owners, and whether, after an adverse possession of forty years, a court of equity would interfere to disturb the possession of respondents.

The answer takes issue on the charge of the bill, that Little and his associates had contributed land and money to support a public *charity;* it averred that, on a proper construction of the original deed of the premises, the meeting-house was not dedicated to a charitable use, but was erected for their common use, and held by them in proportion to the sums severally contributed; and, consequently, if the representatives of these tenants in common had their rights transferred to the corporation, it was only a transfer of their rights by their consent, and for their own convenience—an enabling act, with which the complainants had no concern. The issue, then, was not on the validity of the act, but on the construction of the original deed or agreement of the parties who built the meeting-house. The validity of the act of assembly of Massachusetts was not, therefore, drawn in question directly by any averment of the pleadings by the decree, or by any necessary intendment from other averments in the pleadings, or evidence on the record.

The opinion of the State court to be found in 3 Gray, 1, confirms this conclusion.

The case is, therefore, dismissed for want of jurisdiction.

Writ of error dismissed.

UNITED STATES *vs.* JOHN WILSON.

1. A grant by Pio Pico, the last Mexican Governor of California, dated on the 10th of July, 1846, being after the conquest of the country, adds nothing to the strength or justice of a claim set up to the land by the grantee.
2. But it was the practice and usage of the Mexican Government in California to set apart, for the use of the Indians, small lots of land appurtenant to the houses in which they lived around the missions.
3. Where a person claims a lot under such a distribution among the Indians of a mission, and shows that the grantee and his assigns have lived upon it for a long time, the title ought to be confirmed.

Appeal from the District Court of the United States for the northern district of California.

This was a claim for a tract of land lying near to the mission of San Luis Obispo, containing 300,000 square varas, or about fifty acres of land, and called *La Huerta de Romualdo.* The claim was based on a grant to one Romualdo, an Indian, by Pio Pico, dated on the 10th of July, 1846. But there was evidence to show that the grantee and those claiming under him had been in possession from a period long anterior to the date of the grant, and that he was put in possession by the legal authorities of the country agreeably to the customs and usages which prevailed concerning the distribution of lots at the missions among the Indians, or "children of the missions," as they are called by the Church. The special circumstances connected with the grant of this tract to the Indian Romualdo were detailed in the testimony of Bonilla, the Alcalde of the district, who declared that he acted under the express order of the Governor (Alvarado,) that he placed the grantee in possession, and that he kept a record of his acts, which was lost.

Mr. Black, of Pennsylvania, for the United States. No confirmation can be had under the grant by Pico, because its execution and delivery before the conquest is not shown. *Camberton*, (21 How., 59;) *Fuentes*, (22 How., 443;) *Pico*, (22 How., 406;) *Teschmaker*, (22 How., 392;) *Vallejo*, (22 How., 416;)

Bolton, (23 How., 341;) *Osio*, (23 How., 273;) *Luco*, (23 How., 515;) *Pico*, (23 How., 321;) *Palmer*, (24 How., 125;) *Castro*, (24 How., 346.) The claim must rest upon the testimony of Bonilla and the fact of possession, and it is submitted to the court to say whether that be sufficient. The title is good if it was made according to the laws, customs, and usages of Mexico. There certainly was a custom to distribute lands near the missions among the neophytes. If the history of the country as ascertained from the numerous records which this court has seen shows that the custom existed long enough and was sufficiently uniform to give it the force of law, and if this record proves that it was strictly observed in the present case, then, perhaps, there is no sound objection to the affirmance of the decree of confirmation. The honesty of the claim is not denied, and it has been, as this court knows, the constant policy of the United States not to interpose far-fetched or capricious objections against claims which seemed to be made in good faith for small quantities of land, especially where the claimant was in actual possession himself at the time of the revolution in the government.

No counsel appeared for the claimant.

Mr. Justice NELSON. This is an appeal from a decree of the District Court for the southern district of California.

The tract of land in dispute is situated at the mission of San Luis Obispo, called the Huerta de Romualdo, and is one thousand varas in length and three hundred in breadth, containing some fifty acres of land. Wilson, the claimant below, derived his claim from an Indian by the name of Romualdo, in 1846. In 1842, Governor Alvarado directed Bonilla, the Alcalde at the mission of Obispo, to distribute lands of the mission among the Indians residing there, in separate parcels, as might be deemed proper, proportioning the quantities according to the merits and abilities of each one, putting them into possession immediately.

The Alcalde, who is a witness on behalf of the claimants, states that, under this order of the Governor, he distributed

lands contiguous to the mission, some two miles in length, and at other different points about a mile, where these Indians had their houses and gardens. The lands were given, as to quantity, with regard to the number in the family, the maximum generally being two hundred varas, and the minimum one hundred.

The Alcalde states that he did not set off to Romualdo the land he claimed at the time, as the tract was of greater extension than he gave the others; but that the Indian afterwards, in the same year, brought a special order from the Governor, which directed him to put Romualdo into the possession of the entire extension of the "Huerta," on which he lived. The Alcalde testifies to the genuineness of this special order. He gave the possession to the Indian accordingly. A record was kept of the distribution of these lands in a book in his office, as well as the orders from the Governor; but this book was lost, with all the archives of his office, in 1846, when the American troops passed through the mission. Romualdo had worked for the Governor, and his good conduct was recommended in the special order for the distribution of his Huerta to him. He was advanced in age, and had lived on this place for many years, and had under cultivation, according to opinion of the Alcalde, a fourth of the land.

There is a grant of Pio Pico to the Indian of the same piece of land, dated 10th July, 1846; but this was after the conquest of the country by this Government, and adds nothing to the strength or justice of the claim. The right stood before the commissioners principally upon this grant of Pio Pico, and it was rejected for the reason stated.

The further proof by Bonilla of the claim under Alvarado was given before the district judge. The only evidence of this source of claim before the commissioners was the certificate of Alvarado and of Bonilla, which was properly regarded as incompetent and inadmissible. The district judge confirmed the claim.

The title seems to be in conformity with the practice and usage of the Mexican Government, in setting apart small tracts connected with the huts or houses in which the Indians lived

around the missions, and which were cultivated as gardens. In the present instance, the possession and cultivation were of considerable duration; and, according to the testimony of the Alcalde, the distribution and assignment of the Governor was intended to be permanent, as a home to the occupant. The claim appears to be an honest one, unaccompanied with suspicion; and, under the circumstances, we think was properly confirmed.

It comes within the principle of the case of *The United States* vs. *De Haro's Heirs*, (22 How., 293.)

As there is some question as to the extent of the claim, the petitioners setting up a right to a much larger tract than stated in the evidence in the case that belonged to Romualdo, and as the confirmation also is a confirmation to Wilson, the petitioner, we shall modify the decree of the court below, so as to confirm the claim as if presented in the name of the original claimant to him and his legal representatives; and, further, that the judge of the court below may direct a survey of the claim, if applied for by the Government.

With these modifications the decree below is affirmed.

PRATT *vs.* FITZHUGH ET AL.

1. The right of a party to a writ of error from this court, under the 22d section of the judiciary act, is expressly confined to cases where the matter in dispute exceeds the sum or value of two thousand dollars exclusive of costs.
2. This means a property value capable of being ascertained and measured by the ordinary standard of value, and unless the fact necessary to bring the case within the statute be shown by the record or by evidence *aliunde*, this court has no jurisdiction to review the judgment of the Circuit Court.
3. Therefore, where a cause comes into this court on writ of error to a Circuit Court of the United States, and it appears that no question is controverted between the parties, except whether the defendants below were liable to imprisonment, and that question is raised upon an order of the Circuit Court discharging them on *habeas corpus*, the writ of error must be dismissed for want of jurisdiction.

Error to the Circuit Court of the United States for the northern district of New York.

In May, 1857, the plaintiff in error, Pratt, filed his libel in the District Court of the United States for the northern district of New York against the propeller Kentucky, her boats, &c., to recover damages caused by a collision with a vessel owned by him on Lake Erie. The Kentucky was seized on the 27th of May, and on the same day a bond for her release was executed by the defendants, as sureties for the claimant of the Kentucky, which bond was duly approved and the Kentucky was discharged. A recovery was had by plaintiff, and a decree perfected in his favor in May, 1859, for $21,581 28 against the claimant of the Kentucky, and Fitzhugh, Littlejohn, and Miller, his sureties. In July, 1859, execution issued commanding the marshal of the district to make the amount of the decree out of the goods and chattels of the defendants, and failing in this, to arrest and keep them until the moneys were paid. Under this process the defendants were imprisoned, but were discharged after a hearing upon *habeas corpus* by the Circuit Court of the United States for the northern district of New

York, on the ground that as the law of the State had abolished imprisonment for debt on contracts, the defendants could not be imprisoned under the acts of Congress of 28th February, 1839, and 14th June, 1841. This writ of error was then taken by Pratt, the plaintiff below, and the question argued in this court was, whether, under the acts of Congress, the defendants were liable to imprisonment.

Upon this question the arguments were elaborate and full, but they are not given here because nothing was decided by this court except the question of jurisdiction.

Mr. Rogers, of New York, for plaintiff in error.

Mr. Grant, of New York, for defendants in error.

Mr. Justice NELSON. Pratt, the plaintiff in error, obtained a decree in admiralty against the propeller Kentucky for a collision on Lake Erie. The defendants had given a bond as sureties for the discharge of the vessel from the attachment when first seized, and a summary decree was entered against them, according to the rules and practice in the District Court. Execution was issued, commanding the marshal to make the decree out of the goods and chattels, &c., of the defendants; and in default thereof, to arrest and keep them in custody till the moneys were paid, &c. The defendants were arrested and imprisoned under this process. Afterwards a writ of *habeas corpus* was issued by the Circuit Court for the northern district of New York, and upon a return of the marshal, setting forth the above facts, as furnishing the authority for the imprisonment, an order was entered discharging them from imprisonment, holding that, as the State of New York had abolished imprisonment for debt on contracts, the defendants could not be imprisoned within the acts of Congress of the 28th February, 1839, and 14th June, 1841.

The case is before us on a writ of error. A motion has been made to dismiss the case for want of jurisdiction.

The case is brought up under the 22d section of the judiciary act, which confines the writ of error to cases "where the mat-

ter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs." This has always been held to mean a property value, and without the fact of value being shown on the record, or by evidence *aliunde*, the court has no jurisdiction to hear or re-examine the case. The cases of *Weston* vs. *The City Council of South Carolina*, (2 Peters, 449,) and *Holmes* vs. *Jennison*, (14 ib., 540,) referred to, were brought up from State courts under the 25th section of the judiciary act, in which case no value is required. We do not doubt but that the order discharging the defendants was a final one, and that the only objection to the jurisdiction is the one above stated.

Judgment dismissing the cause for want of jurisdiction.

MOFFITT *vs.* GARR ET AL.

1. The surrender of a patent under the 13th section of the act of July 4, 1836, in judgment of law, extinguishes it—is a legal cancellation of it, and no right can afterwards be asserted upon it.
2. Suits pending for an infringement of such a patent fall with its surrender, because the foundation upon which they were commenced no longer exists.
3. But moneys recovered or paid under a patent previous to its surrender cannot be recovered back afterwards.

Error to the Circuit Court of the United States for the southern district of Ohio.

The plaintiff in error, who was also plaintiff below, filed a declaration in case against defendants in error, for the infringement of letters patent of the United States, granted to him November 30, 1852, for an improvement in grain separators. This declaration was filed March 22d, 1859. On the 25th of October following, one of the defendants filed the following plea: "And now comes the said John M. Garr and says that the said John R. Moffitt ought not further to maintain this action against him; because, he says, that since the commencement thereof and before the 17th day of May, 1859,

to wit, on the day of , the said John R. Moffitt surrendered to the United States the patent before that time issued to him, and for the alleged infringement of which this suit is brought, and this he is ready to verify. Wherefore," etc. To this plea the plaintiff demurred, and the court overruled the demurrer. Judgment for defendant. The plaintiff took this writ of error.

Mr. Lee and *Mr. Fisher*, of Ohio, for plaintiff in error There may be a surender of letters patent which is not made for the purpose of reissue under the 13th section of the act of July 4, 1836. The plea does not aver that the plaintiff's patent was surrendered under, or by virtue of, the 13th section of the patent act; nor does it aver that it was surrendered for the purpose of obtaining a reissue; or that it was surrendered because of a defective or insufficient description or specification; or because the claim was too broad; or because the patent was from any cause void or voidable; nor even that the patent was cancelled.

The question of the right of a patentee to surrender his patent, before the act of 1836, and independently of any statute authorizing him to do so, was fully considered in the discussion of the case of *Grant* vs. *Raymond*, (6 Peters, 218;) but neither the court, nor either of the distinguished counsel, seemed to doubt, for a moment, that he possessed such power. *Batten* vs. *Taggart*, (17 How., 74.) If the right to make such a surrender exists independently of any statute, the making of the surrender does not imply or involve any statutory or other defect in the patent. And where a patent has been so surrendered or abandoned, an action may still be maintained for infringements committed before the surrender or abandonment. If the patentee surrenders his patent at the end of six years, it is the same as if it had been originally granted to him for six years, and that, for violations of his exclusive privileges committed during those six years, his remedy is as complete as if the patent had stood to the end of his term. It would seem as if this proposition did not admit of doubt or argument. If the surrender of the patent vacates it from the first, then the

patentee has been a trespasser from the beginning. He may have been the first and original inventor of a useful improvement; his patent may have been regularly issued; it may have been tested and declared valid in the courts of last resort; and his right to enjoy his monopoly to the end of the full term may have been indisputable. Yet, if he surrenders the latter half of that monopoly to the people, he renders the first half void. He ought to be compelled to refund every penny he had received as patentee, whether peaceably or by the judgment of a competent tribunal. This would be monstrous. But, if he has any rights under the first half of the grant, he is entitled to full rights. If he is entitled to keep the pay received from those who have used and paid, he is also entitled to demand and recover his pay from those who have used and not paid. He might have brought and maintained such an action before the surrender. Why not as well afterward, when suits may be brought any time within six years after the expiration of a patent for infringements committed before? The right of the patentee, we insist, is not divisible. That portion of it which is in possession is no more legal than that which remains in action.

The application of these principles to the present case is obvious.

The plea avers a simple surrender of the patent, made two months after an action had been actually brought to recover damages for a previous infringement. It does not aver cancellation or reissue. The court, by overruling the demurrer, held such a plea to be a bar to such an action. We think the error obvious, upon the principles above set forth.

But if this surrender were, in fact, made under the authority of the 13th section of the act of July 4, 1836, and only by virtue of that section, then we maintain: A surrender of a patent for correction and reissue, by virtue of the statute, does not render the patent void *ab initio*. If the patentee still chooses to risk a suit upon the original patent, he may recover upon it for infringements committed before it was surrendered. In support of this proposition we submit the considerations just urged

If the patent is vacated from its issue, then every exercise of exclusive ownership has been illegal. If not, then infringers ought, at least, to be compelled to pay that which honest men have been willing to give the patentee.

This court has, as it seems to us, expressly refused to affirm the English doctrine, that a surrender and reissue vacated the original patent. *Shaw* vs. *Cooper*, (7 Pet., 314;) *Grant* vs. *Raymond*, (6 Pet., 220.) See also *Ames* vs. *Howard*, (1 Sumner, 488;) *Stanley* vs. *Whipple*, (2 McLean, 37;) *Woodworth* vs. *Stone*, (3 Story, 753, 754;) *Woodworth* vs. *Hall*, (1 Wood & Minot, 257;) *Eastman* vs. *Bodfish*, (1 Story, 529.)

But, again: It is urged, and as the main objection, that, by the very act of surrender, under the statute, the patentee admits that his original patent is void, and, therefore, he is estopped from asserting its validity in a suit for its infringement.

To this we answer, that he makes no such admission, even by the act of statutory surrender.

The 13th section provides, "that whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification more than he had or shall have a right to claim as new, if the error, &c."

A patent, then, may be reissued, if it be—1st, inoperative; or, 2d, invalid. Looking to what follows, the word "inoperative" manifestly refers to the defective specification, and the word "invalid" to the claim of "too much," which, under the act of 1836, rendered the patent absolutely void.

A patent "inoperative" because of a "defective or insufficient" specification is not necessarily void. The specification may not describe the invention as clearly as might be desired, or so comprehensively as to cover a particular evasion of the patent, or it may fall short of describing the whole of the invention, illustrated by the model and drawings. In such case, this court (*Batten* vs. *Taggart*, 17 How., 84) held that the patentee had a right "to restrict or enlarge his claim, so as to give it validity and to effectuate his invention."

But an enlargement of the claim is a claim for something more; and if such a claim be valid, the original claim must be valid also, for "the greater includes the less."

The history of the litigation upon patents shows that many patents have been surrendered and reissued after they had been the subject of fierce controversy, and had repeatedly been declared valid by the courts of the United States. The validity of the famous Woodworth patent had been established in Massachusetts and Ohio. See *Brooks* vs. *Bickwell*, (3 McLean, 250;) *Washburn* vs. *Gould*, (3 Story, 122;) *Woodworth* vs. *Sherman*, (3 Story, 171.) And yet the patent was afterwards reissued. *Woodworth* vs. *Stone*, (3 Story, 751;) *Woodworth* vs. *Edwards*, (3 Wood & Minot, 136 *et seq.*)

So also with the Howe Sewing Machine patent.

The plea having averred surrender only, but not cancellation, the court could not know judicially but that the original patent was still in existence. The acts of surrender and cancellation are distinct, and are so recognised by the court in the case of *Batten* vs. *Taggart*, (17 How., 80.)

Mr. Stanbery, of Ohio, for defendant in error. I will consider, in their order, the grounds for reversal relied on by the plaintiff.

1. "That there may be a surrender of letters patent, which is not made for the purpose of reissue, under the 13th section of the act of July 4, 1836."

It does not seem of any moment to consider whether there may not be a surrender, under that 13th section, without a reissue; for if such surrender is allowable, as the plaintiff alleges, still it is a surrender under that section; and the question remains, as to the effect of the surrender.

The plaintiff argues, that there may be a surrender independently of the statute, and that such a surrender would not necessarily imply that the patent was invalid. In support of this position, *Grant* vs. *Raymond* (6 Peters, 218) is cited.

No such question arose in that case, for the surrender in that case was in virtue of the statute then in force. The real question was as to the new patent issued after the surrender; for

the statute then in force only provided for a surrender, and did not expressly authorize the reissue.

I find it difficult to understand what the plaintiff means by a surrender of a patent, independent of the statute. A patentee may, herhaps, (though it is by no means clear,) destroy his patent by cancellation. That is his own act; but he cannot surrender his patent to himself. The act implies a party capable of receiving the surrender.

Now, what is alleged in our plea is a surrender to the United States—that is, to the party from which the grant emanated. This sort of surrender is authorized by law, and it is the only sort of surrender contemplated by the statute. We have, therefore, under this plea, nothing to do with any other surrender than that authorized by the statute.

It is further claimed by the plaintiff, that "a surrender, under the 13th section, does not render the patent void *ab initio*. If the patentee chooses to risk a suit upon the original patent, he may recover upon it for infringements committed before it was surrendered."

I do not consider it necessary to go into the inquiry whether, for all purposes and in all aspects, the original patent, after its surrender, is to be considered as void from its inception. We are only concerned, in this case, as to the operation or effect of the original patent as a cause of action, or a continuing cause of action after the surrender. We do not aver that, at the commencement of the suit, the plaintiff's patent was void; but we merely say, that, after the suit was brought, the plaintiff surrendered his patent. This the plaintiff admits. What, then, is the effect of a surrender upon an action pending at the time of the surrender?

The surrender is to be allowed when the patent "shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had, or shall have, a right to claim as new."

These are the conditions on which alone, according to the statute, the surrender is authorized. When, therefore, the patentee avails himself of this permission, he must be taken to

admit that his patent is inoperative or invalid, at least until there is some averment to the contrary.

But further, the act of surrender extinguishes the right of action so far as the old patent is concerned, for there is no reservation of any right, either for prior or subsequent infringements, or for actions pending, to be asserted upon the old patent after the surrender. The only right saved is under a reissue, and in virtue of the new patent, and this new right is confined by the express terms of the statute to "actions hereafter commenced for causes subsequently accruing." In the case at bar, the plaintiff counts upon a cause of action which accrued prior to the surrender; but the only rights which survive the surrender, survive alone by virtue of the new patent. Consequently, if the new patent does not sustain the pending action, the old one cannot have that effect.

In the case of *Woodworth* vs. *Stone*, (3 Story's Rep., 749,) a question arose upon the effect of a surrender and reissue *pendente lite*. The case was upon a bill for an injunction. Judge Story held that the case might proceed, notwithstanding the surrender or reissue, to prevent future and threatened infringements, and carefully distinguishes such a suit from an action at law, which only regards the past.

I do not find that the precise question now under consideration has been decided by this court. In *Stimpson* vs. *Westchester R. R.*, (4 How., 402,) the court say: "The charge of infringement in the declaration is laid some years after the new patent, so that the question does not arise whether an action could be sustained for a violation of the right prior to the corrected patent."

The case from which the above quotation was made arose under the 3d section of the act of 1832, which first provided for a reissue. It will be found that it did not contain the provision contained in the 13th section of the act of 1836, confining the new patent to "causes subsequently accruing," and it would seem that this provision was added to settle any question which might arise upon the act of 1832.

In the case of *Batten* vs. *Taylor*, (17 How., 74,) the court

came very near to a decision of this question, for it is said: "The plaintiff, by a surrender of that patent and the procurement of the patent of 1849 with the amended specifications, abandoned the first patent, and relied wholly on the one reissued."

Mr. Curtis, in his Treatise on Patents, (sec. 255,) seems to take it for granted, that, after the surrender, the infringement must be subsequent.

See also *Ames* vs. *Howard*, (1 Sumner, 482, 488.)

The counsel for the plaintiff cite the case of *Eastman* vs. *Bodfish*, (1 Story, 529.) That case has no relation to a surrender. It was a suit upon an extended patent, and simply decides that, as the time laid for the infringement fell within the time of extension, the plaintiff could not rely upon an infringement prior to the extension, but must be confined to the time laid in the declaration. Nor does the case decide that if the time had been laid prior to the extension the plaintiff might have recovered. However that may be, a patent extended is quite another thing from a patent surrendered.

I find only one case in the English books which has any relation to the case at bar—*Perry* vs. *Skinner*, (Webster's Patent Reports, 350.) That case was upon a disclaimer, under a statute which made the amended specification part of the original patent; and the reporter adds this note at the close of the case:

"The result of the above decision would appear to be that the party entitled to letters patent in the title or specification, of which any disclaimer or memorandum of alteration has been enrolled, has no remedy at law in respect of an infringement prior to the date of the enrolment of such disclaimer or memorandum of alteration, but from the date of such enrolment the patentee acquires a new title."

If this is the consequence of a disclaimer, which becomes part of the old patent, how can there be a doubt that the same consequence results from a surrender and reissue? If the disclaimer works a new title by implication, the surrender and reissue do the same thing expressly.

In England the surrender of a patent works a total extinc-

tion of the grant for all purposes. I do not claim such an effect from our statutory surrender, except as to infringements prior to the surrender.

It is very certain that, from the date of the surrender and reissue, there is only one patent *in esse*, for there cannot be two patents for the same invention existing at the same time. Whatever rights survive the surrender must be asserted under the reissued patent, which, for some purposes, has relation to the original grant. The idea suggested by the plaintiff's counsel, that, after the original patent has been surrendered, that patent may be used as the foundation for an action, or introduced in proof as a valid title, seems to me wholly inadmissible.

The plaintiff also claims that the plea is bad, because it does not aver a cancellation of the surrendered patent, and cites 17 How., 80. The case warrants no such conclusion. There is nothing in the statute about cancellation, and this word, whenever used by this court, is used as an equivalent term for surrender. In England no surrender can be made without a record, and perhaps a cancellation; but there a surrender works a total relinquishment of the grant, and as the Crown cannot receive such a relinquishment without a record, this ceremony is necessary. Hindmarsh on Patents, 246.

In conclusion, I beg to call the attention of the court to the following facts shown by the record: The original patent was granted to the plaintiff on the 30th November, 1852. This patent was surrendered on the 23d March, 1858, as is alleged in the declaration, "in consequence of an insufficient and defective description and specification of said invention; and such proceedings were then had, that, on said 23d day of March, 1858, a new patent was granted to said plaintiff on an amended description and specification, previously filed in the Patent Office, for the same invention and improvement, and in accordance with said amended description and specification, which said new letters patent bear date March 23, 1858;" and then profert is made "of said reissued letters patent."

The infringement is next alleged to have been made or committed "after the making of said letters patent, after the reissue thereof," to wit, "on the 25th day of March, 1858, and

on divers other days and times between that day and the commencement of this suit." There is no question that these averments confine the plaintiffs to infringements after the reissue under the new patent. The plea then alleges "a surrender was made after the commencement of the suit of the patent before that time issued to him, and for the alleged infringement of which this action is brought." Now, it is perfectly clear that the original patent cannot be resorted to as a foundation for suit for infringements after its surrender, and during the life of the reissued patent. So, too, it is equally clear that infringements during the time of the new patent cannot after its surrender survive such surrender; for all rights of action under the reissued patent are totally gone, and whatever rights survive, as to duration of the term, &c., have relation only to the first patent.

Mr. Justice NELSON. The suit was brought by Moffitt against the defendants, for the infringement of a patent for an "improvement in grain separators."

The defendants plead to the declaration, that since the commencement of the suit, the plaintiff had surrendered his patent to the United States, for the alleged infringement of which the action was brought. To which the plaintiff put in a general demurrer. The court overruled the demurrer, and sustained the plea, and gave judgment accordingly.

The 13th section of the act of Congress of July 4, 1836, provides, "that if a patent shall be inoperative, &c., it shall be lawful for the Commissioner, upon the surrender to him of such patent," "to cause a new patent to be issued, &c., and the patent so reissued" "shall have the same effect and operation in law on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in the connected form," &c.

Now, the point in the case is, whether or not the patentee may maintain a suit on the surrendered patent instituted before the surrender, if he has not availed himself of the whole of the provision, and taken out a reissue of his patent with an amended specification. The construction given to this section,

so far as we know, and the practice under it, in case of a surrender and reissue, are that the pending suits fall with the surrender. A surrender of the patent to the Commissioner within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right after the surrender, than could an act of Congress which has been repealed. It has frequently been determined that suits pending, which rest upon an act of Congress, fall with the repeal of it. The reissue of the patent has no connection with or bearing upon antecedent suits; it has as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists, and is in force at the time of trial and judgment, the suits fail.

It is a mistake to suppose, that, upon this construction, moneys recovered on judgments in suits, or voluntary payment under the first patent upon the surrender, might be recovered back. The title to these moneys does not depend upon the patent, but upon the voluntary payment or the judgment of the court.

We are satisfied the judgment of the court below is right, and should be affirmed.

The United States *vs.* Vallejo.

1. A claim for land in California admitted by the United States to be regular and genuine confirmed to the proper owner, (the original grantee or his assigns,) though the nominal claimant be one who derives title through a deed bearing date while the proceedings were pending and before the decree of concession.

Appeal from the District Court of the United States for the district of California.

This was a claim for a tract of land in Sonoma county, California, two leagues and a half in length by a quarter of a league in width, and called *Agua Caliente.* M. G. Vallejo filed his petition before the Land Commission claiming the tract above

described under a deed from Lazaro Piña, to whom it had been granted in 1840 by Governor Alvarado. Before any testimony was taken in the case the attorneys of Vallejo withdrew from it and the Commission rejected the claim for lack of any proof, either of the original grant or of the alleged conveyance to Vallejo. Vallejo appealed to the District Court, and introduced a complete *espediente* from the archives showing that the grant had been made to Piña in 1840, and the journal of the Departmental Assembly, which proved that the title had been confirmed in 1845. The original grant was not produced, but was alleged to have been lost. But while the decree of concession to Piña was dated July 13, 1840, the deed conveying the land to Vallejo under the same title bore date December 4th, 1839. This circumstance was not explained. In 1859 the District Court confirmed the title to Vallejo, reserving, however, the rights of the heirs and assigns of Piña, so that the confirmation might inure to the benefit of any parties who could show a better title than Vallejo, "derived from the original grantee by deed, devise, descent, or otherwise." From this decree the United States appealed.

Mr. Black, of Pennsylvania, for the United States. The title-papers in this case are clearly genuine. There is no doubt that Piña petitioned for land; that Alvarado granted it; that the title was properly recorded and afterwards approved by the Departmental Assembly. If Piña were the claimant before the court instead of Vallejo, the United States would not oppose his claim. But the conveyance to Vallejo is dated more than six months before the land was granted. In October, 1839, Piña had petitioned Vallejo, as Commandant General, to grant him the tract in question, and Vallejo had given him a provisional concession, to last until he should have time to get a title from the Government. On the 4th of the following December Piña conveyed the land to Vallejo, and on the 13th of July of the next year his grant issued. This conveyance was a fraud upon the Mexican Government. Piña had no right to sell to another an expectant grant, for which he was asking in his own name and for his own benefit. Vallejo had already

received from the Government as many leagues as the law allowed to be united in one hand. The colonization law did not contemplate that parties who had received the full measure of the Government bounty should swell their possessions by getting grants in the names of other persons. Piña, by making such a deed as this, forfeited his claim on the Government. He assigned it to Vallejo, who could not press it in his own name. When the grant issued it vested no right in Piña, for he had abandoned his claim; neither did it inure to the benefit of Vallejo, who had lost his capacity to take. It was, therefore, void.

Mr. Reverdy Johnson, of Maryland, for the appellee. The facts of this case being admitted, as well as sufficiently proved otherwise, there is no ground for appeal. On the part of the claimant, it is denied that the Mexican colonization laws forbade a party to sell out his right to land for which he had a pending petition, and it is wholly against the principles of justice, as administered in our courts, to say that a title which has been made to one person shall not inure to the benefit of another by whom it has been bought and paid for. At all events, the United States have no title, and, therefore, no right to interfere between the grantee and his alienee.

Mr. Justice WAYNE. This claim is founded upon a grant from Governor Alvarado to Lazaro Piña of the date of July 13, 1840. The original grant was not produced, and is supposed to have been lost during the war between the United States and Mexico, in which the grantee was killed. The espediente is numbered by Jimeno and noted in his index. It exists complete among the archives. The journal of the Departmental Assembly shows that the grant was approved October 8, 1845. Piña, the grantee, occupied the land for several years. The error of date in the conveyance from Piña to Vallejo cannot raise a suspicion against the regularity of the grant. It is the opinion of this court that the original claim is a good and valid claim, and that the same should be, and hereby is confirmed.

Decree of the District Court affirmed.

Ohio and Mississippi Railroad Company *vs.* Wheeler.

1. A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created. It must dwell in the place of its creation.
2. A corporation is not a citizen within the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State.
3. In such case they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in the corporate body and acting under the name conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another State.
4. Where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence.
5. A suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.
6. A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two States, cannot have one and the same legal being in both States. Neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised.
7. The two corporations deriving their powers from distinct sovereignties, and exercising them within distinct limits, cannot unite as plaintiffs in a suit in a court of the United States against a citizen of either of the States which chartered them.

On a certificate of division of opinion between the judges of the Circuit Court of the United States for the district of Indiana.

This was assumpsit brought in the Circuit Court of the United States for the district of Indiana, against Wheeler, a

citizen of that State, to recover the amount due on his subscription to the stock of the Ohio and Mississippi Railroad Company. The declaration described the plaintiffs as "The President and Directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the States of Indiana and Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio."

The defendant pleaded to the jurisdiction as follows:

"And the said Henry D. Wheeler, in his own proper person, comes and defends, &c., and says that this court ought not to have or take further cognizance of the action aforesaid; because, he says, that at the time of the commencement of this suit, and ever since, he was and has been a citizen of the State of Indiana, and is now such citizen; that the plaintiff, before and at the time of the commencement of this action, was, and ever since has been, and now is, a citizen of the same State of Indiana, in this, to wit: that then, and during all that time, and now, the plaintiff was, has been, and is a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of the General Assembly of the State of Indiana, entitled 'An act to incorporate the Ohio and Mississippi Railroad Company,' approved February 14th, 1848, and an act of said General Assembly, entitled 'An act to amend an act to incorporate the Ohio and Mississippi Railroad Company,' approved January 15th, 1849; and that under and by virtue of said acts, the railroad therein mentioned, so far as the same was by said acts contemplated to be situate in the State of Indiana, was long before the commencement of this suit, to wit, on the first day of January, 1856, built and completed, and has been ever since that time, and now is, used and operated in said district by the plaintiff. And this the said defendant is ready to verify. Wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid."

This plea was sworn to. The plaintiff filed a general demurrer; and the defendant joined in demurrer.

"And thereupon the judges of the court were opposed in

opinion on the following question presented by the said pleadings: Has this court, on the facts presented by said pleadings, jurisdiction of this case?"

This was, of course, the only question before the Supreme Court.

Mr. Vinton, of Washington city, for plaintiff. The defendant's plea to the jurisdiction of the court does not deny the averment in the declaration, that the company was created a corporation by the laws of Ohio as well as of Indiana; nor does it deny the averment, that it has its principal place of business in Cincinnati, Ohio, and that it is a citizen of Ohio, and that the subscription was made payable at the office of the company in Cincinnati; but the plea, in substance, alleges that, because that part of the road which passes through Indiana was constructed under and by virtue of the laws of Indiana, and ever since its completion the same has been, and still is, used and operated by said company in said State, under the charter of that State, that, therefore, the company is a citizen of the State of Indiana, and, as such, cannot sue the defendant in that State in the Circuit Court of the United States.

There are, as is well known, in the United States a considerable number of important railroads, which, like the one now in question, run through two or more, or parts of two or more States, by virtue and under the authority of the laws of those States.

If such corporations have a right to sue at all in the courts of the United States, it must be because they are, in contemplation of law, citizens of some one or of all such States. It would be claiming very much for these corporations to insist that they can sue or be sued as a citizen of each of these States. The right of such a corporation to sue as a citizen of a State must, without doubt, be limited to some one of the States through which the road passes.

And this gives rise to the question: What, in such case, is the criterion by which the citizenship of such a corporation shall be determined?

It will be difficult to fix upon any other criterion in such

case except the locality of its principal place of business. The place where it has its principal business office; where its stockholders hold their meetings; where the board of directors have their sessions; where the records of the company are kept; and where the governing power acts and issues its orders—there, if any where, is the *habitat*, the residence, the citizenship of such a corporation.

This proposition would seem to be fairly inferable from the doctrine laid down by this court in the cases of *Covington Drawbridge Company* vs. *Shepherd et al.*, (20 How., 231;) *Louisville, Cincinnati & Charleston Railroad Company* vs. *Letson*, (2 How., 497;) and *Marshall* vs. *The Baltimore & Ohio Railroad Company*, (16 How., 325.)

Upon the strength of these decisions we claim, that as it is admitted by the pleadings in this case that the plaintiff is a corporation, created such by the laws of Ohio, and has its principal place of business at Cincinnati, in that State, the defendant is estopped by that admission from denying that the corporation is a citizen of Ohio, and that this estoppel is founded upon a principle of public convenience.

The case of *Marshall* vs. *The Baltimore & Ohio Railroad Company* seems to be precisely in point. There, Marshall, a citizen of Virginia, sued the Baltimore & Ohio Railroad Company in the Circuit Court of the United States for the district of Maryland. The Baltimore and Ohio road runs through parts of the States of Maryland and Virginia, and, like the present case, that company has its principal business office in one of those States, to wit, at Baltimore, in Maryland, and it uses and operates that part of the road which lies in Virginia precisely as the Ohio & Mississippi Railroad Company uses and operates that part of its road which is in Indiana. And by looking into the laws of Virginia it will be seen that the grant to that company by that State is not merely a grant of a right of way, but is a grant of corporate powers, and that the company is made subject to all the provisions of the general railroad laws of Virginia, so far as the same are properly applicable to that road. Among these laws of Virginia are the act passed March 8th, 1827, sess. acts of 1826–7, p. 77; March 11th, 1837, sess. acts

of 1836–7, p. 101; and March 6th, 1847, sess. acts of 1846–7, p. 86. (See 6th sec. of this act.)

In the early decisions of this court, a strict construction was given to that clause of the Constitution which confers jurisdiction upon the courts of the United States, by reason of the citizenship of the parties; but the late cases, and especially those named above, have proceeded upon the ground, that this clause was intended to grant a beneficial privilege to the citizens of the United States, and ought, therefore, to be liberally construed.

Mr. Porter, of Indiana, for defendant. The averment that the plaintiff is "a corporation created by the laws of the States of Indiana and Ohio," is repugnant as amounting to the allegation of a legal impossibility. As between two States there can be no joint legislation creating one and the same corporation—or, indeed, in passing any law. Each State in its legislation must act independently and separately; and its enactments are only binding within its own jurisdiction. If two States pass a similar law on the same subject, the two are not one joint law, such as would create a corporation. They might, indeed, perhaps create two distinct corporations having the same name and like powers; but they could not make the two to be the same artificial person. Nor could the States by subsequent acts unite the two corporations so as to give them one identity. Such appears to have been the doctrine of Mr. Justice Story, in *Farnum* vs. *The Blackstone Canal Co.*, (1 Sumn., 47.)

The declaration says that the plaintiff was created by the laws of Indiana and Ohio, and yet claims that it is an Ohio corporation. Could the Indiana Legislature contribute anything towards the creation of a corporation "dwelling" in Ohio?

If such action concerning a corporation should be had by two States, can it be said that the corporation was created by both the States? Rather, should we not say that the State whose law first took effect created the corporation; and that the other State had, at most, recognised its existence, not created it?

But as no joint legislation of two States can create one identical corporation, this corporation, if created at all, must, within the constitutional sense, have its citizenship, as well as its creation, in one of these States only; and the declaration leaves it uncertain of which State. We contend that by a public statute of Indiana, as we will hereafter more fully show, Indiana alone created it, and Indiana alone is its dwelling-place. It cannot be contended that the plaintiff is a citizen both of Indiana and Ohio for the purposes of jurisdiction. No natural person can be a citizen of more than one place at the same time. "The supposition that a man can have two domicils would lead to the absurdest consequences." *Abington* vs. *North Bridgewater*, (23 Pick., 170, 177;) Story on the Conflict of Laws, sec. 45, *a*. Now, shall we go so far as to give an artificial person, for the purposes of jurisdiction, a privilege which no natural person in the United States can have? If, as the declaration avers, this corporation was created at all by the laws of Indiana, it is, for the purposes of jurisdiction, a citizen of Indiana, as much as if no other State had legislated concerning it; and it therefore cannot sue a citizen of Indiana in the Federal courts of that State. If the ground assumed in the declaration be tenable, the plaintiff might also sue in the Federal courts in Ohio, and aver that it was created by the laws of Ohio and Indiana.

We have said that the averment, "the principal place of business of the plaintiff is in Ohio," cannot save the jurisdiction, and is mere surplusage. That it may help the jurisdiction seems to be hinted in the case of the *Lafayette Insurance Co.* vs. *French*, (18 How., 404.) We submit, however, that the hint is but an *obiter dictum*. But be this as it may, the contrary has been often ruled in this court. Thus in *Marshall* vs. *The Baltimore & Ohio Railroad Co.*, (16 How., 325,) the averment was that the company was a "body corporate, by an act of the General Assembly of Maryland;" and it was held sufficient. And in *The Covington Drawbridge Co.* vs. *Shepherd*, (20 How., 227,) the same doctrine is held. So, in *The Philadelphia, Wilmington & Baltimore R. R. Co.* vs. *Quigley*, (21 How., 202,) it was held, that to aver the company to be "a body corporate in the

State of Maryland, by a law of the General Assembly of Maryland," was sufficient. So in *Covington Drawbridge Co.* vs. *Shepherd*, (21 How., 113,) the averment that the defendant "is a corporation and citizen of Indiana," was held good. These cases, in 20 and 21 How., must be considered as overruling the dictum above referred to in 18 How., and as settling the rule that the averment of the place of business is unnecessary, and therefore surplusage.

Nor can the averment that the plaintiff is "a citizen of the State of Ohio," help the declaration. This averment, says Mr. Justice Curtis, "can have no sensible meaning attached to it. (18 How., 405.)

We conclude, therefore, that the declaration is on its face bad, as not showing the jurisdiction; and that for this cause, whatever may be thought of our plea, the point in question should be decided in our favor.

Even though this court, on a demurrer to the plea to the jurisdiction, will not look into the declaration, still the decision must be for the defendant, because the plea on its face is good as showing that, so far as concerns jurisdiction, both the plaintiff and defendant are citizens of Indiana.

This plea says that this corporation was created by an act of the Legislature of Indiana, of February 14, 1848. That act is found in the Special Laws of Indiana of 1848, p. 619. By the first section of that act it is provided that it "shall take effect and be in force from and after its passage, and shall be taken to be a public act, and construed liberally for the objects therein set forth, and the regular organization of the corporation under the same shall be presumed and considered as proven in all courts of justice."

From this section of the plaintiff's charter the following conclusions seem inevitable:

First. That this act is a public act, of which all courts must, *ex officio*, take notice. Bac. Ab. Tit. Statutes, F; 5 Blackf. R., 170.

Second. That the corporation in question was created by this statute on the 14th day of February, 1848, and thereby became from that time an Indiana corporation.

Third. That the "regular organization of the corporation," under said Indiana charter, must, *ex officio*, "be presumed and considered as proven" in this court. This court has, in a much weaker case, *ex officio*, taken notice of an Indiana charter, merely because the Indiana constitution makes all the statutes of that State public acts. *Covington Drawbridge Company* vs. *Shepherd*, (20 How., 231.) Indeed, it seems that since the court must officially note this fact, it is probable that in raising our objection to the jurisdiction, no plea at all was necessary; in other words, perhaps on the very face of the declaration the court is bound officially to take notice that this is an Indiana corporation, and that therefore the declaration is bad, as not showing jurisdiction; and so this court has expressly decided in *Covington, &c., Co.* vs. *Shepherd*, (20 How., 227, 231.)

We believe that it is not pretended by the plaintiff that any act of Ohio referring specially to this corporation was ever passed till after said Indiana act took effect. We suppose, indeed, that all the acts of Ohio concerning this corporation were private acts, and that, not being pleaded, they cannot be noticed by this court. It seems that acts creating private corporations, as this is, are private statutes, unless the Legislature makes them public. 5 Blackf., 78; Gould's Pl., 56.

But even if the court will officially notice the Ohio statutes recognising this corporation, it cannot aid the jurisdiction; for it is clear that, these statutes having all been passed after the Indiana charter took effect, they did not create the corporation.

We shall here notice all the Ohio acts of which we have any knowledge which have recognised the plaintiff as a corporation.

The first of these Ohio acts is that of March 15, 1849. Certainly it creates no corporation, but merely recognises the existence of the plaintiff as a corporation created in the State of Indiana. It only says that "the Legislature of Indiana, on the 14th day of February, 1848, passed an act incorporating the Ohio and Mississippi Railroad Company," and "that the corporate powers granted to said company by the act of Indiana incorporating the same be recognised." Here is evidence in the Ohio law itself that this is an Indiana corporation.

The only other Ohio act on the subject which we have found is an act passed January 24, 1851. It authorizes an extension of the road, by the corporation already existing, to the city of Cincinnati. It is true that the third section of this act undertakes to declare that the intention of the first section of the act of March 15, 1849, "was to recognise, confirm, and adopt the charter of the said Ohio and Mississippi Railroad Company as enacted by the Legislature of the State of Indiana." But so far as the present controversy is concerned, there are two objections to this declaratory act:

First. The Ohio Legislature has no power to pass a declaratory act. To declare "the intention" of a prior law is a judicial act; and the judicial power of Ohio has always, by her constitution, been vested in her courts. Her General Assembly has only legislative power; it may make laws, but cannot afterwards construe them. "It seems to be settled, as the sense of the courts of justice in this country, that the Legislature cannot pass any declaratory law." 1 Kent's Com., 456, note *b*, and authorities there cited.

Second. This Ohio act does not pretend to create a corporation. It only "recognises, confirms, and adopts the charter of said company as enacted by the Legislature of the State of Indiana." But the point is not, where has the corporation been recognised, but where was it created? It has never been pretended that, touching the question of the jurisdiction of the Federal courts, a corporation is a citizen of any State except that which created it. Indeed, this court has said, in the case of the *Bank of Augusta* vs. *Earle*, that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." 13 Pet., 588. And in *Runyan* vs. *Lessee of Coster* this court again said: "A corporation can have no legal existence out of the sovereignty by which it was created." 14 Pet., 129.

No matter what is stated in the pleadings, the court must judicially take notice that by the last section of the plaintiff's Indiana charter, the plaintiff is an Indiana corporation, and, therefore, cannot sue a citizen of that State in the Federal courts thereof.

Mr. Chief Justice TANEY. This action was brought in the Circuit Court of the United States for the district of Indiana, to recover $2,400, with ten per cent. damages, which the plaintiffs alleged to be due for fifty shares of the capital stock of the company, subscribed by the defendant.

The declaration states that the plaintiffs are "a corporation, created by the laws of the States of Indiana and Ohio, having its principal place of business in Cincinnati, in the State of Ohio; that the corporation is a citizen of the State of Ohio, and Henry D. Wheeler, the defendant, is a citizen of the State of Indiana."

The defendant pleaded to the jurisdiction of the court, averring that he was a citizen of the State of Indiana, and that the plaintiffs were a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of Assembly of the State.

The plaintiffs demurred to this plea; and the judges being opposed in opinion upon the question whether their court had jurisdiction, ordered their division of opinion to be certified to this court.

A brief reference to cases heretofore decided will show how the question must be answered. And, as the subject was fully considered and discussed in the cases to which we are about to refer, it is unnecessary to state here the principles and rules of law which have heretofore governed the decisions of the court, and must decide the question now before us.

In the case of the *Bank of Augusta* vs. *Earle*, (13 Pet., 512,) the court held, that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

It had been decided, in the case of *The Bank* vs. *Deviary*, (5 Cr., 61,) long before the case of the *Bank of Augusta* vs. *Earle* came before the court, that a corporation is not a citizen, within the meaning of the Constitution of the United States, and

cannot maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State. But, if that be the case, they may sue by their corporate name, averring the citizenship of all of the members; and such a suit would be regarded as the joint suit of the individual persons, united together in the corporate body, and acting under the name conferred upon them, for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another State.

This question, as to the character of a corporation, and the jurisdiction of the courts of the United States, in cases wherein they were sued, or brought suit in their corporate name, was again brought before the court in the case of *The Louisville, Cincinnati and Charleston Railroad Company* vs. *Letson*, reported in 2 How., 497; and the court in that case, upon full consideration, decided, that where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.

The question, however, was felt by this court to be one of great difficulty and delicacy; and it was again argued and maturely considered in the case of *Marshall* vs. *The Baltimore and Ohio Railroad Company*, (16 How., 314,) as will appear by the report, and the decision in the case of *The Louisville, Cincinnati and Charleston Railroad Company* vs. *Letson* reaffirmed.

And again, in the case of *The Covington Drawbridge Company* vs. *Shepherd and others*, (20 How., 232,) the same question of jurisdiction was presented, and the rule laid down in the two last-mentioned cases fully maintained. After these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate

name, as a suit by or against citizens of the State which created it.

It follows from these decisions, that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last-mentioned State. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described.

The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two States, and to be one and the same legal being in both States.

If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of the *Bank of Augusta* vs. *Earle*, before referred to.

It is true, that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The President and Directors

of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States.

These questions, however, have been so fully examined in the cases above referred to, that further discussion can hardly be necessary in deciding the case before us. And we shall certify to the Circuit Court, that it has no jurisdiction of the case on the facts presented by the pleadings.

THE UNITED STATES *vs.* ROBERT B. NELEIGH.

1. A paper purporting to be a grant of land in California first produced from the custody of a claimant after the war, and unsustained by any record evidence, will not be held valid by this court.
2. Evidence of the destruction of archives during the war does not avail the holder of such a naked grant unless he can show where and how the specific papers necessary to complete his title were lost or destroyed.
3. The court again affirms the doctrine that the testimony of Mexican officials cannot be received to supply or contradict the public records.
4. The theory of claimants has been that the want of archive evidence should be excused on the ground that many of the records were lost or destroyed; but the records of the Mexican Government in California being found in tolerable preservation, and the most enormous frauds having been attempted on the assumption that this theory would account for their non-production, the court has been compelled to reject it as altogether fabulous.
5. A grant not recorded, and for which no espediente is found, and which is not among the forty-five sent in to the Departmental Assembly and confirmed on the 8th of June, 1846, cannot be believed genuine on the testimony of a Mexican Secretary, who swears that he signed and delivered it.

The appellee in this case claimed under the title of José Castro, which was rejected by the Supreme Court at Decem-

ber term, 1860, (24 How., 347.) Neleigh and one McKenzie purchased from Castro in 1849 six of the eleven leagues covered by his title, "to be selected whenever the same shall be located by the proper authority." McKenzie died soon after the purchase, and Neleigh, by a conveyance from his widow, under a power in his will, became possessed of his interest in the land. He presented his petition to the Land Commission in September, 1852, asking a confirmation of title to his six leagues, and in March, 1853, Castro petitioned in his own name for a confirmation of the remaining five. The reasons for the rejection of Castro's title, which reached the Supreme Court first, are set forth very fully in the opinion of the court delivered in that case by Mr. Ch. J. *Taney*. Neleigh's claim, after an adverse judgment in the Land Commission, was confirmed by the District Court in October, 1859. From this decree the United States appealed.

No new title-papers were offered. The claim rested in this case, as in that of Castro, upon the naked grant produced from the custody of the claimant. But much additional parol testimony was taken, by which it was sought to distinguish the new case from the old. Four new witnesses, including Pico and Moreno, whose signatures were appended to the grant, were called to prove its genuineness. Some additional evidence of occupation was offered, and the testimony of Col. Fremont introduced to show that he had lost a portion of the archives in the mountains of San Juan—among them papers relating to a title to Gen. Castro. A witness was called to show that there was but one Gen. Castro in California in 1846, thereby connecting the lost papers with the title of the present claimant. On the part of the United States no evidence was added to that offered in the case of José Castro.

Mr. Shunk, of Pennsylvania, for the United States. There is no espediente, note, or other record of this grant in the Mexican archives, and the case rests upon a naked paper produced from the pocket of the claimant in 1849. This objection is fatal. But there is positive historic evidence besides, which proves the paper offered as a title to be fraudulent and ante-

dated. It claims to have issued on the 4th of April, 1846. It is a historic fact, that at that date Pio Pico and José Castro were at open war. The journals of the Departmental Assembly show that they were. Moreno in his testimony in this very case admits the fact, and adds to it the statement that in the spring of 1846 Pico set out with an armed force to drive Castro from the country. Castro asserts in his deposition that during the administration of Pico he recognised no power in California superior to his own, save that of the Supreme Government. He testified his contempt for Pico by seizing the custom-house at Monterey, and withholding from him the public revenues. Yet we are asked to believe that Pico made a grant to this vexatious rebel of eleven square leagues of land just on the eve of a military expedition intended to drive him beyond the bounds of the Department. Such a grant at such a time, considering the angry relations of the parties, is simply incredible.

But the paper produced as a title is fraudulent on its face. Pico styles himself, at its commencement, "Constitutional Governor of the Department of the Californias." He bore no such title at the date of this grant, nor did he lay claim to it. The journals of the Assembly show that he did not receive his appointment as Constitutional Governor until the 15th of April, 1846, and was not inaugurated until the 18th. The first grant made by him, in which he assumed his new title, was that to Pedro Sansevaine, dated April 21st, 1846. In every title issued between the time that he became Governor by virtue of his position as First Vocal of the Assembly in February, 1845, and the date of his inauguration as Constitutional Governor in April, 1846, he styles himself "First Vocal of the Departmental Assembly and Governor *ad interim* of the Department of the Californias." Castro's grant is the only exception to this rule. To accept it as genuine we must believe that Pico, without any conceivable reason, and in this solitary instance, assumed a title to which he had no claim, and recited an appointment which he had not received. But it is easy to conceive, if we adopt the theory that this is an ante-dated paper, that Pico, years after the conquest, in concoct-

ing an ante-dated grant, should forget which of his two titles he was in the habit of using at the time of the false date, and stumble on the wrong one. We have his own word for it in this case, that he had forgotten when he became Constitutional Governor. We have, besides this, the admission of Moreno, that he did not sign the grant until May, although it pretends to have issued in April. It is, therefore, a paper entirely unsupported by archive evidence, contradicted by history and the public records, fraudulent on its face, and ante-dated by the admission of the officers who made it.

The only occupation proved in this case is a military occupation in 1844, two years before the date of the pretended grant, and which lasted but a few months, and a settlement made in 1849, after the discovery of gold had made the land a tempting prize for speculation and fraud.

There is nothing to distinguish Neleigh's case from that of José Castro, except that the fraud only suspected by the court in the one case is made absolutely plain in the other.

Mr. Reverdy Johnson, of Maryland, and *Mr. Gillet*, of Washington, for the appellee. The absence of the espediente and other record evidence in this case is accounted for by the testimony of Colonel Fremont. Papers relating to a title to General Castro were lost among the mountains. We cannot be expected to produce records the loss of which we have plainly and directly proved. Moreover, the grant recites that all the necessary steps required by law as preliminaries to a grant have been taken. Recitals in a grant by a public officer are *prima facie* evidence of the fact recited when they relate to the subject-matter of the grant. *Fremont's Case*, (17 How., 558;) *Reading's Case*, (18 How., pp. 8, 9;) *Peralta's Case*, (19 How., 343;) *Doe* vs. *Wilson*, (23 How., 457.) The recording of titles granted being the duty of the officer after the grant was made, if omitted by him cannot defeat the title of the grantee, nor create a suspicion against it. If the neglect of the Governor to remit the papers of a grantee to the Assembly for confirmation could not defeat or affect the rights of a grantee, as has been held by this court, *Reading's Case*, (18 How., p. 7,) certainly a similar neglect

to record or preserve papers could not defeat or affect him. When a grant is once made, it can only be defeated by the act or omission of the grantee, and no default of a public officer can change his rights or subject them to a doubt. The grantee was entitled to receive the grant and retain it, and this is evidence in favor of his title until overthrown by proof by those questioning it. The grant itself is not *secondary* but *original* evidence, and the best within the power of the party to produce. It has always been held that the production and proof of what purported to be an original grant made by an authorized official was sufficient, and no additional record evidence from the archives was held to be necessary, but whoever sought to defeat the effect of this *prima facie* evidence must do so by competent legal proof. Moreover, this case conforms to the propositions laid down in *Castro's Case*, (24 How., 347,) in relation to the introduction of secondary evidence. The record shows that at a former time there was a grant recorded in the usual manner in the Secretary's office; that some of the books and papers have been lost and destroyed; that there was actual possession within reasonable time, and a survey by the owner, and that this actual possession was as early as Fremont's, was delayed for the same reason, and the want of a plat and judicial action in making a survey excused in the same way. The case differs widely from that of Castro both in the amount of the testimony and the matters to which it relates. The court cannot reject this claim without repudiating a long line of decisions which have come to be regarded as the law of the land.

Mr. Black, of Pennsylvania, in reply. The title, properly so called, and the written documents connected with it, are in precisely the same condition now that they were in when this court examined them before in the case of *The United States* vs. *Castro*. It is a naked grant, without an espediente found among the archives, and without record evidence of any kind to show that it ever was issued or even applied for. This court has decided in certainly not less than twenty-five cases that such a title cannot have its approval. With the exception of the one judge whose commission is dated during the present term, every

member of the court has committed himself and his brethren in his own language against the confirmation of such claims. If the ingenious arguments of the claimant's counsel, that recitals are evidence, that records are lost, that grantees must not be affected by the omissions of public officers, were new, we might reply to them at length, but they have been made and answered and overruled a score of times already, and the process need not be repeated again.

The decision in Castro's case is conclusive on the court as a judicial precedent from which there can be no departure with safety. It is also technically binding as a determination of the same question between the same parties or their privies.

But, passing that, what is the value of the additional evidence found upon this record? Does Moreno add anything even to the moral strength of the case? He is notoriously unworthy of belief. Pico's testimony is on the face of it false. Colonel Fremont is, of course, incapable of making a wilful misstatement; but what does he say? That he lost papers in the mountains, and one of them, he thinks, had reference to a title of General Castro's. But whether it was a title for eleven leagues or one league, for land on the San Joaquin or the Sacramento, in Upper or in Lower California, he does not pretend to know; nor does he say whether the paper he saw was a petition, an informe, or a grant; whether it was signed by Figueroa, by Alvarado, Micheltoreno, or Pico, or by anybody at all. It is preposterous to make a title out of such evidence as this, even if parol evidence were, under any circumstances, admissible.

But there are three facts in this case which were not shown to the court by the record in Castro's case, and which do prove most incontestably that the grant is a mere fabrication. These facts are: 1. That at the pretended date of the grant, Castro was in rebellion against the authority of Pico. 2. That it is attested by a person, as Secretary, who at that time was not Secretary. 3. That it purports to be made by Pico as Constitutional Governor at a time when he had not assumed the duties or the title of that office.

Each one of these facts considered separately would make

it extremely improbable that a grant was made to Castro on the 4th of April, 1846. Men in office do not bestow such favors or any favors at all upon their enemies and the enemies of the Government they represent. Pico and Castro were not then in communication. No petitions passed between them. Castro refused to acknowledge Pico as Governor, and he was known to Pico only as an insolent disturber of the public peace, and a robber of the public money. They addressed one another only in the language which could be uttered from the mouths of their muskets. To find a paper signed or countersigned by an officer who, upon investigation, appears not to have been in office at the time, would anywhere be regarded as about the strongest evidence of forgery that could be produced. When you see that the Governor who makes the grant is described as holding an office which he did not hold at the time, and speaking in a style totally different from that used in all cotemporaneous documents, you are forced to the conclusion that the paper was not made when it bears date.

But it is a rule of circumstantial evidence, which the good sense of every reasonable man approves, that the force of independent criminating facts does not depend so much on their weight as on their number. If you have two, consider them separately, and they may not weigh a feather; but unite them together, and they press upon the accused with the weight of a mill-stone. Two or three such facts as these, each independent of the other, could not exist by chance in the case of an honest grant. In a charge of murder it is *suspicious* to find the knife of the accused party lying near the body of the victim. It is *demonstration* if the purse of the deceased be found in possession of the same person. If, in addition to this, the party who owned the knife, and had the purse, was seen with bloody hands running away from the place of the murder about the time it was committed, *who could stand up* to defend him?

The want of evidence in this case makes it bad enough for the claimant—bad enough to insure the rejection of the claim. But when you see that it is also demonstrated to be a fraud by circumstantial evidence so irresistibly strong as that which ap-

pears on this record, there is no room left for doubt, nor no grounds for an argument.

Mr. Justice GRIER. Neleigh filed his claim before the board of Land Commissioners on the 3d of September, 1852. It was for six leagues of land in Mariposa county, being part of eleven leagues said to have been granted to Lieut. Col. José Castro by Pio Pico, late Governor, on the 4th of April, 1846. The deed from Castro, dated 8th of June, 1849, purported to convey to Bernard McKenzie and Robert Neleigh six of the eleven leagues, "to be taken where the grantees might select." McKenzie's interest was, afterwards, vested in his co-tenant by a conveyance from his administratrix. The commissioners confirmed the claim. But as the grant to Castro had never been surveyed or located, and, like that to Fremont, was vague and uncertain as to its boundary, it might be located on either or both sides of the San Joaquin river. The decree, therefore, did not ascertain what land was confirmed, but ordered that it be "selected by the said petitioner from the said eleven leagues *when the same shall be located by the proper authority.*" This decision of the board was affirmed by the District Court in October, 1859.

In the meantime, José Castro, in March, 1853, filed his claim for the eleven leagues, "for the benefit of himself and those claiming under him." That case came before this court at last term, and may be found reported in 24 Howard, 347. It was rejected by this court, for the reason there given, and which need not be repeated. Nor need we inquire of what use the affirmation of the decree of the District Court would be to Neleigh of a right to select six leagues out of eleven, which, by judgment of this court, never can be surveyed or located. For the purposes of the present case, also, we will assume, that as Neleigh was not a party on record in the former case, he is not concluded by the judgment given in it, and inquire whether he has furnished any new evidence, which, if it had been found in the record of the Castro case, would have led us to a different conclusion. Now, it must be kept in remembrance that the grant to Castro was not rejected, because

it was not signed by the persons whose names are affixed to it. It is a historical fact, and proved by satisfactory evidence, more than once, that, after that country passed into the possession of the United States, the late Governor was very liberal in executing grants to any person who desired them, and for any quantity of land. It was easy to prove his signatures, and Pio Pico himself, when called as a witness, could never recollect anything about *the date*, which was the only material question in the inquiry as to its validity. Of the last two secretaries who attested these grants, one has been found capable, not only of writing false grants, but of supporting them by his oath. Of the other, we have been compelled to say, that he was following in the footsteps of his predecessor.

It is well known that espedientes and records of the grants made in Pico's time were carefully put away by him in boxes, which came into the possession of Col. Fremont, and were delivered to the public officers. These espedientes are all found safe among the records, but the "*toma de razon*," or short record of them, has disappeared. Hence, when a grant is produced for the first time from the pocket of the claimant, and is attempted to be established by proof of the signatures of the Governor and Secretary, the want of an espediente or archive evidence is expected to be excused by the proof that some papers were lost and torn when they were carried away on mules by Col. Fremont, or used "*as cartridge paper*," according to Pio Pico's theory. The enormous frauds which have been attempted to be perpetrated, depending on this theory of the destruction of records, have compelled us to reject it altogether as fabulous. These archives have been collected, and are found in a very tolerable state of preservation. Hence, the propositions laid down in the Castro case, and others preceding it, were an absolute necessity to save the Government from utter spoliation of its territory.

It would be superfluous to repeat the principles laid down in the Castro case. It is sufficient to say, that the additional testimony in this case does not relieve it from its deficiencies there stated. The testimony of Colonel Fremont of having seen some paper concerning a grant to Castro, does not prove

the existence of *this* grant, which was not the only property claimed by Castro in California. The testimony of the late Governor adds nothing to the evidence. He, as usual, acknowledges the genuineness of his signature, which was not disputed; but as to the important question, whether it was made before or after his expulsion by the Americans, he is entirely silent. He could not remember historical facts connected with his administration; that at the *date* of this grant he was at bitter feud with Castro, who had seized upon the custom-house at Monterey, and set the Governor at defiance, and that the Governor was preparing troops, at this time, to compel his submission. The declaration of the witness, that he should nevertheless as soon make a grant to Castro as to any other, is no doubt true, if it refers to the true date of the transaction, after they had both been superseded and deposed by the Americans. Nor does it add anything to the value of this testimony, that the witness explains that, by want of recollection, he means his unwillingness to state the truth.

Moreno, who is always a more willing witness, and who labors under no want of memory or imagination, is brought to supply this want of record proof, and accounts for his signature to the grant being dated when he was *not* Secretary. He swears that he signed it after its date, in the beginning of May, but whether it was May, 1846, 1847, or 1848, he does not state directly, but leaves it to inference that he meant 1846.

But if we were in any doubt as to the credibility of the testimony of this witness, there are other facts established which demonstrate, that if he had stated explicitly that he signed this grant, and recorded it in May, 1846, the assertion would have been untrue.

On the 4th of April, 1846, the date of this grant, it is a fact not only that Moreno was not Secretary, but that Pio Pico *was not Governor*. He first presented his appointment as Governor, to the Assembly, on the 15th of April, 1846, and was inaugurated on the 18th. The first grant made by him, in which he is styled Governor, is that to Pedro Sansevaine, dated the 21st of April. In all his previous grants he is styled "First Vocal and Governor ad interim." This deed was evidently written

so long after, that this fact had escaped the recollection of the parties signing it. In the beginning of May, 1846, it was becoming apparent to all concerned that the power of the Governor and the Assembly would soon pass away. Pio Pico, therefore, prudently gathered up the grants of land which had not been previously laid before the Departmental Assembly for their approval. He accordingly, on the 3d of June, 1846, sent in to them no less than forty-five espedientes. One of these was made in 1839. The others were all dated in 1845 and 1846; the last three on the 2d and 3d of May, 1846. Fortunately, we have the minutes of the Assembly, by which it appears that these forty-five espedientes were reported and confirmed on the 8th of June, 1846. This grant to Castro does not appear among them, and is left to the uncertain testimony of Moreno to establish its existence; and we are asked to presume that it alone was kept back from the Assembly, and that while all the other genuine grants confirmed by them are found among the archives in good order, this alone was converted into "cartridge paper." All these presumptions must be made on the faith of these witnesses, whose testimony we have heretofore declared could not be received to contradict or supply record evidence.

In the former case, this grant to Castro was rejected for the negative reason that there was not the evidence required to prove it genuine. The testimony in the present case has proved it positively spurious.

Let the decree of the District Court be reversed.

FARNI *vs.* TESSON.

1. Where a contract is joint, and not several, all the obligees who are alive must be joined as plaintiffs.
2. If one of the joint obligees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors.
3. If by the condition of a bond the money to be recovered be not for the joint benefit of all the obligees, the suggestion of that fact cannot alter the obligation; but all the parties having a legal title to recover must join in the suit, and the judgment will be for the use of the party named in the condition and equitably entitled to the money.
4. The rule is that a covenant may be construed as joint or several according to the interests of the parties appearing upon the face of the obligation, *if the words are capable of such a construction,* but it will not be construed as several by reason of several interests if it be expressly joint.
5. Where some of the obligees of a bond who should be joined as plaintiffs in a suit brought upon it are omitted in order to give jurisdiction in the case to a Federal court, such a reason, even if alleged in the pleading, would not cure the omission.
6. A defendant can object to a non-joinder of plaintiffs, not only by demurrer, but under the plea of the general issue, or on motion to arrest the judgment.

Error to the Circuit Court of the United States for the northern district of Illinois.

Tesson & Dangen recovered a judgment against Bontcum and Carrey in the Circuit Court of Peoria county, Illinois, on the 12th of September, 1857, for $8,000. On the same day an execution was issued directed to Woodford county, and a levy was soon after made on real and personal property. Bontcum and Carrey filed a bill on the equity side of the court for an injunction to stop further proceedings under the judgment, and the injunction was directed to issue according to the prayer of the bill, "upon the complainants entering into bond in the penal sum of sixteen thousand dollars with Christian Farni and Peter Farni, conditioned according to law." A bond was accordingly

executed, in which the two Farnis with Bontcum and Carrey were the obligors, and Tesson, Dangen, Tuber, Garesche, and Miner the obligees. This bond, it was conceded, was not framed in accordance with the order of the court, but upon its being filed the injunction was issued. Afterwards the plaintiffs, perceiving the insufficiency of their bond, had a new one executed, to which the parties were the same as to the former one; but the conditions were different. This bond was filed by the clerk of the court without the authority of the court and without the knowledge of the defendants in the bill, who on discovering the fact moved to dissolve the injunction, because no sufficient bond had been filed *prior to the issuing of the writ.* The plaintiffs afterwards moved for leave to file a new bond; but no action was taken upon their motion, and in October, 1858, the injunction was dissolved, and after some time they dismissed their bill. At December term, 1858, Tesson brought suit on the second injunction bond against Christian and Peter Farni in the Circuit Court of the United States for the northern district of Illinois. The suit was brought in his own name as surviving partner of the firm of Tesson & Dangen, omitting as plaintiffs the other three obligees to whom the bond had been given, and making only two of the four obligors who executed it defendants. To avoid the objection of non-joinder of the other obligees the plaintiff averred that he was the only one interested in the judgment enjoined; that Miner, one of the obligees, was the sheriff who held the execution enjoined, and the other obligees were merely the agents or trustees of Tesson. The defendants demurred to the declaration, and the plaintiff amended it; but the names of the parties to the action were the same in the amended as in the first declaration, and the averments of their several and separate interests in the bond remained unchanged. To this amended declaration the defendants, in accordance with a stipulation they had made to plead to the merits, on the 26th of February, 1859, filed their plea of *non est factum*, with an affidavit that the writing sued on was never delivered by them. Replication was filed to this plea and issue upon it to the country, and a verdict and judgment rendered in favor of the plaintiff. The defendants ex-

cepted to the instructions given by the court to the jury, which related, however, to points not touched on in the opinion of the Supreme Court. Before signing the bill of exceptions the judge put on record a written explanation to the effect that the objection to the non-joinder of the proper parties, though made by the defendants on the trial, had been understood by the court to have been waived, and was only pressed upon a motion made to arrest judgment, when it was overruled as merely technical. This overruled objection is the only matter in the record to which the opinion of the Supreme Court was addressed, and it has seemed necessary to state only such of the facts as form a necessary introduction to that opinion. The defendants sued out this writ of error.

Mr. Fuller, of Illinois, and *Mr. Carlisle*, of Washington, for plaintiff in error. The bond on which this action was brought was a joint undertaking by four persons to pay five others jointly the sum of $17,000. Two of the obligees were the plaintiffs in the judgment enjoined; two others were agents or trustees for them; and the fifth was the sheriff, who had the execution enjoined.

The sheriff, Miner, one of the obligees, was a citizen of Illinois, of the same State as the defendants in this case; so the plaintiff avers, and so the fact was. This contrivance in pleading was therefore resorted to to support the jurisdiction of the United States court; for, if the suit had been brought in the name of all the obligees, it must have failed, because one of the plaintiffs, Miner, would have been a citizen of the same State with the defendants. Can this pleading be supported by the authorities? It must be kept in mind that this is an action of debt on the penalty of the bond, and that all the authorities make a wide distinction between this form of action and one of covenant upon the undertakings in the conditional part of the obligation, and most, if not all, the cases turn on this distinction. Keeping this in mind, we refer to 1 Williams Saunders, 291, 1st Am. Ed., (*Cabell* vs. *Vaughan*,) where it is said "all the obligees or covenantees, if alive, ought to join in the action; if dead, that fact should be averred." The plaintiff

in this case averred in substance that the obligees not joined were still alive. 1 Chitty's Pleadings, 9; 1 Saunders' Pl. & Ev., 9; *Pearce* vs. *Hitchcock*, (2 Comstock, 388;) *Arnold et al.* vs. *Talmadge*, (19 Wendell, 527;) *Bailey* vs. *Powell*, (11 Missouri, 414;) *Sims & Hollis* vs. *Harris*, (8 B. Monroe, 55;) *Gayle et al.* vs. *Martin*, (3 Alabama, 593.) This defect of parties may be taken advantage of by demurrer, plea in abatement, objection at the trial, motion in arrest of judgment, or by writ of error. 1 Chitty's Pleadings, 12 *a*; *Cabell* vs. *Vaughan*, (1 Saund. Rep., 291.)

The plaintiff filed a declaration, which was demurred to. He then amended by filing two new counts, to which the defendants stipulated that they would plead to the merits, (and this was all the answer they ever made to it.) They did plead to the merits; at the trial, insisted on the objection. The judge overruled it then—overruled the motion in arrest, because he thought the objection too technical to be sustained; yet the authorities all say that the objection was a good one at any stage of the proceedings, and ought to prevail when insisted on.

There is no surprise to plaintiff in this, for he has deliberately taken the hazard of trusting that the court would disregard long and well-settled rules of common law pleading, in order to extend the jurisdiction of the Federal courts.

Mr. Vinton, of Washington city, for defendant in error. It has been a rule of practice from an early period of the common law that covenantees may sue separately in covenant, if the interest and cause of action be several, though the covenant be in terms joint; but if an action of debt be brought on the same obligation to recover the penalty for breach of covenant, all the obligees must join in the suit. 1 Chitty's Plead., 3, 6, and 7; *Eccleston* vs. *Clepsham*, (1 Saund., 153, and note 1.)

The inquiry naturally presents itself, why was this distinction in the rule of practice where the suit is on the same instrument?

When debt was brought to recover the penalty of the bond, the severe rule of the common law gave judgment for the whole penalty according to the letter of the obligation, and

not only shut out all inquiry into the damage which the obligee had sustained, but provided for the obligor no relief in any other form. And so great was this hardship of the common law that the court of equity made relief in such cases one of its special grounds of jurisdiction, which directed an issue of *quantum damnificatus*, and enjoined the excess of the judgment beyond the damage actually sustained. 2 Selwin N. P., 517.

If the obligee by his action of debt claimed the penalty of the bond according to its letter, it was but just that he, too, should be held to its letter, and compelled, though his interest were separate, to sue in the names of all the obligees. But if he brought covenant on his obligation, he recovered such damages only as he had actually sustained; and as he thus relaxed his hold upon the letter of the bond, the rule of practice was relaxed also in his favor by allowing him to sue separately, if his interest and cause of action were separate, though the terms of the obligation were joint. The law remained on this footing until the passage of the statute of the 8 and 9 William III, ch. 11, sec. 8, which enabled the obligor to compel the obligee in an action of debt on the penalty to assign the breaches of the condition of the bond, and limited his recovery to the damage actually sustained.

Since the passage of that statute, the action of debt on a penal bond is virtually put on the same footing with the action of covenant on the obligation. The result of an action on a penal bond, whether debt or covenant be brought, is now substantially the same to both parties in the suit. The English statute on this subject has been everywhere adopted in this country, and the record of this case shows that the plaintiff assigned the breaches of the condition of the bond, and recovered what was equitably due him, being some seven thousand three hundred and odd dollars. When the reason for this distinction in the rule of practice ceased to exist, the distinction itself ought also to have ceased.

But a conclusive answer to this objection to the non-joinder of proper parties to the suit is, that it was waived by the plaintiffs in error in the court below. He who remains silent when

it is his duty and interest to speak, will not be allowed to speak afterwards to the prejudice of another. Having remained silent, then, the defendants had no right to make the objection on motion to arrest the judgment, nor to insist upon it in this court as a ground of error to reverse the judgment. The stipulation to plead to the merits was plainly an agreement to waive the objection of want of parties as a defence to the suit, and not, as is claimed by the plaintiffs in error, an agreement not to avail themselves of this defence in a particular form only, such as by demurrer to the declaration or plea in abatement.

Mr. Justice GRIER. The amendments made to the declaration after demurrer have not removed the original mistake, as to the parties who should have been joined as plaintiffs. In an action of debt on bond, the demand is for the penalty. The condition of the bond is no part of the obligation. It is true, the judgment for the penalty will be released, on performance of the condition annexed to it. The plaintiff may declare on it as single, and defendant would then have to pray oyer of the deed, and have the condition put on the record, so that he could plead a performance of it, or any other defence founded on it. The bond being set forth at length in the declaration, precluded the necessity of oyer, but did not relieve the pleader from the mistake patent in his plea. He sues on a several covenant to pay a sum of money to A, and shows a covenant to pay A B and C jointly. If one of the joint covenantees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors. If, by the condition, the money to be recovered be not for the joint benefit of all, the suggestion of that fact cannot alter the obligation; but will show only that, though all the parties to it should join in the suit, and show a legal title to recover, the judgment will be for the use of the party named in the condition, and equitably entitled to the money. The true reason for the course pursued by the pleader in this case, though not alleged in the pleading, was, perhaps, to give jurisdiction to the Circuit Court of the United States, by omitting the names of obligees who are citizens of Illinois. But it is admitted that such a

reason, even if alleged in the pleading, would not have cured the omission.

It is an elemental principle of the common law, that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a non-joinder of plaintiffs, not only by demurrer but in arrest of judgment, under the plea of the general issue.

When there are several covenants by the obligors, as, for instance, to "pay $300 to A and B, viz: to A $100, and B $200," no doubt each may sue alone on his several covenant. The true rule, as stated by Baron Parke, is, that "a covenant may be construed to be joint or several, according to the interests of the parties appearing upon the face of the obligation, if *the words are capable of such a construction;* but it will not be construed to be several, by reason of several interests, if it be expressly joint." In this case, the covenant is joint, and will admit of no construction. The condition annexed cannot affect the plain words of the obligation.

It has not been denied on the argument that such is the established rule of the law, and such the plain construction of the bond; but it is insisted, that the court should disregard it as merely a *technical* rule, which does not affect the merits of the controversy. The same reason would require the court to reject all rules of pleading. These rules are founded on sound reason, and long experience of their benefits.

It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by the law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the court to follow their example. If any one should be curious on this subject, the cases of *Randon* vs. *Toby*, (11 How., 517;) of *Bennet* vs. *Butterworth*, (ib., 667;) of *McFaul* vs. *Ramsey*, (20 How., 523;) and *Green* vs. *Custard*, (23 How., 484,) may be consulted.

The judgment of the Circuit Court is therefore reversed, with costs.

HARKNESS & WIFE *vs.* UNDERHILL.

1. A fraudulent entry of public land allowed by a register and receiver, upon false proofs of settlement, occupancy and housekeeping, may be set aside and vacated by the Commissioner of the General Land Office.
2. A contract between two persons, neither of them being settlers or housekeepers, that one of them shall enter land for the benefit of both under the pre-emption laws, is a combination to defraud the Government, contrary to public policy, illegal, and void.
3. Such a contract will not operate by way of estoppel to prevent one of the parties, his heirs or alienees, from setting up a good legal title subsequently acquired, against the fraudulent title obtained by the other in accordance with the contract.
4. Where a party has had possession of land for fourteen years under a legal title clear and free upon its face, and the land in the mean time has greatly risen in value, a court of equity cannot make a decree which will turn the owner of the legal title out.

James P. Harkness and Maria his wife brought their bill in the Circuit Court of the United States for the northern district of Illinois, against Isaac Underhill, to compel the defendant to convey to Maria Harkness the west half of the east half of the southeast quarter of section 4 in township 8, range 8, east of the 4th principal meridian, in Peoria county, Illinois. The material facts set forth in the bill are these:

Isaac Waters, the father of Maria Harkness, was a settler and housekeeper on the half-quarter section of land described. As such he was in possession of the whole eighty acres from April 5th, 1832, until July 13th, 1833; and from the latter date until July 2d, 1835, he was in possession of forty acres, the west half, cultivating it and making improvements, which began in April, 1832. On the 24th of November, 1832, he made his affidavit, which was corroborated by that of John G. Trail, that he was a settler and housekeeper on the half-quarter section; which affidavits of himself and Trail he afterwards presented at the land office and applied for the purchase and entry of the land, but failed because the public surveys of that

township had not then been returned. Subsequently to this the surveys were returned, but Waters died without renewing his application. He left a widow and several children. On the 7th of August, 1835, which was after the death of Waters and within one year after the return of the surveys, his widow, on behalf of herself and children, applied for a pre-emption right upon the proofs which Waters had made in his lifetime. The register and receiver allowed the claim, and the land was thereupon entered by the widow for herself and the heirs-at-law of Waters. The receipt was recorded in the office of the recorder for Peoria country.

The narrative now goes back to certain transactions of Waters with other parties. On the 13th of July, 1833, he made his writing obligatory to Stephen Stillman and William A. Stewart, reciting that Waters and Stillman were common owners of the eighty acres; that Stewart had bought half of Stillman's share; that Stewart should pay $50, one half of the whole purchase money, and Waters should make to Stewart and Stillman a good title for forty acres, the east half of the eighty acres. Stewart conveyed his interest to Francis Church. As to the west half, Waters bound himself on the 2d of July, 1835, to convey that to Moses Pettingal and William Wolcott. They assigned their interest to Aaron Russell, who went into possession and made improvements worth $3,000. Russell died in possession in the fall of 1838, leaving no children, but a widow, who retained the possession to the time of her own death in the fall of 1839, when Gale and Cross, administrators of Russell, took possession and kept it until they were turned out by force, as will be mentioned hereafter.

In 1836, Stillman, taking advantage of the possession which he had acquired, with Waters's consent, of the east half of the eighty acres, claimed a pre-emption right in the whole of it. He had previously sold a portion of it to Aquilla Wren. The land office refused to allow him a pre-emption or to permit him to enter the land, because a pre-emption for the same land had been already allowed to the heirs of Waters. Stillman died in 1837. The year afterwards, Wren, together with one Frisby, sent an agent to the land office, who got a pre-emption

right allowed, and an entry made in the name of himself as agent for Stillman's heirs. But this was done without the authority or knowledge of Stillman's heirs, and the purchase money and fees were paid by Frisby and Wren. They also got a patent from the General Land Office at Washington, and turned Russell's administrators (Gale and Cross) out of possession of the west half by force. In 1841, Wren conveyed the west half of the lot to Isaac Underhill.

After the administrators of Russell had been forcibly detruded from their possession, they brought an action against Waters's representatives on the bond which Waters had given to Pettingal and Wolcott for the title of the west half of the lot, and recovered $3,000. On this judgment execution was issued; the land now in controversy was levied on *inter alia*, and sold to Charles Balance for $5. Balance conveyed to Maria Harkness, a daughter of Waters, and one of the present plaintiffs. The other heirs of Waters also released their respective rights to her.

The bill concludes by praying that Isaac Underhill, the defendant, be decreed to convey the west half of the eighty acres to Maria Harkness, and account to her for the profits he has received.

The defendant's version of the facts as extracted from his answer, and simply stated, is this:

Waters was not a settler and housekeeper on the land. His affidavit to that effect was false, and so was Trail's. He went on the land September 23, 1832, put up a log-pen, without a roof, staid there one night only, and the next day made his affidavit. That was the only possession he ever had, and the certificate of pre-emption obtained upon it was fraudulent and void. Defendant knew nothing of the written contract between Waters of the one part, and Stillman and Stewart of the other part, until long after he purchased from Wren, and he denies that the facts recited in that writing are true, or that Stillman got possession of the east half of the lot under that writing; he was in possession before. It is true that Russell made improvements on the west half, but they were made with a full knowledge that Waters's pre-emption right was con-

tested, and its validity denied. When defendant made his purchase from Wren, the bond from Waters to Stillman and Stewart, as well as the receiver's certificate and receipt, were recorded in the recorder's office of Peoria county, but he did not know it; he had no actual knowledge of either transaction, and he insists that he is an innocent and *bona fide* purchaser for a valuable consideration, without notice of any adverse claim whatever. He has made valuable improvements, which the plaintiffs stood by and saw him make for years, without asserting any right of their own; and this, together with the lapse of time, should protect him. He admits that the land was sold by the sheriff at the suit of Russell's administrators, on a judgment against the personal representatives of Waters; but the sheriff's vendee acquired no title, because the title was then not in the heirs of Waters, but in Wren.

The evidence taken in the cause was convincing enough that Waters was not an actual settler and housekeeper on any part of the eighty acres when he made his application for the right of pre-emption. He was at that time a resident of Peoria, and continued to reside there afterwards. This was the only fact controverted between the parties. The Commissioner of the General Land Office ordered the entry of Waters's heirs to be vacated on the ground of fraud. The principal questions, therefore, which arose on the bill, answer, and evidence, were:

1. Whether Waters's right of pre-emption could be set aside and the entry of his heirs vacated on the ground that his proofs were insufficient or false.

2. Whether Stillman, and those claiming under him, were estopped by his contract with Waters to take advantage of the unsoundness of Waters's title.

3. Whether Underhill, the defendant, took the legal title which he purchased from Wren discharged of the equities against it in the hands of Stillman; and

4. Whether the lapse of time and the accompanying circumstances were, or were not, a protection to Underhill against the claim of the plaintiffs.

The Circuit Court decided all the points of fact and law

against the plaintiffs and dismissed the bill. Thereupon, they took this appeal.

Mr. Williams for complainants. It makes no difference whether Waters's house and actual residence was on the land in question or on the adjoining tract. The substantial requirement of the law was, the improvement, and that *was* on the land. The United States were not wronged, for they got as much money, and as good, from Waters as they would have got from Stillman. Nor was Waters's entry a fraud upon Stillman. It was made with his consent and for his benefit. At all events, Waters's entry was good under the act of June 19, 1834, which provides that all persons who were in possession of and cultivated lands in 1833 shall be entitled to pre-emption. Besides, the irregularity was cured by the act of July 2, 1836.

The register and receiver having sold the land to Waters in conformity with the instructions of the Commissioner of the General Land Office, had no further power or jurisdiction over it. Neither had the Commissioner of the General Land Office power to set aside the sale even for fraud. This could only be done by judicial authority. Opinions of Attorneys General, Public Land Laws, Instructions and Opinions, part 2, No. 15, p. 16; No. 57, p. 85; No. 58, p. 85; No. 64, p. 99; No. 88, p. 140; *Elliott* vs. *Piersoll*, (1 Pet., 340;) *Wilcox* vs. *Jackson*, (13 Pet., 511; 13 Curtis, 269;) *Lytle* vs. *The State of Arkansas*, (9 How., 333; 18 Curtis, 159;) *United States* vs. *Arredondo*, (6 Pet., 709, 729;) *La Roche* vs. *Jones*, (9 How., 17; 14 Pet., 458.) The entry of Waters was vacated on an *ex parte* application without notice. A judicial decree made under such circumstances, and in such a manner, would be a nullity. So, for a stonger reason, is the decision of a mere executive or ministerial officer.

Stillman is estopped by the contract between himself and Waters from setting up a title acquired as his was in opposition to the title of Waters. 12 How., 24; *Hallet* vs. *Collins*, (10 How., 174, 183;) *Hunt* vs. *Sloan*, (2 Michigan, 213;) *Pey-*

ton vs. *Stith*, (5 Pet., 485;) *Tilghman* vs. *Lytle*, (13 Ills. R., 239;) *Wenlock* vs. *Hardy*, (4 Little, 272—4;) *Riley* vs. *Millian*, (4 J. J. Marsh, 305.)

Wren and Underhill having purchased with a full knowledge of Waters's claim, and of the facts upon which it was founded, are in no better condition than Stillman himself. Waters's certificate of entry and his bond to Stillman and Stewart were recorded. That record was notice to all the world. It is made so by the recording law of Illinois. 1 Purp. St., 159, sec. 28. Besides, the open, actual, notorious possession which Waters and those deriving title from him had of the west half of the eighty acres, was notice to all persons of the title under which they claimed it. *Rupert* vs. *Mark*, (15 Ills., 542;) *Tuttle* vs. *Jackson*, (6 Wend., 213;) *Colby* vs. *Kenniston*, (4 N. H., 262;) *Mathews* vs. *Demerite*, (22 Maine, 312;) *Landes* vs. *Brant*, (10 How., 348;) *Dyer* vs. *Martin*, (4 Scam., 146;) *Dixon* vs. *Doe*, (1 S. & M., 70;) *Boling* vs. *Ewing*, (9 Dana, 76;) *McConnel* vs. *Read*, (4 Scam., 123;) 1 Story's Eq. Jurisp., sec. 400; 2 Vesey, 437; 13 Vesey, 118; *Buck* vs. *Halloway's Devisees*, (2 J. J. Marsh, 180;) *Grimston* vs. *Carter*, (3 Paige, 421—437;) *Governeur* vs. *Lynch*, (2 Paige, 300;) *Chesterman* vs. *Gardner*, (5 Johns, Ch. 29.)

And this rule extends to the possession of a pre-emption in Illinois. *Bruner et al.* vs. *Manlove et al.*, (3 Scam., 339.)

Mr. Carlisle and *Mr. Webb* for defendant. No one but a settler and housekeeper on the land was entitled to a right of pre-emption under the act of April 5, 1832. Waters was not a settler or housekeeper. He had, therefore, no right—no title—nothing but a fraudulent claim, wholly worthless and void. That being its character, the register and receiver and Commissioner of the General Land Office had authority to rescind, set aside, and treat as a nullity the entry made by his heirs on the false proofs produced by him in his lifetime. As Waters's entry did not give him the title, it was still in the United States, and the land office was justified in permitting Stillman's heirs to enter it. 2 Land Laws, 646; *Lewis* vs. *Lewis*, (9 Mo., 143.) "It is the duty of the Commissioner of

the General Land Office to revise the proceedings of the register and receiver and vacate entries which may have been illegally made, and thereby arrest the completion of a title originating in fraud, mistake, or violation of law." This is the language of the court in *Green* vs. *Hill*, (9 Missouri, 322.) To the same effect are the cases of *Perry* vs. *O'Hanlon*, (11 Mo., 585;) *Huntsucker* vs. *Clark*, (12 Mo., 333;) *Nelson* vs. *Simms*, (23 Miss., 383;) *Glenn* vs. *Thistle*, (23 Miss., 42;) *Mitchell* vs. *Cobb*, (13 Ala., 137;) *Dickinson* vs. *Brown*, (9 Smeade and Marshall, 130;) *Gray* vs. *McCance*, (4 Ill.) Between the case at bar and the case last cited there is no essential difference. The Commissioner of the Land Office held Gray's entry to be a nullity, a fraud on the Government, and directed it to be set aside, and his action was held to be not only legal but conclusive upon the parties. If Waters had any claim under the act of April 5, 1832, or March 2, 1833, he waived it by his neglect to comply with the rules and regulations of the General Land Office, and no subsequent act that he could take advantage of would cure the irregularity.

The bond which Waters gave to Stillman was neither morally nor legally binding. Waters was to convey to Stillman if he obtained a pre-emption, and this he neither did nor could do. His heirs after his death entered the land in fraud of the law, but they never offered to execute the contract by conveying to Stillman. The bond was contrary to the policy of the law.

The plaintiffs rely on the record as proving notice to Underhill. Perhaps these records may be notice that he had a claim, but in 1841, when Underhill made his purchase from Wren, the entry by Waters's heirs had been set aside for three years, and for the same period no person had been in possession claiming under Waters or his heirs. The patent had been issued to Stillman's heirs, and no intention had been manifested to assert an adverse claim. Then eighteen years elapsed after the title to Stillman, and fourteen after Underhill's purchase, before this bill was filed. Meantime the land had increased in value one hundred fold—had been laid out into town lots, improved and built upon by innocent purchasers, and had become a ma-

terial portion of a thriving and important western city. The purchase by Underhill was made in good faith, and the entire legal and equitable title is vested in him. He need not go behind his patent for a title. It is conclusive evidence of right and title in the patentee until attacked and overthrown by some one who can show a superior equity. The defendant is also fully and wholly protected by the statute of limitations. 2 Purple's Stat., 730; Purple's Real Estate St., 424.

Mr. Justice CATRON. In the winter or spring of 1832, Isaac Waters and Stephen Stillman agreed to cultivate and improve the east half of the southeast quarter of section four, a portion of which is in controversy in this suit. This arrangement was made in view of the probability that Congress would, at its then session, pass a pre-emption law. It was further stipulated that Waters should make the necessary proof to obtain the pre-emption. As was anticipated, the act of April 5, 1832, was passed, allowing "to actual settlers, being housekeepers," a pre-emption to enter a half-quarter section to include his improvement. Waters went on the land, made a slight improvement for the purpose of cultivation, erected a temporary hut, or rather a pen, put some furniture in it, and he, with a part of his family, went into the hut, staid there a couple of days, and then returned to his residence in the village of Peoria, where he resided, and continued to reside. He was a substantial resident of the village, having a house, home, and family there. The half-quarter section adjoined the village property. Waters made an affidavit in September, 1832, that he was an actual settler and housekeeper on the land. He does not say at what time, but he applied to enter under the provisions of the act of April 5, 1832. He also procured the affidavit of one Trail, who swore that Waters was an actual settler and housekeeper on the half-quarter section.

In July, 1833, Waters, in a written agreement with Stillman and Wm. A. Stewart, recited the terms on which he and Stillman agreed to improve the land, to wit: that the entry was to be made for their joint benefit on the proofs furnished by Waters. Stewart, at the date of the agreement, stipulated to

pay Stillman's moiety of the purchase-money, and Waters was bound to convey to Stewart and Stillman one-half of the eighty acres; and it appears by a covenant, dated July 2, 1835, executed by Waters to Pettingal and Wolcott, that Waters's portion was the western forty acres, which he bound himself to convey to Pettingal and Wolcott, they being purchasers from Waters. Waters soon thereafter died, leaving a widow and children, and they entered the half-quarter section, in the name of Waters, at the land office at Quincy, August 7, 1835. The entry stood in this condition till May, 1838, when the Commissioner of the General Land Office informed the register and receiver at Quincy that, Stephen Stillman's heirs having applied to them to enter the half-quarter section, containing eighty acres, and having adduced evidence to the Commissioner tending to prove that Waters went on the land into a log-pen, without a roof, and staid there only one night; furthermore, that the affidavits of Waters and Trail being evasive, and not stating that Waters was an actual settler on the 5th of April, 1832, the register and receiver were, therefore, instructed, that if they believed the facts, as respects the frauds practised to obtain the entry in Waters's name, to treat it as void, for fraud, and allow Stillman's heirs to enter the land; and this was accordingly done. The entry in Stillman's name was made under the occupant law of 1834.

We concur with the Commissioner's directions, and the finding of the register and receiver, that the proceeding of Waters was a fraudulent contrivance to secure the valuable privilege of a preference of entry. It was an attempt to speculate on his part, and also on the part of Stillman, his co-partner, by fraud and falsehood. They both knew equally well that Waters was no actual settler on the public lands at any time, and that the affidavits of Waters and Trail were false.

The principal ground on which the bill is founded assumes that the complainant, as assignee of Waters's heirs, is entitled to a decree against the respondent, because his title was derived through Stillman, and that Stillman came into possession under Waters, and therefore Stillman's assignee cannot dispute the title of him under whom he held possession, according to the

doctrine maintained by this court in the case of *Thredgill* vs. *Pintard*, (12 How., 24.)

In Thredgill's case the transaction was fair, and obviously honest. The consideration between the parties was full and undoubted; their contracts bound them. But in this case, there was no legal contract between Stillman and Waters. They combined to defraud the Government; their agreement was contrary to public policy, because it was intended by contrivance to take the land out of the market at public sale—a cherished policy of the Government. Such an agreement can have no standing in a court of justice.

But there is another defence equally conclusive. The bill seeks the legal title from Underhill; he holds under a patent, dated in 1838; he purchased in 1841, and has been in uninterrupted possession ever since. This suit was brought in 1854. In the meantime, the land sued for has been partly laid off into lots, and become city property; yet, Waters's claim lay dormant after his entry was set aside at the General Land Office for eighteen years, and fourteen years after the patent in Stillman's name was issued, and the land conveyed to Underhill by Wren. Underhill, and those holding under him, have held possession from 1841 to the time when this suit was brought; and, in the meantime, the land had greatly increased in value, and changed in its circumstances. These facts present a case on which a court of equity cannot decree for the complainant, if there was no other defence.

The question is again raised, whether this entry, having been allowed by the register and receiver, could be set aside by the Commissioner. All the officers administering the public lands were bound by the regulations published May 6, 1836. 2 L. L. & O., 92. These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court.

This question has several times been raised and decided in this court, upholding the Commissioner's powers. *Garland* vs. *Winn*, (20 How., 8;) *Lytle* vs. *The State of Arkansas*, (22 How.)

For the reasons above stated, it is ordered that the decree of the Circuit Court be affirmed.

LAFLIN *vs.* HERRINGTON ET AL.

The sheriff sold land under an execution against the representatives of the deceased owner, the heirs having a right to redeem in one year. The agent of the purchaser, within the year, assigned the certificate of sale to one of the heirs, who was acting for the rest, and who gave his note for the amount, but did not pay it at maturity. The transaction, though it was not approved, was not disaffirmed by the purchaser within the period allowed for redemption; *Held*,

That a person who bought the title of the original purchaser several years afterwards, when the land had greatly risen in value, could not recover it as against the heirs or their vendees.

Walter Laflin filed his bill in the Circuit Court of the United States for the northern district of Illinois, against the widow and heirs of James Herrington and the Illinois Central Railroad Company, complaining that one William Stuart obtained judgment in the Circuit Court for Kane county, Illinois, 9th June, 1837, against James Herrington, for $646 72, and issued execution thereon within one year thereafter, which was returned by the sheriff *nulla bona;* that afterwards James Herrington died, leaving a widow and ten children, (the defendants,) the widow becoming his administratrix; that James Herrington died seized of certain described lands; that afterwards Stuart notified the administratrix of the judgment and of his intention to issue an alias execution; that he did issue such execution, levied upon the land, and after due advertisement it was sold to William H. Adams for $1,378 42; that Adams being a friend and relative of Stuart, made the purchase for him; that Augustus M. Herrington, one of the heirs of the deceased James Herrington, proposed to redeem the land for himself and the other heirs, but in order to overreach an outstanding title for a fractional interest, requested an assignment of the certificate of sale to be made by Adams; that Adams made an assignment with a blank for the name of the assignee, and instructed his attorney, Burgess, to deliver it to Herrington when the money was paid; that Herrington (though he knew that Adams had bought for Stuart) got the assignment

from Farnsworth, the partner of Burgess; that he got the paper by falsely representing that the land had been incorrectly described, and gave his notes for $2,378 42, payable to Burgess & Farnsworth, agreeing, that if the arrangement should not prove satisfactory to Stuart it should be void, and the certificate, with the assignment, be returned to Farnsworth; that Adams repudiated the arrangement as soon as he heard of it, and wrote to Stuart, who immediately replied, expressing his disapproval in a letter which was read to Herrington before the expiration of the time for redemption; that afterwards, on the 9th of October, 1856, Adams sold and transferred the certificate of sale to Julius Smith, who, on the 20th of November, 1856, conveyed to the complainant; and that the heirs of Herrington in December, 1856, conveyed an undivided interest to the Illinois Central Railroad Company. The bill prays that the defendants be required to deliver up the certificate of sale so that the assignment may be cancelled; that they be restrained by injunction from placing the certificate on record, from filling up the blank in the assignment, from making any claim to the lands, or from demanding a deed of the sheriff; that the sheriff be directed to make a deed to the complainant; that the defendants be decreed to have no title, and required to release all title which they may appear to have.

The facts, as they appeared from the answer and the evidence, are set forth in the opinion of Mr. Justice *Wayne* too fully to need repetition here.

Mr. Reverdy Johnson, of Maryland, and *Mr. Burgess*, of Illinois, argued the cause for the appellants.

Mr. Beckwith, of Illinois, for appellees. 1. The judgment against James Herrington not having been revived against his heirs, the execution was a nullity and the sale void. 2. It is not true that J. M. Herrington got the certificate fraudulently. 3. The appellant, by his own showing, is simply a purchaser of the right to set aside a legal instrument, and has, therefore, no standing in a court of equity. 4. Adams being clothed with the legal *indicia* of ownership, though he was, in

fact, only an agent of Stuart, had power to bind his principal. 5. Stuart ratified the act of Adams, and the subsequent attempt to repudiate it came too late. 6. On the part of the complainant this is a mere speculation; all that is really due to Stuart was tendered, and is now in court for his use. 7. The complainant cannot have the contract with Herrington rescinded without placing the appellees *in statu quo*, which would permit them to discharge the debt and redeem the land.

Mr. Justice WAYNE. We shall confine ourselves to such of the facts of this case as are sufficient to illustrate the point upon which we will decide it. Others have been insisted upon in the argument, but, in our opinion, they have no substantial bearing upon the merits of the controversy.

The complainant and the respondents have chosen to put their respective rights to the land in dispute upon the sale of it, to satisfy the judgment of Stuart against J. Herrington, each claiming the sheriff's certificate of sale by fair purchases, the former, however, charging that the purchase of the latter had been obtained by the fraud and circumvention of Augustus M. Herrington, their co-defendant, without accusing any of the rest of them with complicity in the transaction.

It is recited in the bill that a judgment had been recovered by William Stuart, in the year 1837, against James Herrington, for six hundred and forty-six dollars and seventy-two cents. That an execution issued upon it, within the year of its rendition, commanding the sheriff to make the money out of the goods and chattels, lands and tenements of the debtor, and that the sheriff had returned it to the proper office, with the entry upon it, "that he could find no property of the defendant whereon to levy." This occurred in the lifetime of James Herrington. He died in the year 1839 intestate, leaving a widow and ten children.

The probate court of Kane county granted to his widow letters of administration upon the husband's estate. It is against her, as administratrix, and nine of these children, one of them being dead, and the Illinois Central Railroad Company, that this suit is brought. The answer of that company

makes it unnecessary to notice it further in this opinion, except in confirmation of the fact that, at the time it bought its interest in the land in controversy, and when the complainant bargained for his, it had become a subject of speculation.

Nothing was done for several years after the sheriff's return upon the execution, and the death of the debtor, to collect the debt.

But when it had been judicially determined that the debtor had died seized of the land in controversy, Mr. Stuart, the judgment-creditor, empowered his friend and brother-in-law, William H. Adams, to take such means as were necessary to subject the land to the payment of his judgment. Adams accepted the agency, and employed Messrs. Farnsworth and Burgess, attorneys at law, in the case. They conducted it with the knowledge of Adams of every thing which was done, and with the acquiescence of his principal, Stuart. The counsel served a notice upon the widow and administratrix of J. Herrington, informing her of the unsatisfied existence of the judgment, and that they would apply in three months, at the clerk's office, for an alias execution. They did so, and the execution was issued and levied upon the land. It was sold by the sheriff, in four parcels, for the aggregate sum of $1,378 42, subject to a right of redemption in one year, by the payment of the sums due, with accruing interest and the costs. Mr. Burgess attended the sale at the request of Mr. Adams, and bid on the land to the amount of the execution and costs, in his name, for the benefit of his principal, Mr. Stuart.

Mr. Burgess, as counsel, directed the sheriff to make the certificate of sale to Mr. Adams, and that having been done, he received and retained it. The purchase and retention of the certificate of sale by Mr. Burgess was approved by Mr. Stuart, it being understood it was to remain in the hands of himself, and his partner, Mr. Farnsworth, subject to the right of redemption, or to an assignment of it to a purchaser, as Mr. Adams might direct.

Shortly before the expiration of the time allowed by the law to redeem, Mr. Burgess told Mr. Adams that Augustus M. Herrington, one of the children of the judgment-debtor, and now

a respondent to this bill, wished to redeem the land by paying the amount due upon the certificate of sale, and wanted an assignment of it to himself. Mr. Adams directed Mr. Burgess to write the assignment. He did so, leaving a blank for the name of the assignee, and a figure wanting for the date of the year, which Mr. Adams signed, giving a direction to Mr. Burgess, the latter assuring him it should be observed, that the certificate, with the assignment upon it, should not be given up until the money had been paid.

Either late in January or early in February, 1856, Augustus M. Herrington went to the office of Farnsworth and Burgess, the latter not being in, and he stated to Mr. Farnsworth his desire to get further time than the last day of redemption for the payment of the money due upon the certificate of sale. To this application Mr. Farnsworth says: "Knowing that there had been some conversation to transfer the certificate to A. M. Herrington, and that there was an assignment in the office for that purpose, the transfer of the certificate was made to him upon his giving his note of hand and a due bill in payment, the note being ante-dated as of March the sixth, 1855, with interest at ten per cent., to be paid on the 1st September, 1856, to Farnsworth and Burgess; the due bill being for one hundred dollars 'and a trifle over,' which was paid in a short time afterward, the amount of it being the fee due to Farnsworth and Burgess by Mr. Stuart, for their services in the case." Mr. Farnsworth filled up the blank in the assignment with the name of Herrington, added the figure 5 to give that year as the date of the note, and concluded it, contrary to the fact, with the words, "*for money actually loaned.*"

Mr. Farnsworth declares, in his evidence, that the transfer was made and the note taken in good faith, for the benefit of Mr. Stuart, and for no other purpose than to give to Herrington the ownership of the certificate.

Some days after it had been done, Herrington went to the office occupied by Adams and by Farnsworth and Burgess for the transaction of their respective businesses—that of Adams being to buy and sell land—when the transfer of the certificate to Herrington became the subject of conversation, both

of the counsel and Adams being present. Adams then said to them and to Herrington that he was satisfied with the arrangement, but that he being only an agent, he would write to his principal about it, and if he did not object to it, that he would not. He did write, and received a reply from Mr. Stuart, complaining of what had been done, which was shown to Mr. Herrington on the 5th of March, the day before the expiration of one year from the date of the sale of the land.

But whatever may have been his discontent with the arrangement, that letter and other testimony in the record show that Mr. Stuart did not then intend to disaffirm it, but was content to take the chances of the payment of Herrington's note; at the same time holding his counsel responsible for the debt, if the note should not be paid at its maturity. He also required from them the deduction of their commissions on the amount "collected or to be collected." No complaint was made again of Farnsworth's arrangement by the parties interested in it, until after Herrington's default in payment of the note.

Six months had intervened, when Herrington received a letter, with the signature of Farnsworth and Burgess, urging him to pay the note on account of a letter which they had received from their client, Mr. Stuart. The letter was sent to Herrington, with a request for its return. Burgess and Farnsworth are charged, in that letter, with having given the certificate to Herrington without the knowledge and against the consent of Adams, and in violation of the assurance given by Mr. Burgess, that it should not be parted with by him until the money had been paid. The writer then says, that he had written to Mr. Adams to employ at once some able and honest lawyer—if he shall have the luck to find one—to take immediate measures to settle the matter. And he concludes by telling his lawyers that his confidence, and that of Adams, had been abused, and that if he should be compelled to go to Chicago again on the business, he would expose the whole affair. Then it appears, that up to the date of that letter—six months after that of the previous letter—there had been no actual disaffirmance of Farnsworth's arrangement with Herrington for the certificate of sale; and that all the parties

knew it had been transferred by that arrangement, in virtue of Herrington's right to redeem the land, for the benefit of himself and his mother, and his brothers and sisters. Stuart, Adams, and their counsel continued to anticipate the payment of the note, and the latter were allowed to retain it for payment, without the dissent of Adams or his principal. But, after it was past due for more than a month, the counsel wrote to Herrington a singular letter, without taking notice of any of the other respondents to this bill. They say they "were under the necessity, owing to Mr. Stuart's refusal to ratify the arrangement made by our Mr. F. with you about the certificate of sale of what is called the Laflin property, to refund the money you paid to Mr. F., about the 28th of January last, of $108 34, with interest, amounting to $116 48." Still, Burgess, acting as counsel of Stuart, in writing the letter just read, which was done with the full knowledge of Adams, made no offer to surrender Herrington's note.

The case subsequently shows, that the note was retained by Mr. Burgess, for the security of himself and partner against any claim which might thereafter be made by Mr. Stuart upon them for the money due him, in the event of his successfully carrying into execution his menace to make them responsible for the debt, and with the further intention to use the note to coerce the payment of it out of the land. By this time, however, the land was supposed to have become a good object of speculation. Mr. Burgess and Mr. Adams knew it to be so; for, before the letter had been written to Herrington, announcing to him, for the first time, that Mr. Stuart would not ratify their arrangement for the transfer of the certificate to A. M. Herrington, Mr. Burgess had already become the lawyer of the complainant, Mr. Laflin, for the purchase of the land, with the intention to divest the respondents of all right to the certificate of sale. We think that a moment's professional consideration, unaffected by any resentment of Mr. Burgess against Herrington for the non-payment of his note, would have suggested to him that having himself fully assented to what he represented as his partner's arrangement for the transfer of the certificate, that, so far as he was concerned, it had given to the

Herringtons an equity to the land, which it might not be professionally becoming in him to attempt to defeat, by his agency for the purchase of it for another person. He must have known that, under the circumstances, equity would coerce the respondents to pay the amount due upon the certificate, as the condition upon which they could ever get the sheriff's title to the land. Moreover, he knew that there were then persons offering to buy the land, at a larger sum than the certificate called for, amply securing his principal, Mr. Stuart, and himself and his partner, from all loss. And, further, he might have concluded that any one purchasing, either from Mr. Stuart or Mr. Adams, with a full knowledge of all the circumstances of the transaction before he bought, could not acquire any right in himself, by the purchase, to defeat the previous equity which had been obtained by the representatives of the judgment-debtor, in the exercise of their legal right to redeem the land from the operation of the certificate of sale. The evidence also shows that the complainant, Mr. Laflin, knew all the particulars of the judgment; the subsequent proceedings upon it; the sale of the property to satisfy it; how the certificate of sale had been given by the sheriff, and to whom, and for what purpose; the subsequent assignment of it to A. M. Herrington, in behalf of himself and his father's family; the agency of his counsel, Mr. Burgess, in the whole affair; and the course of Mr. Stuart and Mr. Adams, in respect to it, when the former conveyed to the complainant his interest in the land.

In our opinion, there never was, either by Mr. Stuart or Mr. Adams, or by their counsel, any effective disaffirmance of the assignment of the certificate to Mr. Herrington; and if either of them meant to do so, we think that no act of theirs, either separately or conjointly, could, under all the circumstances, have defeated, in favor of Mr. Laflin, the previous equity to the land, which had been acquired by the respondents. Laflin stands in no better condition than Mr. Stuart did, when his equity in the certificate had been conveyed to others by those who represented him, for a consideration which they chose to retain, with his knowledge, if not strictly with his consent, in

expectation of its payment, until after the time when the right of the assignees of it to redeem the land had passed. The latter, by that course, might well have supposed, and as they did think, that they had an equity in the certificate, not liable to be annulled at the pleasure of those from whom they had acquired it, upon the plea that there had been a failure to pay the money on the day stipulated, and that its non-payment at that time, of itself revested Mr. Stuart with the original, but contingent equities to the land, which the purchase of it, at sheriff's sale, had given to the judgment-creditor. The non-redemption of the land would have made Mr. Stuart's right absolute, upon the expiration of the time allowed; but having made the certificate of sale the subject of speculation and sale before that day, with a postponement for the payment of the consideration of the transfer for a longer time, neither Mr. Stuart nor Mr. Adams, as his agent, can, with any propriety, be considered as having had a right to retain, at the same time, both Mr. Stuart's claims upon the land, if the money should not be punctually paid, and also their transferee's obligation to pay it when due. Indeed, we doubt, without intending ourselves to be finally concluded upon the point, as it has not been so decided by the courts of Illinois, if, under the law of Illinois giving to a debtor the right to redeem his land sold under execution, if even an agreement had been made between these parties, which did make the right to redeem conditional upon the payment of a consideration in money, after the time to redeem had passed, and that, if not then paid, that the creditor should have the right to exclude the debtor from doing so, whether a court of equity, if called upon to adjust the rights of the parties under such a contract, would not, in consideration of the intentions of the legislature in giving to debtors the right to redeem, feel itself bound to dispose of the case, by making the debtor pay the amount due, with interest, and all costs which might have accrued in the litigation.

But how, in addition to what has been said of the disability of Mr. Stuart to convey, at the time it was done, any right to the land to the complainant, and the latter's inability to obtain any such right, in consequence of his knowledge of the cir-

cumstances, when he took Stuart's conveyance, there were incidents in this affair, happening subsequently to the assignment of the certificate to Herrington, produced by the course taken by the complainant and his counsel, Mr. Burgess, and by Mr. Adams and Mr. Smith, who now appears for the first time in this business, which are certainly not calculated to strengthen the complainant's claim to the certificate of sale against the better equity of the respondents.

The course taken by the complainant to get the ownership of the land was to buy it from Mr. Stuart, expecting, if he succeeded in doing so, that Mr. Adams, having no interest or claim upon it, would, as Stuart's agent, transfer to him the certificate of sale which the sheriff made in his name, only, *as he says in his testimony*, for the benefit of Stuart. The case, however, shows that Mr. Adams would not or did not do so, and that he assumed, in eight days afterwards, and when he knew that his principal had conveyed to Laflin, to be the owner of the certificate, and conveyed the same land to Julius C. Smith, authorizing him to receive a deed for it, in his own name and to his own use, from the sheriff, in virtue of the certificate of sale, and then remitted himself to Mr. Stuart sixteen hundred dollars, the consideration which Laflin was to have paid Mr. Stuart, but which had not been done, though said in the deed that it had been.

Now, there are certain facts in connection with Stuart's deed to Laflin and Adams's to Smith which must be mentioned, and particularly so, as they are mostly derived from the testimony of Mr. Adams:

1. Mr. Burgess acted as the agent of Walter Laflin, the complainant, in the negotiation between Smith and Laflin, for the purchase of the property, and for the procurement of the deed from Stuart to Laflin. "Do not recollect who informed him so, but thinks it was Mr. Burgess."

2. The deed from Mr. Adams to Smith was executed, the latter being acquainted with the dispute that had arisen concerning the property and with the circumstances attending the transfer of the certificate to the Herringtons.

3. Smith knew when Adams made his deed, and when he

accepted it, that Adams was only the agent of Stuart; that he had nothing in the land to convey; that the certificate of sale, which he was then professing to sell him, had been issued to him only as the agent and for the benefit of Stuart; that it had been already assigned, with his signature, to A. M. Herrington, and when the deed was made to Smith, on the 9th of October, that both himself and Adams were then aware of the fact of Stuart having sold his interest in the land to Laflin on the 1st of the same month. The title to the land, then, as between Stuart, Laflin, Adams, and Smith, stood thus: that the second had the first title to it, and the latter, that of Mr. Adams, the agent of Stuart, who had not at the time any property in the land, or any delegated authority from Stuart to convey it to Smith. We know not what were the inducements of Mr. Adams to make a transfer, under such circumstances, to Smith; but when he gave his testimony in this case, it would have been better for all parties concerned if he had given a full explanation of the transaction. It was, however, not done. But Smith accepted the conveyance, and brought a suit against Augustus M. Herrington and others for the property; and he states in his bill, that William H. Adams, for a valuable consideration *paid, and agreed to be paid, had* assigned the certificate to him. His suit was filed two days after the date of the conveyance to him. Thus matters stood until the 20th November of the same year, just one month, when he conveys the property to Walter Laflin, the complainant, for the sum of thirty thousand dollars, for which he had agreed to give sixteen hundred, the exact sum which Adams remitted to Stuart when he conveyed to Smith. Our object in giving the narrative of the transfers of this land has not been to ascertain whether all of the persons who have been mentioned were in combination to divest the Herringtons of their equity in it, but to show the fact that there was such a combination for speculation, which a court of equity will not countenance. The conveyances to Laflin and Smith were made by Mr. Stuart and Mr. Adams before the letter of the 23d of October, 1856, was written to A. M. Herrington by Farnsworth and Burgess, letting him know that Mr. Stuart

had refused to ratify their arrangement for the transfer to him of the certificate of sale. Mr. Smith's suit was also brought before that letter was written. Mr. Burgess had negotiated the sale from Stuart to Laflin on the first of October, and in that letter, of the 23d of the month, calls the land, for the first time, the Laflin property.

Mr. Burgess also knew that Adams's transfer to Smith was executed on the 9th, and, as early as the 11th, he became the counsel of Smith in the suit against the Herringtons, notwithstanding he had before bought the property for Laflin, then being at the same time the counsel of Laflin and Smith, in respect to land for which they had to all appearance antagonist claims, which was acquired through his agency, his situation as to each of those persons being known to Adams when the incidents occurred which have been just mentioned, and, of course, before the letter of the 23d of October was written to Herrington. Further, we find in the record proof of his representation of Laflin and Smith, and with their consent at the same time, in the fact that after Smith's suit had been allowed to stand for six weeks, that Smith consented to give a quit-claim deed for the land to Laflin, for which the latter was to pay thirty thousand dollars, and that the litigation between Smith and Herrington was immediately transferred to Laflin, under the professional direction of Mr. Burgess.

All the foregoing facts, in connection with the evidence that this land had then become very valuable, convince us that there was a combination to deprive the Herringtons of their equity in it, by using the fact of the note of A. M. Herrington not being paid at its maturity as a pretence for doing so. Mr. Allen, engaged in the real estate business, says that he knew the land; that he knew it as the property contested between Matthew Laflin and Herrington's heirs, and thirteen acres of it, running from State street to the lake, comprising what was known as the Herrington tract; that it had seven fronts—one on State street, two on Wabash avenue, two on Michigan avenue, and two on Indiana; he thinks that in each front there was about six hundred feet, and that its value in March, 1856, was one hundred and twenty-five dollars per front foot.

That may have been an exaggerated estimation; but whether so or not, it serves to show, especially as it was not controverted as to the amount, that all the persons concerned in defeating the equity of the Herringtons—and they were also dealers in land—were in combination to effect that object for a speculation, and that Mr. Burgess gave to them his professional services to accomplish it. Now, it is not meant by us, that the buying of land with the expectation of selling it at an advance in price is wrong of itself, any more than that the purchase of merchandise is so, when made by the anticipation of its rise by the happening of political events, or by foresight of what will be the demand for consumption at a future day, and a deficiency of supply; but the difference between them is, that the latter is a triumph of sagacity, which gives life and energy to all trade; but that to buy land for speculation, upon a combination to divest the right of another to it, is a contrivance to fulfil the designs of selfishness.

We have given the facts of this case plainly, in connection with the assignment of the certificate of sale to Herrington, and the subsequent attempts which were made to divest his interest and that of his family in it, and necessarily with the names of all the persons concerned in them. That of Mr. Burgess occurs frequently under circumstances that call for a further remark. We do not mean it to be inferred, from anything that has been said, that, in the combination to make the speculation out of the property, he had any prospective pecuniary expectation or interest in its results. There is no evidence of that in the record, and there is that he advocated zealously the causes of his new clients—perhaps from temperament of character, perhaps from resentment to the Herringtons for the non-payment of the note at its maturity, which A. M. Herrington had given to Farnsworth and himself for the certificate of sale; but, be that as it may, we think, considering what had been the relations between himself and partner with A. M. Herrington in this matter, in appearing in court against him and his family for others in the same business, that he was not sufficiently mindful of the restraints imposed by prudence upon lawyers in making engagements with their clients.

which cannot be disregarded without subjecting them to misconception and suspicion, and the profession to the already too prevalent impression that it is not practiced with all the forbearances of the strictest honesty or of the highest moral principle.

With these views, we shall direct the judgment of the court below to be affirmed.

We ought to have said, also, that there was no error in receiving the letter of Mr. Stuart to Farnsworth and Burgess as evidence, complaining of their want of fidelity as his lawyers. It was not confidential, or meant to be so, in the sense of its having any connection with the merits of the case, for Mr. Stuart had authorized it to be communicated to another lawyer, for the purpose of obtaining from Farnsworth and Burgess an immediate settlement of the debt.

UNITED STATES *vs.* COVILLAND ET AL.

1. A confirmation of a Mexican land title in a proceeding conducted in the name of the original grantee is binding upon the United States, and upon all the assignees of the original grantee.
2. When a survey is executed conformably to the decree of confirmation, the alienees of the original grantee may intervene to protect their own rights.
3. When the survey is completed, and a patent issued to the original grantee, his assignees can assert their rights against him in the ordinary courts of the country.
4. But the extraordinary tribunals, proceeding under the act of 1851, cannot order a second patent to issue for a part of the land previously confirmed to the original grantee.
5. If such a decree were made, it would not bind the Government, and would be a nullity as between the original grantee and his assignees.

Charles Covilland, José Manuel Ramirez, William H. Sampson, administrator of John Sampson, Charles B. Sampson, Robert B. Buchanan, and Gabriel N. Suezy, presented their petition to the Board of Land Commissioners, at San Francisco, on

the 31st of May, 1852, claiming to be confirmed in their title to two tracts of land lying on the Yuba and the Feather rivers. The title set forth in the petition was derived from Captain John A. Sutter, whom the petitioners alleged to be a regular and legal grantee from the Mexican Government. It was alleged that Sutter had two grants, one made by Governor Alvarado for eleven leagues, in 1841, and the other by Micheltorena, in 1845, for twenty-two leagues, and the land claimed in the present case was averred to be part of these grants. The conveyances from Sutter to the petitioners were set out and produced before the board.

The evidence which the petitioners laid before the board and before the District Court to establish the title of Sutter under his two grants was nearly the same in this case as in the case of *Sutter* vs. *The United States*, (21 How., 170,) where there was a final decree confirming his claim under the title from Alvarado for eleven leagues, and rejecting that under the Micheltorena title for twenty-two leagues.

The record does not show precisely what quantity of land was conveyed by Sutter to Covilland and his associates, but the boundaries described in the deeds include a comparatively small part of Sutter's original claim. The Board of Commissioners confirmed the claim of the petitioners for the quantity of land included in their deeds as part and parcel of the lands granted to Sutter, and previously confirmed by the board to him.

Upon appeal by the United States to the District Court, the decree of the board was confirmed with certain immaterial modifications, and this appeal to the Supreme Court was then taken by the United States.

Mr. Stanton, of Washington city, for the United States, resisted the claim of the present parties on the grounds:

1. That the title of Sutter to the whole grant of eleven leagues being confirmed, the authority of this court is exhausted.

2. That the specific tract claimed in this case cannot be ascertained until the Sutter tract of New Helvetia shall be located.

Mr. Crittenden, of Kentucky, for the appellees. 1. The petition of the claimants and proceedings thereon are in strict accordance with the statute. (9 Stat. at Large, 633.) 2. There is no error in the decree. 3. The decree cannot be made erroneous by a fact not appearing in the record, namely, that a patent had been decreed or issued to Sutter for the whole tract of land. 4. The issuing of a patent to the claimants is no part of the decree, it is only consequential; and though the issuing of a patent to Sutter for the whole tract might be a valid reason to justify the Executive Department for refusing to issue a patent to the claimants for a part, yet that does not make the decree itself erroneous. It only makes ineffectual a part of the decree, or defeats what would otherwise have been a consequence of the decree. 5. The decree contains nothing to the prejudice of the United States, and ought not, therefore, to be reversed.

Mr. Justice CATRON. Covilland and four others petitioned to have confirmed to them two tracts of land, as joint owners, assuming to derive title from John A. Sutter. His claim was confirmed for eleven leagues by the decision of this court, in 1858, and which judgment is reported in 21 How., 170. It appeared, in that case, that Sutter had assigned to others a great portion of his original grant; nevertheless, the suit against the United States seeking a confirmation was prosecuted in his name, regardless of that fact.

That a confirmation in the name of the original grantee, divesting the legal title of the United States, is binding on the Government and on the assignees, is the established doctrine of this court. It was so held in the case of Percheman, (7 Peters, 56,) which decision has been adhered to, and was recognised in Sutter's case, (21 How., 182,) of which this case is, in fact, a part.

To this course of decision the courts adjudicating titles to lands situate in California are requested to conform by the 11th section of the act of March 3, 1851; nor can their decisions affect injuriously the rights of assignees. The 15th section of the act so provides.

The decree made by this court in 1858, in favor of Sutter, remanded the proceeding to the surveyor general's office in California, to have a survey made of the land conformably to our decree, to the end of having a patent founded on the survey, divesting the title of the United States. In executing the survey, Sutter's assignees may intervene and protect their rights, according to the act of June 14, 1860.

We are not aware that the survey has been executed; but when it is finally completed, and a patent issued to Sutter, his assignees can assert their rights against him in the ordinary courts of the country. But the extraordinary tribunals, proceeding by force of the act of 1851, cannot order a second patent to issue for a portion of Sutter's grant. Such judgment could have no effect against the Government; and as between Sutter and the petitioners, would be a nullity, being prohibited by the 15th section of the act of 1851.

It is ordered that the judgment be reversed, and the petition be dismissed.

SINGLETON *vs.* TOUCHARD.

1. Where a plaintiff in ejectment claimed under a Mexican title, confirmed and patented according to the act of 1851, the defendant cannot oppose to it another Mexican title not finally confirmed, but pending in the Supreme Court on appeal by the Attorney General.
2. In such case the plaintiff has a legal title, while the defendant's title (if it be a title) is but inchoate and equitable, and will not avail him in an action at law.

Gustave Touchard, a subject of the French Emperor, brought ejectment in the Circuit Court for the northern district of California, against James Singleton and seventeen others, for a tract of land situate in the county of Santa Clara, California, being a portion of what is known as *Yerba Buena* rancho. All the defendants answered, averring the title of the land claimed by the plaintiff to be in the public authorities of the city of San José, and all, except two of them, admitted that they were

in possession of certain portions of the land for which they severally took defence under conveyances or licenses from either the Mayor and Council, or the commissioners of the funded debt, of San José city. The other two defendants did not aver any conveyance to them from the city officers. They asserted the title to be in the city, but denied that they themselves were in possession.

On the trial the plaintiff produced a patent from the United States to Antonio Chaboya, reciting his claim under a grant from the Mexican Government, and the final confirmation of it pursuant to the act of Congress of March 3, 1851. It was admitted that this patent covered the land in suit. The plaintiff showed the conveyances through which Chaboya's title was transmitted to himself, and proved the possession of the two defendants by whom that fact was denied in their answers.

On the part of the defendants, evidence was given to show that the Mayor and Common Council of the city of San José had petitioned the Board of Land Commissioners for confirmation of their claim to the commons, or pasture lands, of the pueblo of San José. It appeared, that this claim had been confirmed by the commissioners for four leagues, being one league in each direction from the centre of the plaza, and for the remainder of the land the claim was rejected. On appeal to the District Court the title of the city to all the land it claimed was confirmed. The Attorney General took an appeal to the Supreme Court. It was proved, that the boundaries assigned to the pueblo lands by the decree of the District Court included all the lands in dispute between the present parties. After this, the defendants proceeded to show the documentary and other evidence, upon which the pueblo of San José claimed its title from the Mexican nation.

The judge of the Circuit Court instructed the jury that the patent conferred a legal title upon Chaboya and his alienee, the plaintiff. As to the defendants' title, it could not (he said) be set up against the patent, even though the evidence were such as to prove the Mexican grant to the pueblo a good one, and entitled to confirmation, under the act of Congress. The confirmation of the city's claim by the Land Commission and

the District Court, with an appeal to the Supreme Court still pending, and without a survey or patent, might be good in equity, but could not be made available to the party in this action.

The jury accordingly found a verdict for the plaintiff, upon which the court gave judgment, and the defendants sued out this writ of error.

No counsel appeared for plaintiffs in error.

Mr. Stanton and *Mr. McCrea*, (with whom was *Mr. Wilkins* and *Mr. Hepburn*,) for defendants in error, argued that the Mexican title set up by the plaintiffs in error was unsound in itself; and even if it were good, it could not be used to resist the perfect legal title of the defendant in error. The confirmation by the District Court amounts to nothing, for it may be reversed. And even if it were a final decree, without a survey or patent, it would be useless in a court of law. *Waterman* vs. *Smith*, (13 Cal. Rep., 418;) *Waterman* vs. *Samuels*, (15 Cal. Rep., 123;) *Mezes* vs. *Greer*, (24 How., 268.)

Mr. Justice GRIER. There were two several instructions given by the court below to the jury. If either of them be correct, the verdict rendered for the plaintiff below was correct, and the judgment of the court thereon must be affirmed.

The plaintiff in ejectment claimed under a patent from the United States; the defendants under a claim confirmed by the District Court, on which an appeal had been entered by the Attorney General. This claim had not been surveyed; its boundaries were not officially ascertained, nor had any patent been issued for it.

The court instructed the jury, "that in the action of ejectment the legal title must prevail; that the plaintiff had a legal title by his patent, and the defendant's, if any, was but an inchoate and equitable title, which might avail in a court of chancery, but it could not avail the defendant in action of ejectment."

This instruction was in exact accordance with numerous de-

cisions of this court, (see *Mezes* vs. *Greer*, 24 How., 268,) and justified the verdict, even if there had been error in the other instructions given.

There is another and important question in the case. It relates to the nature of the title of a pueblo to its common or pasture lands, and whether, under the laws and customs of Spain and Mexico, the government of the colony could make valid sales within the boundaries of the common so claimed?

This question is now for the first time presented to this court. The defendants in error have filed their brief, containing an elaborate argument; but the plaintiffs in error have not furnished us any. As it is not necessary, to our judgment of affirmance of this case, to give any opinion on this point, we decline any examination of the question on an *ex parte* argument.

We may give, as an additional reason for this course, that the question depends on the local law, and on the history and custom of the Mexican government and the Governors of California. And since the appeal in this case, it seems to have been adjudged by the local tribunals. (See *Hart* vs. *Burnett*, 15 Cal. Rep., 544; and *Brown* vs. *San Francisco*, 16 Cal. Rep., 452.)

This decision of a question of local law by these domestic tribunals may well have been considered by the plaintiffs in error as a sufficient reason for abandoning his case without argument here.

Judgment of the District Court affirmed.

CLAGETT *vs.* KILBOURNE.

1. A joint stock company formed for the purpose of buying and selling lands is a partnership.
2. The separate creditor of a member of an association dealing in lands has the same rights, and no others, against his debtor's share in the lands of the association, that the separate creditors have against the partnership goods of an ordinary mercantile firm.
3. The creditor may levy his execution on his debtor's share of the joint property, but he sells only the debtor's interest in it, after payment of all the partnership debts.
4. The purchaser under the execution takes the estate which the judgment debtor would have been entitled to after a final settlement of the partnership accounts.
5. The purchaser of one partner's share or interest in the lands of an association cannot maintain ejectment for it; his remedy is in equity, where he may call for an account, and thus entitle himself to all that the judgment debtor could have claimed after payment of the partnership liabilities.

Writ of error to the District Court of the United States for the district of Iowa.

The case is fully stated in the opinion of the court.

Mr. Dixon, of Iowa, for plaintiff in error.

Mr. Mason, of Iowa, and *Mr. Gillet*, of Washington city, for defendants in error.

Mr. Justice NELSON. This suit is an ejectment by Clagett to recover from the defendant an undivided one-sixth of certain parcels of land situate in the county of Lee, and State of Iowa. The plaintiff claims under a sheriff's deed of the property on a sale under a judgment and execution against one Isaac Galland. The principal question in the case turns upon the effect of this sale and conveyance to pass the title to the purchaser.

An association or joint-stock company was formed in 1836 by several persons, in which Isaac Galland, the judgment

debtor, was a member, for the purpose of dealing in the purchase and sale of lands in the State of Iowa, then the Territory of Wisconsin, lying between the Mississippi and Des Moines rivers, known as the Half-breed tract.

By the articles of association, the lands purchased were to be conveyed to certain trustees named, to hold as joint tenants in trust, for the benefit of the persons composing the association. The stock or capital was divided into forty-eight shares, and held in unequal parts by the stockholders representing the moneys paid into the association. Isaac Galland was the owner of 8-48 or one-sixth of the whole.

The articles stipulated that the trustees should purchase the lands situate as above stated, cause them to be surveyed, lay out sites for towns, villages, and cities, as they might deem eligible, and cause the property to be examined in respect to water power and hydraulic privileges, and lay out the same with reference thereto. The trustees were also authorized to sell and convey any part of the lands purchased, and take such securities for the purchase money as they might deem fit, make contracts, and do all lawful acts necessary and proper to carry into effect the objects of the association.

It is then stipulated that the purchase money, and the costs of the improvements, taxes, assessments, &c., were to be charged on the property, and paid out of the first proceeds of the sales; and that the proceeds, after paying all expenses, charges, improvements, disbursements, &c., should be applied to the repayment of the purchase money until the whole amount be paid.

They were to keep regular books of account, in which all the purchases, sales, and proceedings, in respect to the property, should be kept, and semi-annual accounts were to be rendered to the associates; and that, when the trustees should have realized money enough from the sales, and other disposition of the property, to satisfy all the purchase money, improvements, interest, taxes, assessments, &c., their power to sell said property should cease, and a division of the lands and moneys belonging to the association, if any, made among the stockholders.

The lands were to be divided into two classes: the first to include sites of towns, villages, and cities, and hydraulic privileges; the second should embrace the residue of the property, and each class to be divided into forty-eight shares, the original number of shares of the association.

It appears from the bill of exceptions that, in 1841, partition was made of the half-breed tract among the proprietors, and that the trustees of this association drew shares in the tract, among others, numbered 43, 56, 84, and 93.

The judgment against Isaac Galland was recovered in 1843, and the sale took place in 1851. The sheriff's deed is dated in 1852. The lots of which 8-48 parts or one-sixth were sold, and to recover the possession of which this suit is brought, were included in the shares above mentioned, and represent the interest of Galland, as claimed, in the several lots. It was admitted that the defendant was in possession of these lots, and that he claimed titles under deeds from the trustees of the association.

The evidence being closed, the counsel for the defendant took objection to the admissibility of the judgment and sale, on the ground that Marsh, Lee, and Delevan, the trustees, were the sole owners of the land under the partition and decree; and that Isaac Galland had no legal title to the same, upon which the judgment could operate as a lien, or be sold on execution, and the court excluded the judgment, execution, and sale.

The joint-stock company, of which the judgment debtor in this case was a member, constituted a partnership for the purpose of dealing in real estate; and the law governing the rights of creditors, representing the separate debts of a partner, must determine the rights of the plaintiff. The judgment was for the individual debt of Galland, and is sought to be enforced against the partnership funds.

The proceedings for this purpose assume that the share of the judgment debtor in the association is an interest in the lands; and though legal title be in the trustees, is liable to be seized on the execution and sold, and the purchaser put in possession.

The settled law is otherwise. We do not deny but that the execution may be levied on the joint property, with the view of reaching the undivided interest of the judgment debtors; but in such case the levy is not upon his individual share, as if there were no debts of the partnership, or lien on the same, for the balance due to the other partners. It is upon the interest only of the judgment debtor, if any, in the property, after the payment of all the partnership debts, and other charges thereon. The purchaser takes the same interest in the property which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided, but an unascertained interest, and the purchaser is substituted to the rights and interests of the judgment debtor in the property sold. Neither does the sale transfer any part of the joint property to the purchaser, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner (judgment debtor) himself.

The remedy of the purchaser is, to go into equity and call for an account, and thus entitle himself to the interest of the judgment debtor, if any, after the settlement of the partnership liabilities.

The fact that the property in this case consists of real estate, does not change the principles of law governing the ultimate rights and interests concerned. The real property belonging to the partnership is treated in equity as part of the partnership fund, and is disposed of and distributed the same as the personal assets.

In this case the legal title is in the trustees, who are bound to account to the stockholders the *cestuis que trusts*, according to their respective shares, after all debts of the association have been discharged. The equity of the judgment creditor is the interest in the land, after a sufficient portion of it has been disposed of for this purpose.

It is quite clear the plaintiff has mistaken his remedy, as he obtained no title, legal or equitable, to the particular lots in question.

It is proper to add, even if an equitable title had been ac-

quired, it would not have helped him, as it will not sustain an ejectment in the Federal courts. (23 How., 235, 249; 21 ib., 481.)

There are other questions discussed by the learned counsel for the respective parties; but as the examination of them is not material to the decision of the case, we forbear noticing them.

Judgment affirmed.

FARNEY *vs.* TOWLE.

1. In a case where an alleged violation of the Constitution of the United States is the ground of error, the Supreme Court has no jurisdiction, unless the point presented by the assignment and joinder was raised and decided in the State court to which the writ is directed.
2. It must appear that the point was raised in the State court; that the party called attention to the particular clause in the Federal Constitution relied upon, and to the right claimed under it, and that the question thus distinctly presented was ruled against him; and if these things do not appear, the judgment of the State court cannot be reviewed here.

Error to the Superior Court of the city of New York.

Inasmuch as this case was dismissed for want of jurisdiction, it is unnecessary to state the arguments of counsel upon points not alluded to in the opinion of the court. That opinion contains all that is necessary to a full understanding of the question decided.

Mr. Field, of New York, for plaintiff in error.

Mr. Ellingwood, of New York, for defendant in error.

Mr. Chief Justice TANEY. This is a writ of error to the Superior Court of the city of New York, and the error assigned is that the court maintained the validity of a statute of that State by which new trustees had been substituted in place of

those appointed by a testator, and authorized to carry into execution the trusts created by the last will of the deceased. And the plaintiff in error alleges that this law was a violation of that article of the Constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts."

But no such point appears to have been raised in the State court, and this article in the Constitution does not appear to have been even referred to or noticed in any part of the proceedings. The answer of the plaintiff in error, it is true, charges in general terms that the law was unconstitutional and void; but from the context it would seem that this charge was applied to the constitution of the State rather than to that of the United States; and even if it could be construed as applying to the latter, it has repeatedly been declared by this court, as will appear by the reports of its decisions, that in order to give it jurisdiction, it must appear that the point was raised and decided in the State court; that the attention of the court was called to the particular clause of the Constitution of the United States upon which the party relied, and to the right he claimed under it; and that, with the question thus distinctly presented, the decision was against him.

This writ of error must, therefore, be dismissed for want of jurisdiction.

CREWS ET AL. *vs.* BURCHAM ET AL.

1. Where a treaty with an Indian tribe reserves a certain quantity of land, to be afterwards selected by the President, and patented to an individual of the tribe, such reservation creates an equitable estate in the reservee to the land reserved, which he may sell, and upon the selection and patenting of the land, the title will vest in his grantee.
2. This is held to be the rule in a case where the reservee conveyed his interest under the treaty, and died before the issuing of the patent.
3. In a contest between the grantee of the reservee himself under a conveyance before the patent, and the grantee of his heir under a deed made after the land was selected and patented, the title of the former party must prevail.
4. It is no objection to the right of the first grantee that the land finally patented did not lie within the district ceded by the treaty which made the reservation, because the recitals in the patent are conclusive; and, at any rate, third parties have no right to impugn the patent for such a reason.
5. Where land has been laid out in town lots, or otherwise divided among many occupants, who are threatened with numerous suits, a bill in equity will lie to quiet the title, although the complainants have a legal title, and therefore an adequate remedy in a court of law in each several case.
6. It cannot be said of a party that he is an innocent purchaser, without notice, if, before he purchased, the adverse title was duly recorded, and persons claiming under that title were in actual possession.

Appeal from the Circuit Court of the United States for the northern district of Illinois.

By the treaty of 1832, the Pottawatomie Indians ceded to the United States all their lands in Illinois, Indiana, and Michigan, south of the Grand river; and by the same treaty the United States agreed to grant certain quantities of land to certain members of the tribe—among others, to Francis Besion a half section, to be selected for him by the President after survey. The half section was surveyed, selected, and a patent for it was duly issued in the name of Besion, in 1845. Besion

died in 1843. Previous to his death, (and of course before the patent,) he conveyed his interest in the half section of land, to which he was entitled under the treaty, to William Armstrong, with covenants of warranty and further assurance. After Besion's death, and after the patent issued, his sister and sole heir conveyed the half section to Crews and Sherman. The plaintiffs below claim under the deed from Besion to Armstrong, and the defendants hold the title which was conveyed by Besion's heir after his death. The latter parties commenced actions at law against persons claiming through the former, and this bill was brought to quiet the title.

The main question was, whether Besion before the date of the patent had, by virtue of the treaty, such a title as he could convey by deed, or whether the deed to Armstrong was void for want of an assignable interest in the grantor. The defendants insisted that the deed to Armstrong passed no title; that, in fact, no title to this particular land existed out of the United States until the patent; that the patent vested the title in Besion's heirs, and that the deed from Besion's sister gave the whole estate to her grantees.

The Circuit Court held that the grantee of Besion, in his lifetime, took under his deed all the estate which Besion had in the half section; that the patent, when it issued, inured to the use of Armstrong and the parties claiming under him; and that, consequently, the sister and heir of Besion had no estate which could pass to Crews and Sherman by her deed to them.

The incidental points, which were taken on the hearing, are sufficiently stated in the opinion of Mr. Justice *Nelson*.

The Circuit Court enjoined the defendants against prosecuting the action already commenced, against bringing any fresh actions, and against every other interference with the plaintiffs' rights. And thereupon the defendants appealed to this court.

Mr. Arrington, of Illinois, and *Mr. Baxter*, of Virginia, for appellants. The treaty did not *proprio vigore* give to Besion a title, legal or equitable, in this particular land, and the deed to Arm

strong carried nothing, either by estoppel, by relation, or by virtue of the act of Congress. *Jackson* vs. *Woodruff*, (1 Cow., 286;) *Livingston* vs. *Peru Iron Co.*, (9 Wend., 520;) *Blake* vs. *Doherty*, (5 Wheat., 362;) *United States* vs. *King*, (3 How., 786, 787;) *Bullock's Case*, (10 Eliz., Dyer, 281, cited 2 Co. Rep., 36;) *Hayward's Case*, (2 Co. Rep., 36;) *Stukeley* vs. *Butler*, (Hobart, 174;) Bacon's Abridg. Grant, H., 3; Sheppard's Touchstone, 251; *Haven* vs. *Cram*, (1 N. Hamp., 93;) *Canning* vs. *Pinkham*, (id., 356;) *Vandenburgh* vs. *Van Bergen*, (13 Johns, 217;) *Jackson* vs. *Van Buren*, (id., 525.)

The case of *Doe* vs. *Wilson* (23 How., 457) is not against the appellants. Grantees under a treaty are not tenants in common with the United States; and if they were, they could not convey particular portions of the common property to other parties. Litt., sec. 292; Comyn. Dig. Estates, K. 8; *Fisher* vs. *Wigg*, (1 Ld. Raym., 329;) *Fleming* vs. *Kerr*, (10 Watts, 444;) *Ross* vs. *McJunkin*, (14 Serg. & R., 364;) 1 Story's Equ., sec. 634; 4 Kent, 368; *Duncan* vs. *Sylvester*, (24 Maine, 482;) *Peabody* vs. *Minot*, (24 Pickering, 329;) *Fletcher* vs. *Peck*, (6 Cranch, 142;) *Johnson* vs. *McIntosh*, (8 Wheaton, 543.)

The appellants are protected by their character of *bona fide* purchasers. The record was no notice to them, because it was made before the patent; and the deeds, as recorded, contained no definite description of any land. *Monroe* vs. *McCormick*, (6 Ire. Equ., 85;) *Farmers' Loan & Trust Co.* vs. *Maltby*, (8 Paige, 361;) *State of Conn.* vs. *Bradish*, (14 Mass., 302;) *Moore* vs. *Hunter*, (1 Gilman, 331.)

Mr. Carlisle, of Washington, and *Mr. Niles*, of Illinois, for the appellee. The provisions of the treaty amounted to a solemn grant to Besion, and to his heirs and assigns, of a half section of land. Such grants have been recognised as assignable in numerous cases. *French* vs. *Spencer*, (1 How., 228;) *Landes* vs. *Brant*, (10 How., 348;) *Stoddard* vs. *Chambers*, (2 Pet., 316.) The act of Congress passed May 20, 1836, (5 U. S. Stat., 31,) declares that where a patent has been issued to a person dead before the date of the patent, the title shall be vested in the heirs, devisees, *or assigns* of the patentee, and this act has re-

ceived a judicial construction entirely favorable to the view of the appellees.

The title under the patent relates back to the treaty. On this point it is not necessary to go behind the case of *Doe* vs. *Wilson*, (23 How., 457.) That case and this are precisely parallel.

The appellants are not *bona fide* purchasers without notice. The deeds under which the appellees claim were recorded: that fact and the possession of the land are conclusive upon the point of notice.

Mr. Justice NELSON. This bill was filed by the appellees, the complainants below, against the defendants, to enjoin a suit at law to recover a part of fractional section 24, in township 31, Illinois. By a treaty with the Pottawatomie tribe of Indians of October 27, 1832, the nation ceded to the United States all their lands in Illinois and other States, subject to certain reservations, for which patents were to be issued. Provision was made in the treaty, that the reservations should be selected under the direction of the President of the United States, after the land was surveyed, and the boundaries should correspond with the public survey. Francis Besion, a member of the tribe, was a reservee of one half section of land under this treaty. As we have said, the treaty bears date 27th October, 1832. On the fourth of February following, Besion conveyed, for a valuable consideration, all his right and interest in the half section to William Armstrong, under whom the complainants below derive their title. The selection of the half section was made by the President, in pursuance of the treaty, and a patent was issued on the 17th February, 1845, for the same, to Besion and his heirs, with an habendum clause, "to have and to hold the said tract, with the appurtenances, unto the said Francis Besion, his heirs and assigns." Besion died in 1843, before the issuing of the patent. The defendants set up a title to the tract under conveyances from the heirs of the reservee, claiming that the deed from him to Armstrong carried with it no right or title to the half section, which was subsequently

selected and patented. The decree of the court below was in favor of the complainants, enjoining the suit at law, and restraining the institution of others for the purpose of quieting the title.

The main and controlling questions involved in this case were before this court in the case of *Doe et al.* vs. *Wilson*, reported in 23 How., 457, which arose under a reservation in this treaty in behalf of the chief, Pet-chi-co.

It was there held, that the reservation created an equitable interest to the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee.

It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the Government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the Government. The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect; and the only objection of any plausibility is the technical one as to the vesting of the legal title.

The act of Congress, May 20, 1836, (5 U. S. St., 31,) provides, "that in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land

designated therein shall inure to, and become vested in, the heirs, devisees, or *assigns* of such deceased patentee, *as if the patent had issued to the deceased person during life.*"

We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the treaty, and that it was to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same with a full covenant of warranty. The land is sufficiently identified to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this act of Congress. The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime.

The warranty estops the grantee, and all persons in privity with him, from denying that he was seized. The estoppel works upon the estate, and binds the after-acquired title as between parties and privies. (11 How., 325; 21 ib., 228.)

Some expressions in the opinion delivered in the case of *Doe* vs. *Wilson*, the first case that came before us arising out of this treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession, and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the Government, and had no relation to the legal title.

An objection was taken, that a portion of the half section embraced in the patent to Besion did not lie within the district of country ceded by the treaty. The same objection was taken in the case of *Doe* vs. *Wilson*, and the answer given was, the recitals in the patent, that the sections were those selected by the President, and to which the reservee was entitled under the treaty, were conclusive on the point; and we may add, that

certainly no third party has any right to complain, if the fact were as alleged.

An objection was also taken, that if the complainants held the legal title to the premises in question, their remedy was at law, and not in equity. But the answer is, that the bill was filed by the complainants, among other things, to relieve their title from the embarrassment of the adverse claims set up under the deeds from the heirs of Besion, and also to restrain a multiplicity of suits. It appears that a portion of the land has been laid out in town lots, which are held under the complainants' title.

A further objection was taken, that the defendants are *bona fide* purchasers for a valuable consideration. But the answer is, that the deed from Besion to Armstrong, which referred specially to this reserved right to the half section, was duly recorded before the purchase of the defendants; and, besides, those deriving title under this deed to Armstrong were in possession of the tract, claiming title to the whole at the time, which operated as notice to the subsequent purchasers.

The decree of the court below affirmed.

Rice *vs.* Railroad Company.

1. If Congress pass an act granting public lands to a Territory to aid in making a railroad, and if, by the true construction of the act, the Territory acquired any beneficial interest in the lands as contradistinguished from a mere naked trust or power to dispose of them for certain specified uses and purposes, the act is irrepealable, and a subsequent act attempting to repeal it is void.
2. If the Legislative Assembly of the Territory, in an act incorporating a company to make the railroad which Congress intended to aid by the grant, conferred upon the company any right, title, or interest in the lands granted by Congress, it is not competent for Congress afterwards to repeal the grant and divest the title of the company.
3. Where it appears that the Territorial act of incorporation was passed *before* the grant was made by Congress, and that *after* that grant the act of incorporation was re-enacted with certain modifications,

the re-enactment gives to the railroad corporation such title as the Territory was capable at that time of conferring.

4. But if the grant was revoked, or the act making it repealed, before the re-enactment of the charter, the title of the company must depend on the validity of the repealing act.

5. The original act of incorporation, passed by the Territorial Legislature, being before the grant by Congress to the Territory, did not operate as a valid grant to the company so as to vest in it a title to the lands, when subsequently granted.

6. Legislative grants are not warranties, and the rule of the common law must be applied to them, that no estate passes to the grantee except what was in the grantor at the time.

7. While the Federal courts have no common law jurisdiction, not conferred by statute, and their rules of decision are derived from the laws of the States, still, in construing acts of Congress, the rules of interpretation furnished by the common law are the true guides, and have been uniformly followed.

8. In ascertaining the meaning or effect of a State statute, the rules of construction are borrowed from the common law, except in cases where the courts of the State have otherwise determined.

9. An act of Congress granting land to a Territory, to be held for the purpose of making, or aiding to make, a public improvement of general interest, and restricting the use to that one purpose, does not pass to the Territory a beneficial interest *in presenti.*

10. If the grant be coupled with a provision that the lands shall be subject to the disposal of the Territorial Legislature, for the public purpose specified *and no other,* and shall not inure to the benefit of any company *heretofore constituted and organized,* it is clear that *future* legislation of the Territory alone could dispose of the lands, even for the purpose declared.

11. Where the act of Congress making the grant declares that no title shall vest in the Territory, nor no patent issue for any part of the lands until twenty miles of the railroad be finished, these words cannot be rejected or disregarded, or shorn of their ordinary signification, unless they be so clearly repugnant to the rest of the act that the whole cannot stand together.

12. Such words are not necessarily repugnant to, or inconsistent with, the word *grant* used in the same and in previous sections of the act.

13. The word *grant* is not a technical word, like *enfeoff,* and although, if

used broadly and without limitation, it will carry an estate in the thing granted, yet, if used in a restricted sense, the grantee will take but a naked trust for the benefit of the grantor.

14. Words which, standing alone in an act of Congress, may properly be understood to pass a beneficial interest in land, will not be regarded as having that effect, if the context shows that they were not intended to be so used.

15. Legislative grants must be interpreted, if practicable, so as to effect the intention of the grantor; but if the words are ambiguous, the true rule is to construe them most strongly against the grantee.

16. Wherever privileges are granted to a corporation, and the grant comes under revision in the courts, it is to be construed strictly against the corporation and in favor of the public, and nothing passes except what is given in clear and explicit terms.

Error to the District Court of the United States for the district of Minnesota.

Edmund Rice brought trespass in the county court of Dakota, Territory of Minnesota, against the Minnesota & Northwestern Railroad Company, for cutting timber on section 15 of township 114 north, of range 19 west. The defendants answered that the title to the section of land described in the plaintiff's complaint was in them, and set forth their title as follows:

The defendants were incorporated on the 4th of March, 1854, by the Legislative Assembly of Minnesota Territory, for the purpose of making a railroad from the northwest shore of Lake Superior to some point to be selected on the northern line of Iowa in the direction of Dubuque. This act of incorporation provided, among other things, that, "for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted that any lands that may be granted to the said Territory to aid in the construction of the said railroad shall be, and the same are hereby, *granted in fee simple, absolute, without any further act or deed;* and the Governor of this Territory or future State of Minnesota is hereby authorized and directed, in the name and in behalf of said Territory or State, after the said grant of land shall have been made by the United States to said Territory, to execute and deliver to said

company such further deed or assurance of the transfer of the said property as said company may require, to vest in them a perfect title to the same: provided, however, that such lands shall be taken upon such terms and conditions as may be prescribed by the act of Congress granting the same." The books of subscription were opened at St. Paul and New York. Stock was subscribed to a large amount; the requisite proportion of it was paid in, and the company was organized agreeably to the terms of the charter. On the 29th of June, 1854, an act was passed by Congress granting to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad along the route mentioned in the charter, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road within the Territory. The act of Congress making the grant was as follows:

"1. *Be it enacted, &c.*, That there is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from the southern line of said Territory, commencing at a point between township ranges 9 and 17, thence by the way of St. Paul, by the most practicable route, to the eastern line of said Territory, in the direction of Lake Superior, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road within said Territory; but in case it shall appear that the United States have, when the line of said road is definitely fixed by the authority aforesaid, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said Territory, subject to the approval of the Secretary of the Interior, to select from the lands of the United States, nearest to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, which land (thus selected in lieu of those sold, and to which pre-emption has attached as aforesaid, together with the sections or parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Ter-

ritory of Minnesota for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the road in each case, and selected for and on account of said road: *Provided, further*, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever: *And provided, further*, That any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroad through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"SECTION 2. *And be it further enacted*, That the sections and parts of sections of land which by such grants shall remain to the United States, within six miles on each side of said road, shall not be sold for less than double the minimum price.

"SECTION 3. *And be it further enacted*, That the said lands hereby granted to the said Territory shall be subject to the disposal of any Legislature thereof for the purpose aforesaid, and no other; nor shall they inure to the benefit of any company heretofore constituted and organized; and the said railroad shall be and remain a public highway for the use of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; nor shall any of the said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

"SECTION 4. *And be it further enacted*, That the lands hereby granted to said Territory shall be disposed of by said Territory only in the manner following—that is to say: no title shall vest in the said Territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, until a continuous line of twenty miles of said road shall be com-

pleted through the lands hereby granted; and when the Secretary of the Interior shall be satisfied that any twenty miles of said road are completed, then a patent shall issue for a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of said road, until it shall be completed; and if said road is not completed within ten years, no further sale shall be made, and the land unsold shall revert to the United States.

"SECTION 5. *And be it further enacted*, That the United States mail shall be transported at all times on said railroad, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same."

It was before the passage of this act that the books of subscription were opened, namely, on the 1st of May, 1854. On the 20th of the same month subscriptions were made upon the books at St. Paul. On the 30th of June, 1854, the day after the act of Congress making the grant was approved by the President, one million of dollars were subscribed to the stock on the books opened at New York, and ten per cent. thereupon duly paid to the commissioners. Directors were then elected and the company completely organized. Afterwards, on the 16th of February, 1855, the Territorial Legislature made some modifications and additions to the charter and re-enacted it. The defendants further averred, that on the 20th of October, 1855, they caused a survey to be made of their route for the railroad and located it agreeably to the act of incorporation and the act of Congress; that the route as located runs through the land claimed by the plaintiff and described in his complaint; that it was not until after this location, to wit, on the 1st of January, 1856, that the plaintiff purchased the land from the United States, and that the trespass complained of consisted in going on that part of the land where the track of the railroad was lawfully located and cutting such timber as was necessary to be removed for the purpose of constructing the work.

To this answer of the defendants the plaintiff replied, that

after the officers and directors of the company were chosen by the stockholders, and entered upon the discharge of their duties, and before the trespasses complained of were committed, to wit, on the 24th day of August, 1854, Congress passed the following act repealing that by which the grant was made on the preceding 29th of June:

"*Be it enacted*, That the bill entitled 'An act to aid the Territory of Minnesota in the construction of a railroad therein,' which passed the House of Representatives on the twentieth day of June, eighteen hundred and fifty-four, and which was approved by the President of the United States on the twenty-ninth day of June, eighteen hundred and fifty-four, be, and the same is hereby repealed."

The defendants demurred to the replication, and for cause of demurrer set forth that the repealing act of 24th August, 1854, was void and of non effect.

The court of original jurisdiction gave judgment on the demurrer in favor of the plaintiff. The defendants appealed to the Supreme Court of the Territory, where the judgment was reversed, but judgment was not entered for the defendants. By the law admitting Minnesota into the Union as a State the records of the Supreme Court of the Territory were transferred to the District Court of the United States. There an application was made to amend the record by entering a proper judgment, which was done, and this writ of error sued out by the defendants from the Supreme Court of the United States was directed to the judge of the District Court.

Mr. Noyes, of New York, and *Mr. Barbour*, of Iowa, for the plaintiffs in error. The act of Congress of June 29, 1854, was *per se* a grant *in presenti* to the Territory of Minnesota of all the lands designated by odd numbers within six miles of the contemplated railroad. It also granted an easement or right of way over all the other public lands upon the route of the railroad. *Sessieur* vs. *Price*, (12 Howard, 59.) By the terms of the act "the land is *hereby granted* to the Territory of Minnesota," and this phrase is repeated several times. The lands are to be "*held* by the Territory," and in a specified event

they shall *revert* to the United States. Reversion signifies the *returning* of the land after a particular estate is ended. Jacobs' Law Dict., Tit. *Reversion.*

It is true the 4th section provides, that "the lands *hereby granted* to said Territory shall be *disposed of* only in manner following—that is to say, *no title shall vest* in the said Territory of Minnesota, nor shall any patent issue," until certain conditions are performed. But this does not annul the grant of a present interest; it merely qualifies the power of disposal.

A grant by Congress is higher evidence of title than a patent. *Grignon* vs. *Astor*, (2 How., 319.) It is equivalent to a conveyance with livery of seisin. *Enfield* vs. *Way*, (11 New. Hamp. Rep., 520;) *Enfield* vs. *Permit*, (5 N. H. Rep , 280;) *Wilcox* vs. *Jackson*, (13 Peters, 498.) All the words of this act are harmonized by construing it as vesting a present interest upon a condition subsequent. Such was the intention of Congress, and the intention overrules all technicalities. *Rutherford* vs. *Green*, (2 Wheaton, 198.)

But if the construction were doubtful, the grantee would be entitled to the benefit of the doubt. The rule is not so in the interpretation of the King's naked grants from pure favor; yet where a consideration is reserved, the rule prevails that a public grant must be construed most favorably to the grantee. Chit. on Prerogative, Chap. 16, sec. 5; Lord Raymond, 32 Bac. Abr. Prerog., F. 2; 17 Viner, 152; 6 Inst., 446; *Mollyn's Case*, (6 Coke's Rep., 5;) *Whistler's Case*, (10 Coke's Rep., 65.) Where a particular certainty precedes, it shall not be destroyed by an uncertainty coming after. Bac. Abr., Tit. Prerog. Here the grant is absolute and certain, with nothing to render it uncertain but the subsequent provision for the manner of disposal.

The act of Congress certainly granted a right of way over the public lands, along the line of the railroad; otherwise the manifest intent of the act would be wholly defeated. It is not to be presumed that Congress meant to make a void grant. *Charles River Bridge Case*, (11 Pet., 592;) *Whistler's Case*, (10 Coke, 65;) *Gayety* vs. *Bethune*, (14 Mass. R., 56;) Com. Dig. Grant, E. 11; ib. G., 12; Co. Litt., 56 *a*; Bac. Abr. Prerog.,

F. 2, 602; 17 Vin., 153, Title Prerog.; O. C. Pl., 1; id. Pl., 4; id. Pl., 13; *Lord Chandos' Case*, (6 Co. R., 55;) *Atkyn's Case*, (1 Vent., 399, 409;) *Moleyn's Case*, (6 Coke R., 6;) Finch's Law, 100; *Saunders's Case*, (5 Co. R., 12;) Plowden, 317; *Darcy* vs. *Askwith*, (Hobart's R., 234;) *Lyford's Case*, (11 Coke R., 52;) Bac. Abr., Incidents; Pl. 8, and Nusans Pl., 14; *Allen's Case*, (Owen, 113;) 10 Co. R., 67, 6; Chitty Prerog., Ch. 16, § 5; Lord Raym., 32.

These rules apply with the greater force, because this grant was founded upon a valuable consideration—carrying the mails at the price fixed by Congress, and troops without any charge. "When the King's grants are upon a valuable consideration, they shall be construed favorably to the patentee, for the honor of the King." Bac. Abr. Prerog., Construction of Grants, 5.

Congress had power to make this grant; and the Territory had power to take it. Grants of lands have been made to every Territory from the beginning of the Government, and their validity never questioned. Seventy-two sections were long ago granted to the Territory of Minnesota to establish a university. Can any one doubt the perfect title of the Territory under that grant?

The act of the Territorial Legislature of March 4, 1854, was a valid grant to the defendants of the lands to be granted by Congress. The Legislative Assembly had jurisdiction and authority to make the grant, and to covenant with the defendants that they should have a vested interest when such interest was acquired by the Territory from the United States; and such a covenant the Territory did make with the railroad company. No authority from Congress was necessary, beyond what was vested in the Territorial government by the organic act.

The railroad company fully complied with all the conditions of its charter, but was not yet organized on the 29th of June, 1854. But it was then in a condition to accept the charter. After the passage of the granting act, a million of dollars were subscribed, the officers were elected, and the charter accepted The company, therefore, became seized of the lands.

The repealing act is void. A grant of land or of a franchise once made by a legislative body cannot be rescinded by the granting power. Charles River Bridge Case; Chitty on Prerog., 132; 3 Kent, 458; *Fletcher* vs. *Peck*, (6 Cr., 87;) *King* vs. *Amery*, (2 T. R., 515.) This is true where the grant is a naked one, and *a fortiori* where it is founded upon a consideration. Here the considerations are—1. The right of the United States to transport troops free of charge. 2. The right to have mails carried at the price fixed by Congress or the Post Office Department. 3. The enhanced value of the even sections, the minimum price thereof being doubled by the act itself. 4. The obligation of the company to build the road, for this obligation may be enforced. *Lyme Regis* vs. *Henley*, (5 B. & Adol., 77; S. C., 5 Bing., 91;) *Reg* vs. *B. & P. Railway Co.*, (9 Car. R., 478; S. C., 6 Jurist, 804;) *Charles River Bridge Case*, (7 Pick., 446, 447, 448;) *Rex* vs. *Hastings*, (1 D. & R., 148; S. C., 5 B. & A., 692, *n*;) *Cohen* vs. *Wilkinson*, (12 Beav., 125; S. C., 13 Jurist, 621.)

If the repealing act be an attempt to take the property for public use, it is void, because it makes no provision for compensation to the owners. *Piscat. Bridge Case*, (7 N. H. Rep., 35;) *Charles River Bridge Case*, (7 Pick., 507;) *Gardner* vs. *Newburgh*, (2 John. Ch. R., 168;) *Perry* vs. *Wilson*, (7 Mass. R., 395;) *Stevens* vs. *Mid. Canal Co.*, (12 id., 468;) *Callendar* vs. *Marsh*, (1 Pick. R., 430;) *Van Horne's Lessee* vs. *Dorrance*, (3 Dall., 304;) *Livingston* vs. *Mayor of N. Y.*, (8 Wend., 85.) If it was the intention simply to divest the owner of his estate, then it is in direct conflict with that provision in the Constitution which declares that no man shall be deprived of his property except by due course of law—that is, by a judical proceeding. *Wilkinson* vs. *Leland*, (2 Peters, 657;) *Taylor* vs. *Porter*, (4 Hill R., 140; 2 Kent's Com., 13;) *Hoke* vs. *Henderson*, (4 Dev. N. C. Rep., 15;) Co. Litt., 2 Inst., 45, 50; *Jones* vs. *Perry*, (10 Yerger, 59.) The repealing act is void also, because it is contrary to the principles of natural justice and equity. *Bonham's Case*, (8 Co., 118;) *Day* vs. *Savage*, (Hobart's R., 87;) *City of London* vs. *Wood*, (12 Mod., 687;) *Bowman* vs. *Middleton*, (1 Bay., 252;) 1 Kent's Com., 451; ib., 448; Smith's Com. on Const., § 158;

Bates vs. *Kimball*, (2 Chip. R., 89;) *Merrill* vs. *Sherburne*, (1 N. H. R., 213;) *Wilkinson* vs. *Leland*, (2 Peters, 627.) For these reasons it is submitted that the right of the defendants was perfect to locate their railroad upon the lands in question, and neither the sale to the plaintiff nor the repealing act of Congress could take that right away.

Mr. Stevens, of Michigan, for defendant in error. The Territory of Minnesota was incapable of taking or holding the lands. A Territory has no sovereign authority like that of an independent community. It is within the jurisdiction of the United States, subject to the power of Congress, and has no power except what is specially given it. The Territory of Minnesota, not having received from Congress the special privilege to hold lands, cannot be a grantee. 1 Pet. R., 511; 3 Story on Const., §§ 1316, 1324.

Besides, this act of Congress declares, expressly, that "no title shall vest nor any patent issue" until, &c. These are plain words, and they are not overcome by the previous use of the word grant. That word does not imply a warranty. 2 Greenl. Crui., 735.

This railroad company acquired no rights under the act of the Territorial Legislature, because that body had no power, by its organic act, to create corporations; and because the Territory, at the time when it made its donation to the company "in fee simple," had nothing to grant. It was void, and no estate passed to the grantee, if the grantor had none at the time. Bac. Abr., 514; 2 Humph., 19; 4 Cow., 427; 4 Mass. R., 688; 4 Cruise Dig., 52. The grant being without covenant or warranty, a consideration cannot give title to an estate subsequently acquired by the Territory.

There was no consideration, though the company formally accepted the charter. The corporation could not be compelled to build the road. Neglect or failure to do so would simply work a forfeiture of its franchises. 2 Bac. Abr.; Redfield on Railways, 452; 18 Eng. L. & E. Rep., 199.

Perhaps it might be objected that this company could not take because the act of Congress declares that the lands shall

not inure to the benefit of any corporation "*heretofore constituted and organized.*" The plaintiff does not make that point. The company was constituted by its charter, but not organized before the 29th of June, 1854.

But there was no title vested here, either in the Territory or in the railroad company, and Congress had a right to repeal the law. Legislatures have the power always to take away by statute what was given by statute, not divesting the private rights vested in individuals or corporations. *Oriental Bank* vs. *Freese*, (6 Shep., 109;) *People* vs. *Livingston*, (6 Wend., 531.) Congress might have repealed the organic act of the Territory itself, and that would have been a resumption of the grant. What Congress could do in that way can surely be done by a direct repeal of the grant itself.

Mr. Justice CLIFFORD. This is a writ of error to the District Court of the United States for the district of Minnesota, bringing up the record of a suit transferred into that court from the Supreme Court of the Territory.

According to the transcript, the suit was commenced by the present plaintiff on the first day of November, 1856, in the District Court for the county of Dakota, before the Territory was admitted as a State. It was an action of trespass; and the complaint contained two counts, each describing a distinct tract of land as the close of the plaintiff. Both tracts, however, as described, comprised a certain part of township number one hundred and fourteen north, of range nineteen west, situate in the county where the suit was brought; and the several acts of trespass complained of were alleged, in each count, to have been committed on the twenty-fifth day of October, prior to the date of the writ.

Service was duly made upon the corporation defendants, and they appeared, and made answer to the suit. Whenever the answer to the suit extended beyond the mere denial of the allegations of the complaint, the law of the Territory required that it should contain "a statement of the new matter constituting the defence or counter claim;" and the defendants

framed their answer, in this case, in conformity to that requirement.

Among other things, they admitted, in the answer, that the plaintiff claimed title to the premises under the United States, by purchase and entry, made on the first day of January, 1856; but averred that they were incorporated by the Territorial Legislature on the fourth day of March, 1854, and set up a prior title in themselves, under the provisions of their charter, and an act of Congress passed on the twenty-ninth day of June, in the same year.

Responding to that claim, the plaintiff replied, that the act of Congress referred to in the answer was repealed on the fourth day of August of the same year in which it was passed.

To that replication the defendants demurred, showing, for cause, that the act of Congress last named was void, and of no effect.

Judgment was entered for the plaintiff in the county court; and thereupon the defendants appealed to the Supreme Court of the Territory, where the judgment of the county court was reversed; but no final judgment in the cause was ever entered in that court.

Pursuant to the act of Congress admitting the Territory as a State, (11 Stat. at Large, 285,) the record of the suit was then transferred to the District Court of the United States created by that act; and the latter court, on the nineteenth day of November, 1858, after supplying an omission in the record of the county court, entered a final judgment in favor of the defendants. Whereupon the plaintiff sued out a writ of error, and removed the case into this court.

Possession of the premises having been in the plaintiff at the time the supposed trespasses were committed, and the several acts of trespass complained of being admitted, the controversy must turn upon the sufficiency of the title set up by the defendants. They were incorporated by the Territorial Legislature on the fourth day of March, 1854, as alleged in the answer. Their charter empowered them, among other things, to survey, locate, and construct a railroad from the line of the

State of Iowa to Lake Superior. Authority was also given to the company, in the charter, to secure, in the manner therein pointed out, a right of way for the contemplated railroad, two hundred feet in width, through the entire length of the described route. For that purpose they might purchase the land of the owner, or might enter and take possession of the same, upon paying proper compensation. And the charter also contained the following provision: All such lands * * * and privileges belonging, or which may hereafter belong, to the Territory or future State of Minnesota, on and within said two hundred feet in width, are hereby granted to said corporation for said purposes, and for no other; and for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted, that any lands that may be granted to the said Territory, to aid in the construction of the said railroad, shall be, and the same are hereby, granted in fee simple, absolute, without any further act or deed. Provision was also made for such further deed or assurance of the transfer of the said property as said company might require, to vest in them a perfect title to the same; and to that end, the Governor of the Territory or future State was authorized and directed, "after the said grant of land shall have been made" to the Territory by the United States, to execute and deliver to said company such further deed or assurance, in the name and in behalf of said Territory or State, but upon such terms and conditions as may be prescribed by the act of Congress granting the same.

These references to the act of incorporation will be sufficient, in this connection, except to say, that the corporators named in the first section held a meeting within the time specified in the act, and voted to accept the charter, and gave notice of such acceptance, as therein required. They also chose a committee, to call future meetings for the organization of the company, and authorized the committee to open books and receive subscriptions for one million dollars of the capital stock. Books of subscription were accordingly opened, under their direction, on the first day of May, 1854, and on the twentieth day of the same month subcriptions were made to the amount

of two hundred dollars, of which an instalment of ten per cent. was duly paid by the subscribers. Congress, on the twenty-ninth day of June, 1854, passed the act entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," which is the act of Congress referred to in the answer of the defendants. (10 Stat. at Large, p. 302.)

Assuming the allegations of the answer to be correct, subscriptions to the capital stock of the company were made on the following day to the amount of one million of dollars, and an instalment of ten per cent. upon each share so subscribed was duly paid to the committee. Having complied with the conditions of the charter in these particulars, the subscribers to the stock, in pursuance of previous notice given by the committee, met in the city of New York, on the first day of July in the same year, and completed the organization of the company, by the election of twelve directors, and such other officers as were necessary under their charter to effect that object.

Reference will now be made to the act of Congress set up in the replication of the plaintiff, in order that the precise state of facts, as they existed on the fourth day of August, 1854, when the repealing act was passed, may clearly appear.

By that act it was in effect provided, that the bill entitled "An act to aid the Territory of Minnesota in the construction of a railroad," passed on the twenty-ninth day of June, 1854, be, and the same is hereby, repealed. (10 Stat. at Large, 575.) Repealed as the act was at the same session in which it was passed, the defendants had not then procured the amendments to their charter set up in the answer, nor had they then commenced to survey, locate, or construct the railroad therein authorized and described. They had completed the organization of the company under their original charter, at the time and in the manner already mentioned; but they had done nothing more which could have the remotest tendency to secure to them any right, title, or interest in the lands described in the complaint. One of the amendments to their charter, set up in the answer, was passed by the Territorial Legislature on the seventeenth day of February, 1855, and the other on the first day of March, 1856—more than a year and a half after the act of Con-

gress in question had been repealed. Survey of the route and location of the railroad were made on the twentieth day of October, 1855; and the defendants admitted that the location included the parcels of land in controversy, and that they went upon the same at the time alleged, and cut down and removed the trees from the track of the railroad, as alleged in the complaint.

Most of the facts here stated are drawn from the answer of the defendants; but, inasmuch as the pleadings resulted in demurrer, and the replication did not controvert the allegations of the answer, it must be assumed that the facts stated in the answer are correct.

Looking at the statement of the case, it is quite obvious that two questions are presented for decision of very considerable importance to the parties; but in our examination of them we shall reverse the order in which they were discussed at the bar. Briefly stated, the questions are as follows:

First. Whether the defendants acquired any right, title, or interest in the lands in controversy, by virtue of the provisions of their charter, as originally granted by the Territorial Legislature; and if not, then,

Secondly. Whether the Territory, as a municipal corporation, by the true construction of the act of Congress set up in the answer, acquired, under it, any beneficial interest in the same, as contradistinguished from a mere naked trust or power to dispose of the land, in the manner and for the use and purpose described in the act?

Argument is not necessary to show that those questions arise in the case, because, if the defendants acquired such a right, title, or interest in the lands, under their original charter, then it is clear that it became a vested interest as soon as the act of Congress went into effect; and on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect. *Terret* vs. *Taylor*, (9 Cran., 43;) *Pawlet* vs. *Clark*, (9 Cran., 292.)

But the determination of that question in the negative does not necessarily show that the plaintiff is entitled to prevail in

the suit, because, if the legal effect of the act of Congress set up in the answer was to grant to the Territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act, and divest the title; and the defendants, on the facts exhibited in the pleadings, although they did not acquire any title under their original charter, are, nevertheless, the rightful owners of the land, by virtue of the first amendment to the same, passed by the Territorial Legislature. Unless both of the questions, therefore, are determined in the negative, the judgment of the court below must be affirmed. *Fletcher* vs. *Peck*, (6 Cran., 135.)

It is insisted by the defendants that their original charter, or that part of it already recited, operated as a valid grant to them of all the lands thereafter to be granted by Congress to the Territory, and that the charter took effect as a grant, so as to vest the title in the company the moment the act of Congress was passed. But it is very clear that the proposition cannot be sustained, for the reason that both principle and authority forbid it. Grants made by a Legislature are not warranties; and the rule universally applied in determining their effect is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. Even the defendants admit that such was the rule at common law; but they contend that the rule is not applicable to this case. Several reasons are assigned for the distinction; but when rightly considered, they have no better foundation than the distinction itself, which obviously is without merit.

One of the reasons assigned is, that there is no common law of the United States, and, consequently, that the rule just mentioned is inapplicable to cases of this description. Jurisdiction, in common law cases, can never be exercised in the Federal courts, unless conferred by an act of Congress, because such courts are courts of special jurisdiction, and derive all their powers from the Constitution, and the laws of Congress passed in pursuance thereof. Rules of decision, also, in cases within the thirty-fourth section of the judiciary act, are derived from the laws of the States; but in the construction of the laws of Congress, the rules of the common law furnish the

true guide; and the same remark applies in the construction of the statutes of a State, except in cases where the courts of the State have otherwise determined.

Able counsel submitted the same proposition in the case of *Charles River Bridge* vs. *The Warren Bridge*, (11 Pet., 545;) but this court refused to adopt it, and, in effect, declared that the rules for the construction of statutes in the Federal courts, both in civil and criminal cases, were borrowed from the common law. See, also, 1 Story, Com. on Con., (3d ed.,) sec. 158.

More direct adjudications, however, as to the validity of a grant where the title was not in the grantor at the time it was made, are to be found in the earlier decisions of this court. Three times, at least, the question has been expressly ruled, and in every instance in the same way. It was first presented in the case of *Polk's Lessee* vs. *Wendell*, (9 Cran., 99,) and the court, Marshall, Ch. J., delivering the opinion, said that where the State has no title to the thing granted, or where the officer issuing it had no authority, the grant is absolutely void. Five years afterwards, the same case was again brought before the court, and the same doctrine was affirmed in the same words. *Polk's Lessee* vs. *Wendell*, (5 Whea., 303.)

Notwithstanding those decisions, the question was presented to the court for the third time in the case of *Patterson* vs. *Winn*, (11 Whea., 388;) and on that occasion this court, after referring to the previous decisions, said, we may therefore assume as the settled doctrine of the court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority or prohibited by statute, *or the State had no title*, it may be impeached collaterally in a court of law in an action of ejectment. Assuming the rule to be a sound one, it is as applicable to a grant by a Territory as to one made by a State, and the cases cited are decisive of the point. Our conclusion, therefore, on this branch of the case is, that the defendants acquired no right, title, or interest in the lands in controversy by virtue of their original charter.

2. Having disposed of the first question, we will proceed to the consideration of the second, which involves the inquiry

whether any beneficial interest in the lands passed to the Territory under the act of Congress set up in the answer. It is contended by the defendants, on this branch of the case, that the act of Congress in question was and is, *per se*, a grant *in presenti* to the Territory of all the lands therein described, and that a present right estate and interest in the same passed to the Territory by the terms of the act. Reliance for the support of that proposition is chiefly placed upon the language of the first section. Omitting all such parts of it as are unimportant in this investigation, it provides "that there shall be, and is hereby, granted to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad, * * * every alternate section of land, designated by odd numbers, for six sections in width on each side of said road within said Territory, * * * which land shall be held by the Territory of Minnesota for the use and purpose aforesaid." Certain words in the clause are omitted, because they are not material to the present inquiry, and if produced, would only serve to embarrass the investigation. Standing alone, the clause furnishes strong evidence to refute the proposition of the defendants, that a beneficial interest passed *in presenti* to the Territory; because it is distinctly provided that the lands granted shall be held by the Territory for a declared use and purpose, evidently referring to the contemplated railroad, which, when constructed, would be a public improvement of general interest. Resort to construction, however, on this point is wholly unnecessary, because it is expressly declared in the second proviso that the land hereby granted shall be exclusively applied in the construction of that road for which it was granted, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever. Beyond question, therefore, the lands were to be held by the Territory only for the use and purpose of constructing the railroad described in the act, and they were to be applied to that purpose and no other.

Passing over the residue of the section, and also the second section, as unimportant in this inquiry, we come to the third, which shows, even more decisively than the first, that the interpretation assumed by the defendants cannot be sustained.

Among other things, it provides, "that the said lands hereby granted *shall be subject* to the disposal of any Legislature thereof for the purpose aforesaid, and *no other;* nor shall they inure to the benefit of any company heretofore constituted and *organized.*" Such disposal of the lands could not be made under the previous legislation of the Territory, for the reasons already assigned in answer to the first proposition of the defendants; and we may now add another, which is, that no such authority was conferred in the act of Congress granting the land. Whether we look at the language employed, or the purpose to be accomplished, or both combined, the conclusion is irresistible that it was by future action *only* that the Legislature was authorized to dispose of the lands, even for the purpose therein described; and it is clear, irrespective of the prohibitions hereafter to be mentioned, that they could not be disposed of at all for any other purpose, nor in such manner that they would inure to the benefit of any company previously constituted and organized. Much reason exists to conclude that the latter prohibition, notwithstanding the fact that the defendants were not then organized, includes their company; but, in the view we have taken of the case, it is not necessary to decide that question at the present time. Considered together, and irrespective of what follows, the first and third sections show that the lands were to be held by the Territory for the declared use and purpose of constructing a specified public improvement; that they could not be disposed of at all under any previous Territorial legislation, nor for any other purpose than the one therein declared, nor to any company falling within the prohibition set forth in the third section; but, restricted as the authorities of the Territory were by those limitations and prohibitions, their hands were still more closely tied by the provisions of the fourth section, which remain to be considered.

By the fourth section it is provided, "that the lands hereby granted to the said Territory shall be disposed of by said Territory only in the manner following—that is to say, no title shall vest in the said Territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned,

until a continuous length of twenty miles of said road shall be completed through the lands hereby granted." Provision is also made for the issuing of a patent for a corresponding quantity of the lands when the Secretary of the Interior should be satisfied that twenty miles are completed, and so on till the whole was finished; and it also provides that, if the road is not completed in ten years, no further sale shall be made, and the lands unsold shall revert to the United States. Comparing the several provisions together, it is not perceived that they are in any respect inconsistent, and certainly they all tend more or less strongly to the same conclusion. Certain lands are granted to the Territory by the first section, to be held by it for a specified use and purpose, to wit, for the construction of a specified public improvement, and to be exclusively applied to that purpose, without any other restriction, except that the lands could be disposed of only as the work progressed. To carry out that purpose, the lands were declared by the third section to be subject to the future disposal of the Territorial Legislature, but that, in no event should they inure to the benefit of any company previously constituted and organized. Neither of those sections contain any words which necessarily and absolutely vest in the Territory any beneficial interest in the thing granted. Undoubtedly, the words employed are sufficient to have that effect; and if not limited or restricted by the context or other parts of the act, they would properly receive that construction; but the word grant is not a technical word like the word enfeoff, and although, if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantor. Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction is, that the intention must be deduced from the whole statute, and every part of it. (1 Kent's Com., 462.) Intention in such cases must govern when it can be discovered; but in the search for it the whole statute must be regarded, and, if practicable, so expounded as to give

effect to every part. That rule cannot be applied to this case, if it be admitted that a beneficial interest in the lands passed to the Territory, because it is expressly provided by the fourth section of the act that no title shall vest in the Territory of Minnesota, nor shall any patent issue for any part of the lands, until a continuous length of twenty miles of the road shall be completed. Unless that whole provision, therefore, be rejected as without meaning, or as repugnant to the residue of the act, it is not possible, we think, to hold that the Territory acquired a vested interest in the lands at the date of the act; and yet the fourth section contains the same words of grant as are to be found in the first and third, and no reason is perceived for holding that they are not used in the same sense. It is insisted by the defendants that the provision does not devest the grant of a present interest; that it only so qualifies the power of disposal that the Territory cannot place the title beyond the operation of the condition specified in the grant. But they do not attempt to meet the difficulty, that, by the express words of the act, the absolute title remained in the grantor, at least until twenty miles of the road were completed; nor do they even suggest by what process of reasoning the four words, "no title shall vest," can be shorn of their usual and ordinary signification, except to say that it would be doing great injustice to Congress to hold, notwithstanding the words of the first section, that no title passed to the grantee. Whether the provision be just or unjust, the words mentioned are a part of the act, and it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together. On the other hand, if it be assumed that the Territory acquired but a mere naked trust or power to dispose of the lands and carry out the contemplated public improvements therein described, then the whole act is consistent and harmonious. *Sims* vs. *Lively*, (14 B. Mon., 432.)

These considerations tend so strongly to support the latter theory, that, even admitting the rule of construction assumed by the defendants that the grant must be construed most strongly against the grantor, we would still be constrained to

hold that the second proposition submitted by them cannot be sustained. Legislative grants undoubtedly must be interpreted, if practicable, so as to affect the intention of the grantor; but if the words are ambiguous, the true rule of construction is the reverse of that assumed by the defendants, as is well settled by repeated decisions of this court. *Charles River Bridge* vs. *Warren Bridge*, (11 Pet., 544.)

Most of the cases bearing upon the point previously decided were very carefully reviewed on that occasion, and, consequently, it is not necessary to refer to them. Judge Story dissented from the views of the majority of the judges, but the opinion of the court has since that time been constantly followed. Later decisions of this court regard the rule as settled, that public grants are to be construed strictly, and that nothing passes by implication. That rule was applied in the case of *Mills et al.* vs. *St. Clair County*, (8 How., 581;) and the court say the rule is, that if the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if those do not support the right claimed, it must fall. Any ambiguity in the terms of the contract, say the court in the case of the *Richmond R. R.* vs. *The Louisa R. R. Co.*, (13 How., 81,) must operate against the corporation, and in favor of the public, and the corporation can claim nothing but what is given by the act. *Perrine* vs. *Chesapeake Canal Co.*, (9 How., 192.) Taken together, these several cases may be regarded as establishing the general doctrine, that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. *Ohio Life and Trust Co.* vs. *Debolt*, (16 How., 435;) *Com.* vs. *The Erie and N. E. Railroad Co.*, (27 Penn., 339;) *Stourbridge* vs. *Wheeley*, (2 Barn. & Ad., 792;) *Parker* vs. *Great W. Railway Co.*, (7 M. & Gr., 253.)

That rule is plainly applicable to this case; and when applied, we think it is clear that the Territory acquired nothing under the act of Congress set up in the answer but a mere naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein described. Suppose it to be so, then it is not controverted that Congress could at any time repeal the act creating the trust, if not executed, and withdraw the power. It is suggested, however, that the closing paragraph of the fourth section of the act is inconsistent with this view of the case, but we think not. Until the trust or power conferred was revoked by a repeal of the act, the lands were to be held by the Territory for the use and purpose therein described, and, of course, were to be withdrawn from sale and entry under the pre-emption laws of the United States; and unless some period was fixed for the completion of the contemplated improvement, the delay might become the subject of complaint and embarrassment. Ten years were accordingly allowed for that purpose, and if the work was not completed within that time, then the power of the Territory to dispose of the lands was to cease, without any further action on the part of Congress. Such part of the lands as had been appropriated at the expiration of that period in execution of the work, were to be unaffected by that provision, but the residue would cease to be held by the Territory for the use and purpose for which the lands had been granted, and would again fall within the operation of the pre-emption laws. Another suggestion is, that if the views of the plaintiff be adopted by the court, the same rule will apply to all the grants made by Congress to the States and other Territories. Of course the suggestion is correct, if such other grants are made in the same terms, and are subject to the same limitations, restrictions, and prohibitions; but we have looked into that subject, and think it proper to say, that we see no foundation whatever for the suggestion. One of those grants came under the revision of the court in the case of *Lessieur et al.* vs. *Price*, (12 How., 76,) and this court held, and we have no doubt correctly, that it was a present grant, and that the Legislature was vested with full power

to select and locate the land; but the case is so unlike the present, that we do not think it necessary to waste words in pointing out the distinction. Our conclusion upon the whole case is, that the act of Congress set up in the replication of the plaintiff is a valid law, and that the plaintiff is entitled to prevail in the suit.

Mr. Justice NELSON. I cannot agree to the judgment of the court in this case. The fundamental error of the opinion, I think, consists in not distinguishing between public and private legislative grants. The former concern government—are grants of political power, or of rights of property, connected with the exercise of political power for public purposes, in which no individual or corporate body can set up a vested interest, any more than a public functionary can set up a vested or private interest in his office. These are grants that may be altered, modified, or repealed, at the will of the Legislature. Examples of this description of grants are the erection of towns and the incorporation of cities and villages, to which are delegated a portion of the political power of the Government, to be administered within their limits and jurisdiction. Private legislative grants are subject to very different considerations. These are grants of rights of property, lands, or franchises, which may be made to individuals or corporate bodies, to towns, counties, States, or Territories, and in which the grantee may have private beneficial interests. Examples are, the grant of lands to a town for the founding of a school, or of a church, or for the benefit of the poor of the town. The grantee in all such cases takes a beneficial interest in the grant, as the representative of the persons for whose benefit it is made. The town has an interest in the encouragement and support of schools, in the education of the people under its charge, in the support and maintenance of religion and religious institutions, and in the maintenance of the poor. It is well settled in this court that grants of this description, when made by the Legislature of a State, cannot be recalled; and we do not perceive any reason why the inviolability of the same class of grants should be less when made by the legislative power of

the General Government. Congress has made many grants of lands to States and Territories for the same or kindred objects; for the founding of seminaries of learning; for building common roads, railroads, and canals; for reclaiming marsh lands, clearing obstructions from rivers, and other like objects. Now, can it be said that the States and Territories have no beneficial interest in these grants, or that they hold them as the mere agents of the General Government, or as naked trustees, and that they may be recalled at pleasure? I think not; certainly this is not the language of the court in respect to similar grants made by the States to public corporate bodies such as town and cities. If this be the sound construction of this class of grants, and the one to be hereafter adopted and applied, I do not see that any effect is to be given to them until the lands granted have been sold and conveyed to purchasers. They might take a valid title under the power of sale contained in the grant. But even then, the State or Territory would derive no benefit from the grant after the sale: or, if they hold the lands as public agents or naked trustees for the General Government, as has been argued, the purchase money would belong to it and might be reclaimed. Certainly, if the States and Territories are the mere agents of the General Government in the grants mentioned, the money would belong to the principal. Indeed, upon the doctrine contended for, I do not see how the sixteenth section in every township of the public lands which is reserved to it for common schools can be held by an indefeasible title. The use for which the grant is made in that instance is as much a public one as a grant of land to the town to build a canal, a turnpike, or railroad. And if a public use of this description deprives the town of any beneficial interest in the grant, then Congress may reclaim this sixteenth section if unsold, and, if sold, the purchase money.

It has been strongly insisted, that the grant in question rests upon different principles from one in which the title to the lands has vested directly in the State or Territory upon the passage of the law. The 3d section provides that the lands hereby granted, &c., shall be subject to the disposal of the Legislature of the Territory for the purpose mentioned. The

4th section: The lands hereby granted, &c., shall be disposed of by the Territory in the following manner: No title shall vest in said Territory, nor shall any patent issue for any part of the land, until a continuous length of twenty miles of said road shall be completed; and when the Secretary of the Interior shall be satisfied that any twenty miles has been made, a patent shall issue for a quantity of land not exceeding one hundred and twenty sections, and so on, until the road is finished. And then ten years is given for the completion of the road.

This is a conditional grant, the condition particularly specified in this fourth section. The condition is, the construction of twenty miles of the road, when one hundred and twenty sections are to be conveyed, and so on. The idea seems to be, that a conditional grant of this description may be revoked, but not one absolute in its terms. I am not aware of any such distinction. Certainly none is to be found in the common law. At common law or in equity a conditional grant is just as obligatory a d indefeasible between the parties as one that is absolute. The grant carries with it not only the right, but the obligation, of the grantee to fulfil the condition; and until the failure to fulfil, the obligation is complete and the grant irrevocable.

It would be singular if the grantor, by availing himself of his own wrong in not waiting for the performance of the condition, could defeat the grant. Certainly it cannot be maintained, that the grant of land on condition is no grant until the condition is performed. And, if so, then why not as effectual and binding as an absolute grant, until default in the condition?

But there is another equally satisfactory answer to this ground for revoking the grant. The provision relied on, instead of furnishing evidence of an intent not to make a binding grant to the Territory, leads to a contrary conclusion. Its object cannot be mistaken. It was to secure the application of the lands or the proceeds of them to the construction of the road. The act had before declared that the lands granted should be disposed of by the Territory only as the work progressed, and in

furtherance of this purpose, and to prevent any failure of it, provided that no title should vest or patent issue except from time to time as twenty miles of the road were completed. The argument that this provision indicates an intention on the part of Congress not to vest any beneficial interest in the Territory in the lands seems to me to be founded on a misapprehension of its purport and effect, which was simply to secure the accomplishment of the purposes of the grant.

Then, as to the difference between this grant and the numerous others of a similar description, which it is said are subject to a different interpretation. I have examined several of them. The present one is a copy of the others *mutatis mutandis*, with one exception, and that is, instead of withholding the title to the lands till the twenty miles of the road are completed, the act forbids the sale of them till the condition is fulfilled. In the one instance, on satisfying the Secretary of the Interior that the twenty miles have been constructed, the patent issues for the several sections specified; in the other, on satisfying him that the work has been done, he gives to the State or Territory an authority to sell. The different provisions prescribe a different mode of securing the application of the lands to the purposes of the grant. This is the object and only object of each of them; and so far as this distinction goes, other grants of this description will be entitled to the benefit of it in case of an attempt to revoke them.

Mr. Justice WAYNE concurred in the dissent expressed by Mr. Justice *Nelson*, and added, as a further reason against the judgment of the court, that after this grant was made, more than a million of dollars was subscribed upon the faith of it to the railroad corporation.

Mr. Chief Justice TANEY, Mr. Justice GRIER, and Mr. Justice SWAYNE concurred in the opinion of Mr. Justice *Clifford*.

Mr. Justice CATRON did not sit in the case, being prevented by illness.

Judgment of the District Court reversed, and the cause remanded with directions to overrule the demurrer filed by the defendants, issue a writ of inquiry to ascertain the plaintiff's damages, and after the return of the inquisition to enter judgment in his favor.

WOODS *vs.* LAWRENCE COUNTY.

1. Where the charter of a railroad company authorizes the counties "through which it may pass" to subscribe to its stock, a county lying between the two termini of the road may subscribe without waiting until the route is actually located.
2. If the statute requires the grand jury to fix the amount of the subscription and to approve of it, and upon their report being filed empowers the commissioners to carry the same into effect by making the subscription in the name of the county, and if these things be done agreeably to the law, the county cannot afterwards deny its obligation to pay the amount subscribed.
3. Where the charter provided that payment of the stock should be made upon such terms and in such manner as might be agreed on between the company and the county, an agreement to pay in bonds, with coupons attached for the semi-annual interest, is binding, and the bonds being issued accordingly, are lawful and valid securities.
4. In a suit brought to recover the arrears of interest on such bonds it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defence for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners.
5. In a suit brought upon the coupons by a *bona fide* holder his right to recover is not affected by the fact that the railroad company sold the bonds at a discount of twenty-five per cent., contrary to the charter, which forbids the sale of them at less than their par value.

This was an action of debt brought in the Circuit Court of the United States for the western district of Pennsylvania, by Alexander G. Woods, a citizen of New York, against the county of Lawrence, in the State of Pennsylvania, to recover the amount of certain coupons for interest on bonds given by

the defendant to the Northwestern Railroad Company. The defendant denied its obligation to pay the coupons or the bonds.

The plaintiff, to maintain the issue on his part, gave in evidence the act of the Pennsylvania Legislature by which the Northwestern Railroad Company was incorporated. Section 1 appointed certain persons therein named to open books, receive subscriptions, and organize a company with all the powers and subject to all the duties, restrictions, and regulations prescribed by the general railroad law of the State. Section 2 fixes the capital stock at 20,000 shares of $50 each, to be increased to $2,000,000 hereafter, if found expedient. Section 3 fixes the termini and prescribes the gauge, &c., of the road to be built. Section 4 authorizes the company to use any section of five miles when finished, as fully as the whole might be used if it were all finished. The remaining three sections of the act are as follows:

"SECTION 5. That said company be, and they are hereby, authorized to borrow money to an amount not exceeding the capital stock of said company, upon bonds to be issued by said company, whenever the said president and directors shall deem the issue of such bonds expedient: *Provided*, That the rate of interest on said bonds shall not exceed seven per centum per annum, and that said bonds shall be convertible into the stock of said company, at the option of said company and the holder or holders of said bonds, and that no bond shall be issued for a sum less than one hundred dollars.

"SECTION 6. That the president and directors of said company are hereby authorized to pay to the stockholders, in the months of January and July in each year, interest at the rate of six per centum per annum on all instalments paid by them, and to continue to pay the same until the road shall be completed; and all the profits or earnings of the said railroad within the said time shall be credited to the cost of construction; and all interest paid shall be charged to the cost of construction, but no interest shall be paid on any share of stock upon which any instalment that has been called for remains

unpaid, and the stock of said company shall not be subject to any tax in consequence of the paymen of the interest hereby authorized, nor until the net earnings of the company shall amount to at least six per centum per annum upon the capital invested.

"SECTION 7. That the counties through parts of which said railroads 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 said company and the proper county: *Provided*, That the amount of subscription by any county shall not exceed ten per centum 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 the 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 amount 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. 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.

It was proved that the grand jury of Lawrence county, on the 21st of May, 1853, passed a resolution *recommending* that the county commissioners "subscribe stock to the Northwestern Railroad to the amount of $200,000, agreeably to the act of Assembly incorporating said company, and to issue bonds for the payment of said stock, making the conditions such as will best promote the interest of said railroad company and the county of Lawrence."

On the 20th of August, 1853, the county commissioners

subscribed $200,000 for the county to the capital stock of the railroad company, by affixing their names and their official seal to the following instrument:

"By authority of an act of the General Assembly of the Commonwealth of Pennsylvania, passed the 9th day of February, A. D. 1853, entitled 'An act to incorporate the Northwestern Railroad Company,' and by virtue of the action of the grand jury of the county of Lawrence had at May session, 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 Lawrence, we, the undersigned, commissioners of said county, do hereby subscribe, for and in the name of the county of Lawrence, to the capital stock of the Northwestern Railroad Company, the sum of two hundred thousand dollars, being four thousand shares in said capital stock. It is understood that whenever the amount of this subscription is required from the county of Lawrence 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 between the commissioners of Lawrence county and 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 Lawrence, this 20th day of August, A. D. one thousand eight hundred and fifty-three."

To pay this subscription, bonds were signed, sealed and delivered to the railroad company in the following form:

"Know all men by these presents, that the county of Lawrence, 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 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 day 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, credit, and property of said county of Lawrence are hereby solemnly pledged, under the authority of an act of 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 resolution of the county commissioners, in their official capacity, passed the —— —— —— ——, the commissioners of said county have signed, and the clerk of said commissioners has countersigned these presents, and have hereto caused the seal of said county to be affixed this ——— day of ———, A. D. one thousand eight hundred and fifty-——."

To each of these bonds forty coupons were attached, of which the following is a specimen:

"COUNTY OF LAWRENCE.

"Warrant, No. 37. For thirty dollars.

Being for six months' interest on bond No. —, payable on the first day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company in the city of Philadelphia.

$30. ———— ————, Clerk."

On the part of the defendant, it was not only proved, but it was conceded by the plaintiff to be true, that the presentment or recommendation of the grand jury was made before the railroad company was organized; that the subscription by the commissioners was made before the railroad was located, and that, in fact, the railroad or any part of it never was located within the limits of Lawrence county. It was also proved that the bonds of the county, after they came into the hands of the railroad company, were disposed of, not at their par value, as the act of incorporation requires, but for seventy-five per cent. of that value.

The defendants on these facts asked the Circuit Court to charge that—1. The county was not authorized by the act of

Assembly to make this subscription. 2. The subscription is void because the grand jury did not prescribe the manner and terms of payment. 3. The county was not authorized to issue the bonds. 4. The sale of the bonds, contrary to law, at a less price than par, avoided them in the hands of the purchaser.

Upon the points of law the judges of the Circuit Court differed in opinion, and made a certificate of their division, which brought the cause into this court.

Mr. Smith, of Pennsylvania, for the plaintiff. The constitutional authority of the State of Pennsylvania by her Legislature to delegate to a county or its officers the power of making a subscription to a railroad company, and to pay for such subscription in bonds of the county, is not an open question, and is not raised here. Two questions are raised, and these are—1. Whether the act in evidence does give the authority; and, 2. Whether the fact that the bonds were sold by the railroad company at less than their par value destroys the plaintiff's right to recover. Of these two questions in their proper order:

I. The county, represented by its commissioners, or a majority of them, is 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 said company" and said county. That this language, although general and somewhat indefinite, will include the power as exercised by the commissioners of Lawrence county in issuing the bonds in question in this case, and is intended so to do, hardly seems to admit of doubt. No one supposed that any county or municipal corporation could subscribe to the stock of any railroad company in any other way than by borrowing money upon its credit. This could only be done by the issue of bonds, or some other sort of securities, well known in the money market. The counties had neither silver nor gold with which to pay their subscriptions. The only "manner" in which they could "make payment," was by the issue of their promises to pay. The form of bonds payable to bearer, with coupons attached, was the most convenient to all interested, and such securities

were most available in the money market. That the Legislature intended to give to the commissioners of the several counties described in the act, authority to issue bonds similar to those in dispute, is evident from the second proviso of the seventh section, which provides that "the bonds of the respective counties, given in payment of subscriptions, shall not be sold by said railroad company at less than their par value." The county, the railroad company, and all parties concerned, so understood the authority given, and have acted under it accordingly. The bonds have been issued, put into the market, and sold to the highest bidder, without a word of dispute as to the power of the commissioners to make them, until such time as repudiation became more convenient than payment.

This question has been before the Supreme Court of the State of Pennsylvania, and the authority of the commissioners of Lawrence county to issue the very bonds in dispute has been sustained. *The County of Lawrence* vs. *The Northwestern Railroad Company et al.*, (8 Casey, 144;) *Diamond* vs. *Lawrence County*, (1 Wright, 353.) In the last case Mr. Justice Woodward, in giving the opinion of the Supreme Court of Pennsylvania upon the questions which arose, says: "It is not necessary for us to discuss the irregularities of the subscription made by the county, nor the authority of the county to make it. In the case in 8 Casey, the subscription was held to be valid, and we should, doubtless, reach the same conclusion again if we were to review the whole ground. But because it is not necessary we forbear to do it." The act has been passed upon, and the validity of similar subscriptions for railroad purposes has been affirmed also by the Supreme Court of the United States in *Curtis* vs. *The County of Butler*, (24 How., 435.)

On the question of authority in the county to make the subscription, it is objected, "that the presentment or recommendation of the grand jury was materially deficient in not setting forth or prescribing the terms and manner of payment, and the subscription, consequently, was void, for want of authority."

The act requires that the amount of the subscription "shall be fixed and determined by one grand jury of the proper county,

and approved by the same." A grand jury of Lawrence county resolved that the commissioners be, and are hereby, recommended to subscribe two hundred thousand dollars to the stock of the railroad company, and to issue bonds for the payment of said stock, making the conditions such as will best promote the interests of both parties. This is a substantial if not a literal compliance with the terms of the act, and was accepted and acted upon as sufficient to give the commissioners the authority to make the subscription.

II. The validity of the subscription and the issue of the bonds in question having been established, we come to the second point to be discussed: How far are these bonds affected by the second proviso of the seventh section of the act, "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 their par value?" The fact that the plaintiff is a *bona fide* holder of the bonds in dispute, for a valuable consideration, was not put in issue upon the trial.

As between the county and the railroad company, the defence set up by the county would be good *pro tanto* at least, but it is difficult to see how it can affect a *bona fide* holder, for a valuable consideration without notice. The bonds have been given to the company in payment of stock; the company has received them at their par value. If the bonds, however, which have been received as cash are not of that value, a fraud has been practised upon other stockholders, who paid in money, or its equivalent. But the bonds being made payable to bearer, and thus made negotiable securities, the county will have to pay them and the interest thereon, whether they have purchased a hundred dollars' worth of work or only seventy-five. The proviso that the bonds shall not be sold at less than their par value is not a condition precedent that can affect the covenants upon them. That proviso assumes that the bonds have been issued and given in payment of stock, dollar for dollar, and imposes the prohibition upon both the county and the railroad company. The county should not have subscribed, nor should the railroad company have received their securities, unless they were equivalent to the cash paid by other stockhold-

ers. If it were not intended by the Legislature, and expected by the county and the railroad company, that these bonds should be negotiable in the money market, the proviso was unnecessary. The railroad company may have violated the provisions of the act, and committed a fraud upon the county and other stockholders; that is a question among them. These bonds have been thrown upon the money market. They have passed from hand to hand, as other negotiable securities, until they have come into the possession of the plaintiff. He calls upon the makers of these securities to pay them according to their stipulations; the county cannot make successful defence by setting up fraud or a violation of the provisions of the act on the part of the railroad company. The purchaser of the bonds was required to look to the face of those instruments alone for the terms upon which he took them. He was bound to inquire whether they had been executed by persons having authority to pledge the faith and credit of the county. Their delivery could be presumed from the fact that they were found in the market.

The Supreme Court of Pennsylvania occupies a peculiar position upon the question of the negotiability of securities similar to the bonds in controversy. In the case of *Carr* vs. *Le Fever*, (3 Casey, 413,) Mr. Chief Justice Lewis, in giving the opinion of the court, says: "We do not desire to have any doubt on the question whether the holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name. Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and being expressly designed to pass from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name." In the case in 8 Casey, already referred to, the parties and the court seem to have regarded these bonds as negotiable and in the hands of *bona fide* holders, and not subject to equities between the county and the railroad company. The proceedings are based upon the assumption that the county will be bound to pay the par value

of any of the bonds which may have been passed off by the railroad company, although disposed of fraudulently and in violation of the provisions of the act. How, upon any other assumption, could the court have decreed in that case that the company should return the bonds in their possession to the county and pay the par value of those which had been put into circulation? But in the case of *Diamond* vs. *Lawrence County*, (1 Wright, 353)—decided since this case was tried in the Circuit Court—they have taken the broad ground that "such bonds have not the quality of commercial paper in Pennsylvania; they are but bonds, and, even in the hands of innocent and remote purchasers, they are subject to the equities existing against them, when in the hands of the first purchasers from the company. The interest coupons are subject to the same equities." In this position, as they admit, "they stand alone; all the courts, American and English, are against them." It is respectfully submitted that this decision is not binding upon the Supreme Court of the United States. The doctrine of *lex loci contractus* does not apply here. In questions of a purely local character, the decisions of the State judicatories should, perhaps, govern; but, although these bonds may be said to be creatures of the Legislature of Pennsylvania, so soon as they were thrown upon the market they put off their local and assumed a character as broad as commerce itself.

Mr. Taylor and *Mr. McCoomb*, of Pennsylvania, for defendant. The power to subscribe was not given to the county of Lawrence by name, but only to those counties "through parts of which said railroad may pass." A county through which it may not pass has certainly no authority by this act to subscribe. It is a contingent power, which may or not take effect upon the happening or not happening of an uncertain future event, and it remains in abeyance until the event occurs. *Dartmouth College Case*, (4 Pet. Cond. Rep., 575.) In point of fact, it had not occurred at the time when the subscription was made. The railroad was not then located in the county or in any part of the county. It has not yet been located; it probably never will be. It is confidently submitted, that for this

reason the power did not and does not exist to make the subscription.

It is unreasonable to understand the words of this act in a sense which would justify such a subscription before the road is located. Even if the grand jury and commissioners could be sure that the road would pass through some part of the county, it may be that it will pass through an insignificant corner of it. Before an actual and final choice of the route it is impossible to say how much ought to be subscribed; for until then no one can tell how much benefit or injury the construction of it may do to the public interest of the county. In determining what the action of the county authorities ought to be the locality of the road is an indispensable and decisive element, without which no calculation approaching to the truth can be made.

To say that Lawrence county has power to subscribe because it is one of the counties through which it *may* pass—that is, one of those in which it is *possible* that a part of the road may be located—is a proposition wholly untenable. It may pass through any one of nine counties, but it is not possible that it should pass through all of them. Had all these counties the power to subscribe? If all of them had subscribed on the assumption that each one was to have the road running through it, some of them would certainly have cheated themselves, and exercised a power never conferred by law. The court avoids this absurdity by simply declaring that a county through which the railroad may pass is one in which the route of it has been located and some progress made in the building of the road.

This construction is also objectionable on constitutional grounds. In the celebrated case of *Sharpless* vs. *Philadelphia*, (21 Penn. St. Rep., 147,) the constitutionality of an act like this was put on the legislative power of taxing, and to make it an exercise of the taxing power it must be a burden imposed upon the people of a district which has a special interest in the public improvement to which the revenue raised is intended to be applied. Lawrence county could have no special interest in this road unless it passed through her territory. The existence of that interest was the test of her power to subscribe,

and the extent of it was the only measure by which the prudence of exercising the power could be judged of. This court has declared that if a law admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of the Legislature, it is the duty of the courts to adopt the former construction. *United States* vs. *Coombs*, (12 Pet., 76.)

Granting that if the whole road were made, it must necessarily pass through Lawrence county; still, the whole road may never be made. The third section of the charter authorizes a connection with any other road at any intermediate point on the line, and the fourth section enacts that when *five miles are completed* it may be used as if the whole were finished. The company has the *right* to make a road from some point, selected by itself, on the Pennsylvania railroad west of Johnstown, to the Ohio State line. But there is nothing to prevent it from making five miles in Allegheny county, connecting at one end with the Pennsylvania railroad, and at the other with the Allegheny Valley railroad. Will this court say that such a Northwestern railroad in contemplation of law passes through Lawrence county? Can it be tolerated that such a monstrous fiction shall be used for the mere purpose of plundering the public and enriching unscrupulous speculators?

Again: it is contended by the plaintiff that the road was located through the county before subscription, "because the company itself, by the very act of accepting the subscription, had determined upon the completion of the road through at least a part of the county." This proposition, when analyzed, amounts to this: the acceptance of a subscription from the county is a contract by the company to locate the road through the county, and a contract to locate is equivalent to a location. But "a stipulation for a particular route of the projected railway is, in other respects, againt the policy of the law, and therefore illegal." *Pittsburg and Steubenville Railroad Co.* vs. *Biggar*, (10 Casey, 458.) Now, to say that an illegal contract to locate is equivalent to a location is absurd. Besides, the proposition under discussion is, that there was no power to subscribe until after location; hence, to say that there was a

location by virtue of the subscription, and that there was power to subscribe by virtue of the location, is but reasoning in a vicious circle.

The power to issue the bonds in question is not given to the county by the act incorporating the railroad company. This is a power which must be given in the most direct and unmistakable manner, either in express words or by necessary implication. A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation. *Commonwealth* vs. *Erie & N. E. Railroad Co.*, (3 Casey, 351.)

Again: plaintiff finding no rest for the sole of his foot in the express words or necessary implication of the statute, plants himself upon the agreement of the parties, and says the county was authorized to make payments in such manner as might be agreed upon by the company and the county. Coupon bonds were so agreed upon; the county was therefore authorized to issue them. This argument is quite fallacious. The power to issue bonds is one thing; the exercise of that power is another. If there were power in the county to issue bonds, then the agreement of the parties might make bonds a manner of payment, but it is preposterous to say that the power was given merely because it was assumed.

The true force and effect of the clause authorizing the parties to agree upon the manner and mode of making payment will be clearly evinced by ascertaining the difficulty intended to be overcome thereby. Now, this railroad company was incorporated, "subject to all the duties, restrictions, and regulations" prescribed by the general railroad law of 1849. If we turn to that law, section 8, it is found that the railroad company is restrained from accepting any subscription upon any other terms than those therein prescribed. These terms were, "to be called in and paid at such times and places and in such proportions and instalments, not, however, exceeding five dollars per share, in any period of thirty days, as the directors shall require." If, therefore, the enabling act had stopped short with the simple grant to the county of authority to subscribe, any subscription made must have been subject to the terms aforesaid; not because the county had no power

to bargain for others, (for her authority was unrestricted in that respect, as that of a natural person,) but because the company had no authority to accept. To suppose that a county, whose means of payment could be accumulated only by the slow process of taxation, would subscribe any considerable amount of stock, subject to the calls and forfeitures in said section mentioned, was simply absurd. Wherefore, that the company might take any benefit under the grant of authority to the county to subscribe, it was necessary that the company itself should be authorized to accede to a subscription, to be paid "at such times and places, and in such proportions and instalments," as, by the county, was thought practicable, having regard alone to its ordinary source of revenue, taxation; we say ordinary, because the extraordinary method of recourse to loan is not even hinted at, much less authorized, in the act. A release, then, to the company from the statutory restraint aforesaid was the object in view. To this end, the clause "and to make payments," &c., was introduced; and the object was supposed to be accomplished, when thereby the consent of both parties as to terms and manner of payment was substituted for the arbitrary calls of the directors of the company, as provided in the statute. In purport or effect the clause conferred no new or additional power upon the county; it only removed from the company a legal disability.

But let it be conceded that the statute authorizes the issuing of bonds, what manner of instrument is to be understood as designated by that word? An instrument executed and delivered by the obligor, signed and sealed by him, not legally assignable in any but the one way provided by the act of 1715, that is, under the hand and seal of the obligee, before two credible witnesses, and when assigned, subject to all the equities then existing between the original parties:—such is a bond in law, in equity, and in the popular sense of the word. It would be so understood by the members of the Legislature when they voted for the bill. It is a term of art, too; and terms of art are to be understood in their technical sense when used in a statute. *Brockett* vs. *Ohio and Pennsylvania Railroad Co.*, (2 Harris, 143;) *Ketchum* vs. *Tyson*, (3 Murphy, 314;) *Smith* vs.

Harman, (6 Mod., 143;) 9 Bac. Abridg., 238, 244. A coupon bond could not have been contemplated by this act. The variable law merchant may, if it will, adopt and protect these specialties as commercial paper, but statute laws must be executed according to the sense and meaning they had at the time they were passed. *Commonwealth* vs. *Erie & N. E. Railroad Co.*, (3 Casey, 339.) The difference between a bond in its true sense and an instrument such as this, which leaves the county naked and defenceless against the frauds of the railroad company, is one of unspeakable importance.

The provision in the charter that the bonds should not be sold by the railroad company for less than their par value is a condition of their validity. The words of the statute are part of the bond, and incorporated with it, and those words are apt and proper to create a condition. *Bear* vs. *Whisler*, (7 W., 19;) *Westenberger* vs. *Reist*, (1 Harris, 598; 2 Coke Litt., 223;) *Smith* vs. *Bowditch M. F. Ins. Co.*, (6 Cush., 448; Angell on Ins., 189;) *Hamilton* vs. *Elliott*, (5 S. & R., 375; 2 Pars. on Cont., 15;) *Thomas* vs. *Commissioners of Allegheny*, (8 Casey, 229;) *Lawrence County* vs. *N. W. Railroad Co.*, (8 Casey, 152.) The consequence of a breach of the condition subsequent is to rescind, annul, and make void the obligations of the bond, and equity will not relieve against such a forfeiture of what, otherwise, might have been the right of the obligee.

Mr. Hamilton, of Pennsylvania, in reply. As to the defendant's proposition, "That there was no authority vested in the county of Lawrence to make subscription to the stock of said Northwestern Railroad Company; and that the bonds are consequently void;" we answer, that this defence was overruled twice by the Supreme Court of Pennsylvania, in cases involving directly the validity of this same subscription and the bonds issued in pursuance thereof. *Commonwealth ex rel. Lawrence County* vs. *The Northwestern Railroad Co.*, (8 Casey, 144,) and *Diamond* vs. *Lawrence County*, (1 Wright, 353.) In the first of these cases the court say, in the opinion delivered by the Chief Justice, that "notwithstanding the unskilfulness and inexperience with which this affair was managed by the

county authorities, we think that enough was done to constitute a valid subscription to the capital stock of the company, and thus to furnish a valid basis for the issuing of the bonds." In the other case the same doctrine was reaffirmed.

The power to execute and issue bonds or other certificates of indebtedness belongs to all corporations, public as well as private, and is inseparable from their existence. *Commonwealth ex rel. Reinboth* vs. *D. Fitzsimmons et al., members of the Select and Common Councils of the City of Pittsburg*, in the Supreme Court of Pennsylvania—(not yet published.)

The authority given by the Commonwealth to the defendants to incur the debt or obligation by subscription, necessarily included the authority to give the creditor the usual evidences of a debt.—*Ibid.*

In the case just cited there was authority to the city of Pittsburg to subscribe to the capital stock of the Allegheny Valley railroad, but no express authority to issue bonds in payment thereof. The city executed and delivered to the company, in payment of the subscription, its bonds payable to bearer, with coupons annexed, and the Supreme Court held them to be valid, notwithstanding the absence of express authority to issue them. We submit, therefore, that the question has been authoritatively decided against the county, and is not now open to discussion upon general principles.

It is alleged by the defendant: "That the sale of the bonds of Lawrence county, given in payment of her subscription, below their par value, contrary to the provisions of the act of Assembly, by the railroad company, avoided the bonds in the hands of the purchaser."

The same defence was made to these and similar bonds in several cases, in the Supreme Court of the State, and overruled. In the *Commonwealth ex rel. Lawrence County* vs. *The Northwestern Railroad Company*, the relator obtained a money decree against the defendant for the bonds which it had negotiated below par. This decree could only have been rendered upon the hypothesis that the bonds were obligatory on the county in the hands of *bona fide* holders. In the *Comm. ex rel. Thomas* vs. *The Commissioners of Allegheny County*, (8 Casey,

218,) affirmed in *The Comm. ex. rel.* vs. *The Select and Common Councils of Pittsburg*, (10 Casey, 496;) *The Comm. ex rel. Armstrong* vs. *The Commissioners of Allegheny County*, (1 Wright, 277;) *The Comm. ex rel. Middleton* vs. *Same*, (1 Wright, 237;) and *Same ex rel. Reinboth* vs. *Same* (not yet reported,) the court held that the sale of the bonds by the railroad companies below par, in violation of the prohibition contained in the statutes which authorized their issue, might be a good defence as an equitable defalcation, on behalf of the obligors, against the principal of the debt, but not against the interest.

There are exceptions to the rule that the assignee of an ordinary bond takes it subject to a right in the obligor to defalcate against the assignor, or show want of consideration or non-existence of the debt. As when the bond is delivered to the obligee to enable him to raise money, or the obligor encourages the transfer of it. *Eldred* vs. *Hazlett*, (9 Casey, 307.) Nor has the assignee anything to do with agreements between the original parties inconsistent with the purport or legal effect of the instrument. *Davis* vs. *Barr*, (9 S. & R., 141.) The condition prescribed by the act was both collateral to the bonds and inconsistent with their legal effect.

The provision in question having been intended for the benefit and protection of the county, it was competent for the commissioners to waive it, which they did, in point of fact, by executing and delivering to the company instruments obliging the county to pay to the holder or bearer thereof.

The bond of a corporation, payable to bearer, passes by delivery, and the holder may sue in his own name; or, in other words, the obligation of the contract is to pay the bearer.

These bonds were intended for the market, and were made negotiable by the contract of the parties. Although not negotiable in the mercantile sense of the term, yet the county, having agreed that they should pass from hand to hand by delivery and be payable to bearer, is estopped from denying to them the character and effect of regularly negotiable paper. *Ohio, ex rel. Morgan Bros.* vs. *Com. of Clinton Co.*, (6 Ohio S. R., 285;) Legal Int., Dec. 10, 1858, per GRIER, J., in *M'Coy* vs. *Washington Co.; Lafever* vs. *Carr*, (3 Casey, 413;) *Morris Canal Co.*

vs. *Fisher*, (N. J. Rep.;) *Delafield* vs. *State of Illinois*, (2 Hill, 189;) *Stoney* vs. *Trust Co.*, (11 Paige, 365.)

In 1 Parsons on Contracts, 240, it is said: "We regard the English authorities as making all instruments negotiable which are payable to bearer, and which are also customably transferable by delivery, within which definition, we suppose, the common bonds of railroad companies will fall. Usage must have great influence in determining this question. The true test as to whether an instrument is negotiable or not should depend on whether any writing is necessary in order to its transfer."

The condition prescribed in the act was a rule to the company exclusively, and was only intended to apply to the bonds of the county that might be delivered directly to the company in payment of the subscription to its capital stock.

What notice, actual or constructive, had the plaintiff that the bonds in controversy were ever in the hands of the company? The county was authorized to subscribe to the stock, but not limited to any particular mode of payment. The commissioners might have sold the bonds of the county in the market, and paid for the stock with the proceeds; or they might have borrowed money and applied it to that purpose, with or without the issue of bonds. Besides, it is a part of the defendant's case that the county had no authority to issue bonds at all in payment of said subscription. The bonds themselves contain no ear-marks tending to show that they had passed through the hands of the company, nor is there any circumstance on the face of them to give notice of the default of the company.

Assuming that the plaintiff had notice of the condition in the act, and that these particular bonds had been in the hands of the company, how was he to ascertain whether or not they had been put in circulation by the company at less than their par value? If they were in fact sold in disregard of the condition, the obligor would not be likely to know of the fact, because it must necessarily have occurred after the delivery of the bond. The company would not be likely to publish its own wrongful act, or to give information such as would impede the circulation of the bonds or impair their value.

The provision in restraint of the use of the bonds is not a condition, but is in the nature of a collateral and independent covenant. The county, by the contract of subscription and the delivery to the company of its bonds, became a stockholder, and was entitled to participate in the management of the affairs of the company.

The contract, therefore, between the county and the company was not executory, but an executed contract. The holder of the bond would be entitled, according to its tenor, to look to the obligor for payment, and the county to resort to the company's statutory obligation for indemnity for any violation of the prohibition to sell the bonds at less than par. It is like the case of a grantee taking a covenant against a known incumbrance. In case of breach of the covenant, he cannot withhold the purchase money, but must resort for indemnity to an action on his covenant.

Mr. Justice WAYNE. This is an action of debt brought upon coupons for interest attached to bonds, which had been passed by the county of Lawrence to the Northwestern Railroad Company, in payment of its subscription for two hundred thousand dollars to the capital stock of that company.

It is here upon a certificate of a division of opinion between the judges of the Circuit Court.

The company was incorporated as the Northwestern Railroad Company on the 9th February, 1853, with the power to build a railroad from some point upon the Pennsylvania or the Alleghany Portage 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*. It was to be done on the most eligible route, &c., &c., and to be connected with any railroad then constructed, or which might thereafter be built, at either end or at any intermediate point on the line thereof. The capital stock was to be twenty thousand shares, of fifty dollars each, with power to increase it to two millions of dollars, if the directors of the company should think its exigencies required that to be done. The company was authorized, in either event, in respect to the amount of

capital, to build the road *by borrowing money on its bonds, bearing interest at seven per centum*, not exceeding the amount of its capital, and with the further limitation, that no bond should be issued for less than one hundred dollars. The seventh and last section of the act is, that the counties, through parts of which the railroad may pass, are severally authorized to subscribe to the capital stock of the company, and to pay its subscription in such manner as might be agreed upon between the county and the company. But no county could subscribe more than ten per cent. upon its assessed valuation; and before any subscription could be made, its amount was to be determined by a grand jury of the county, and approved by it. And when that had been done and filed, the county commissioners were authorized to make the subscription as the grand jury had directed. Then follows a proviso, that when the bonds of the county were passed to the railroad company, they should not be sold by it at less than their par value. The meaning of that proviso will be given hereafter, when we shall consider the fourth question upon which the judges were divided in opinion.

Upon the trial of the case, the plaintiff gave in evidence the recommendation and direction of the grand jury for the subscription. It was executed by the commissioners to the amount of two hundred thousand dollars, for the payment of which the county was to issue bonds, with such conditions as might best promote the interests of the railroad company and of the county of Lawrence. The plaintiff also gave in evidence one of the coupons upon which he had sued, attached to the county bonds. We give a copy of it, that the obligation of the county to pay those coupons and their bonds, when the latter shall become payable, may be better understood:

COUNTY OF LAWRENCE.

Warrant No. 37 for 30 dollars. Being for six months' interest on bond No. —, payable on the first day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company, in Philadelphia.

$30. ———— ————, *Clerk.*

Here the plaintiff rested his case.

The defendant gave in evidence the agreement for the sub-

scription, as made by the commissioners. We have examined it in connection with the presentment of the grand jury, and found both properly in conformity with the section of the act giving to the counties, severally, the right to subscribe. It is recommended and determined, that the subscription of the county of Lawrence shall be two hundred thousand dollars, or four thousand shares of the capital stock of the railroad company, it being understood, that, whenever the amount of it should be required by the company from the county, it should be paid in bonds of sums not less than a thousand dollars, payable in twenty years after date, or at such other times after the date of the bonds as might be agreed upon between the commissioners of the county and the railroad company, the interest upon the bonds to be paid semi-annually by the *railroad company*, until the time when the road shall have been completed.

The defendant then gave other evidence, to prove that when the grand jury made its presentment, the railroad company had not been organized; also, that when the subscription was made, the company had not fixed upon its line, or that any part of it should be run within the limits of Lawrence county, and then that no part of it had ever been built within that county.

It was also proved by the defendant, that the company, in using the bonds of the county to get money upon them for the construction of the road, had sold them at a discount of twenty-five per cent., but not with having credited the county with less than their par amount.

Thus the case stood when it was submitted to the jury, and the defendant asked the court to give the following instructions:

1. That there was no authority vested in the county of Lawrence to make the subscription to the Northwestern Railroad Company, and that the subscription and the bonds which had been issued for its payment were void.

2. That the recommendation and report of the grand jury were materially deficient, in not setting forth or prescribing the terms and manner of payment, and that the subscription was void on that account.

3. That the county of Lawrence was not authorized to issue the instruments or bonds in question.

4. That the county bonds, which had been given in payment of the subscription, having been sold below their par value, was contrary to the provision of the act incorporating the railroad company, and were, therefore, avoided in the hands of purchasers.

We observe, in respect to the first, second, and third questions, that they are not now open questions in this court. They were in effect comprehended in the case of *Curtis* vs. *The County of Butler*, which this court passed upon at the last term, as well in respect to the constitutionality of the act of the 9th of February, 1853, as to what was the proper construction of it. This court then decided, after mature deliberation upon all the sections of the act, assisted by the arguments of Mr. Stanton and Mr. Black, which were in every particular fully up to the occasion, that, by the 7th section of the act of the 9th February, 1853, the counties through parts of which the Northwestern railroad may pass were authorized to subscribe to the capital stock of the company, and to make payments on such terms as might be agreed upon between the company and the county; and that the subscription was valid, and binding upon it, when made by a majority of its commissioners. It was also then decided, that the power given to the county to subscribe included its right to issue bonds, with coupons for interest attached, for the payment of its subscription. The constitutionality of the act was admitted in the argument then, as it has been in this case. But it is now urged, in addition to what was then said, that as the county of Lawrence had not been empowered *by name* to subscribe, such omissions must suggest a purpose of the Legislature, when passing the act, to accommodate itself to what is asserted to have been, at that time, the constitutional law of Pennsylvania, as it had been expounded by the Supreme Court of that State, in respect to the right of the Legislature to empower a county to subscribe and tax the people of it to pay for railroads and other improvements of a like kind, which were not positively to be constructed within its territory.

One of the cases cited is that of the *Commonwealth, ex relatione Dysart* vs. *Mc Williams and Isett.* It was a *quo warranto*, in which it was alleged that they had usurped the office of supervisors and assessors of Franklin township, under and by virtue of the act of the 13th April, 1846, and of assessing, levying, and collecting taxes, for the use and benefit of the Spruce Creek and Water Street Turnpike Company. And it was decided that the defendants, as supervisors, had the power to levy and collect a tax to enable them to subscribe for shares of the stock of the turnpike company, at the cost of the inhabitants of the township, in virtue of the authority vested in the supervisors of townships by the act of the 15th of April, 1834, and because the 16th section of the act of 1846, incorporating the turnpike company, had provided that the supervisors of the public highways, in the townships through which the road may pass, "were authorized to subscribe in the name and behalf and for the use of its inhabitants any number of shares, not exceeding three thousand six hundred, in the capital stock of the turnpike road." The decision is not put upon the locality of the route of the road, though, in fact, it was located and passed through the township of Franklin; but upon the constitutional power of the Legislature to pass both acts just mentioned, and that, in doing so, it did not differ in principle from the power given to tax for the purpose of repairing roads and bridges, and for such other purposes as may be authorized by law.

Before leaving this case, we recommend it as a whole, and particularly the decision of Mr. Justice Bell, to the perusal of such of the profession who may be engaged in a case of *quo warranto* in the State of Pennsylvania.

The other case cited of *McDermond* vs. *Kennedy*, (Brightley's Reports, 332,) which was taken to the Supreme Court and affirmed, is, that a municipal corporation, under a power to make such by-laws as shall be necessary to "promote the peace, good order, benefit, and advantage of the borough," and to assess such taxes as may be necessary for carrying the same into effect, *is not authorized to levy a tax* for the payment of a part of the expense to be incurred by a railroad company in

bringing the line of their road nearer to the town than it had been originally located. Judge Reed places his conclusion, exclusively, upon the disability of a borough corporation to exercise rights on private property, except for corporate purposes; and he says, it can no more raise a tax, and grant the avails of it to a railroad, because it is believed to be advantageous to the borough, than they could do anything else, for there is no relation or connection between the railroad and the borough. Neither of the cases cited have any application to sustain the position taken—that the Legislature meant, by omitting the names of the counties in the act of the 9th February, 1853, that it had not the power to authorize them to subscribe to the capital stock of a railroad which was not to be run within its territory.

Nor do these cases countenance the idea, that the power given to the county to subscribe was not exercisable *in presenti*, but was in abeyance until the passing of the railroad through it. It is true, when a charter is given for franchises or property to a corporation, which is to be brought into existence by some future acts of the corporators, that such franchises or property are in abeyance until such acts shall have been done, and then they instantaneously attach. But not to distinguish the acts enjoined or permitted, to give to the corporation its intended purpose and object, is to confound the franchises with such acts, and would nullify the means by which the franchises are to be produced.

A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment. To ascertain how it is to be brought into existence, the whole charter must be consulted and compared. If that depends upon co-operating subscriptions of money, to be borrowed upon securities of indebtedness bearing interest, payable yearly, or at times within the year, until the security is finally payable, it must be intended that all the parties, to whom has been given a right to subscribe, may use it to aid the beginning and the completion of the object; in other

words, when there is no express limitation as to the time of making the subscription, that it was optional with those who could do so to make it, when most convenient or advantageous to themselves. In this instance, we find that certain persons were named in the first section of the act as commissioners to receive subscriptions and to organize the company; and that the counties, through parts of which the railroad may pass, were permitted to make their subscriptions with those commissioners, and that they could receive them. Then, it was intended that the subscription should precede the organization; and no one, who reads the whole act, will doubt that the latter depended upon the subscription of the larger, if not the whole number of the twenty thousand shares of which the capital stock was to consist.

The road was to be built with money to be borrowed on the bonds of the company, and upon the bonds of such of the counties meant in the act which might choose to subscribe. Until the subscription received had indicated the responsibility of the parties to be equivalent to the contemplated cost of the road, or that it would become so, there was neither an inducement to organize the company, nor security for capitalists to lend upon.

We conclude that there is no weight in the suggestion, of its having been meant by the Legislature that the road was to be carried within a county before it could subscribe. The subscription depended upon the presentment of the grand jury, and the agreement of the commissioners to take for the county four thousand shares of the company's capital stock. And it was agreed that the subscription was to be paid for in bonds of the county of not less than a thousand dollars, payable in twenty years after date, or at such other time as the company and the county might agree upon. The company having agreed to pay the interest until such time as the Northwestern railroad should be completed, the county bonds were made and paid to the company accordingly; and we have no doubt of the obligation of the county to pay them.

But it is now said, that such of the county bonds as were sold by the president and directors of the railroad at a discount

are "avoidable" in the hands of the purchasers of them, because the act for making and paying them to the company declares that the company shall not sell them "at less than their par value." Such are the words of the statute; and it was proved and conceded by the plaintiff that they were sold at a discount of twenty-five per cent.

The words of the seventh section are, 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.

Those words have a meaning, but not such as it was assumed to be when the court was asked to instruct the jury upon the fourth prayer. A comparison of the seventh section, in which they are, with the fifth and sixth sections of the act, will show that they were meant to secure to the counties the par value of their instalments, as those were to be paid in bonds, from any reduction by the sale of them at a discount, to the loss of the county, after the railroad company had received them in payment. The words are, whenever bonds of the respective counties are given in payment, the same shall not be sold by the railroad company at less than par value, &c.; and such bonds shall not be subject to taxation until the clear profits of the railroad shall amount to six per cent. upon the cost of it. Such was the understanding of the commissioners and the railroad company when they entered into their agreement for the subscription. The agreement itself, the stipulation that the subscription was to be paid by bonds, the undertaking of the company that it would relieve the county from the payment of interest of its bonds, and that the interest should be on their par value until the entire railroad was completed—and every section of the act shows it to have been the intention of the Legislature to have the railroad constructed by money to be borrowed upon bonds, payable at a distant date—indicate the correctness of our interpretation of the limitation upon the sale of the county bonds at less than par. And the conclusion is strengthened by consulting the sixth section of the act, giving to the company the right to pay an interest of six

per cent. per annum to the stockholders, on instalments for subscription paid by them, until the railroad should be finished; and requiring, when that happened, that all interest which had been paid in the meantime should be credited to the cost of the construction of the road—in that, placing all of the stockholders upon an equality as to the cost of the road, and securing to them the number of shares for which they had subscribed, and for which they had paid by instalments. Without such an arrangement, that equality could not have been produced, and this result in respect to the subscription of the counties paid by bonds would have followed. If the railroad could have sold the bonds at less than par, after they had been received in payment, and charged the discount to the counties, in that case the latter could not have received the number of shares for which they had subscribed, by permitting a part of the sum, for which they were authorized to tax the counties, for the ultimate payment of the bonds, to be diverted to a purpose neither contemplated nor allowed by the act; and, in respect to the county of Lawrence, its subscription would have been reduced to fifty thousand dollars less than the amount of the bonds which it had issued and paid to the railroad, supposing the whole to have been sold at 25 per cent. less than their par value, in that way reducing its dividend—three thousand dollars per annum—when the clear income of the company, after it had been finished, should become 6 per cent. per annum upon the cost of the road.

We are confirmed in the opinion, that the limitation upon the company that it should not sell the bonds of the counties at less than par, after it had taken them in payment of the subscription, had no other meaning than this, that they should not so sell them at the expense of the counties—causing any loss to them less than their par value, as they were payable to the company at par in twenty years, with an annual interest of six per cent.

It has also been insisted, that the county of Lawrence could not subscribe before the Northwestern Railroad Company had been organized, or before its line had been indicated by a sur-

vey on the ground and a part of it had been fixed for construction within the county; and it is said that no part of it had been built in it.

Having already shown that the right to subscribe was given to enable the company to organize, and that organization was essential before the route of the road could be determined, and that there was no direction in the act when that was to be done, and that a wide discretion had been given as to the point of its beginning, and how it should be continued in the counties, and where it should terminate on the Pennsylvania and Ohio State line, we must declare that the objection has neither pertinency nor force against the subscription made by the county of Lawrence. Another objection is, that the right to subscribe depended upon a part of the road having been built within the county.

We deem it only necessary to repeat what has just been said, that the act indicates no point at which the line of the road should be begun. That, taken in connection with the fourth section of the act, it could not have been the intention to require a part of the railroad to be built in each county before it should subscribe; its language being, that its franchises should be used and enjoyed when five miles of the railroad had been finished, as fully as if the whole road had been completed.

We therefore answer, that there was authority in the county of Lawrence constitutionally, and by the proper construction of the act of the 9th February, 1853, to subscribe to the stock of the Northwestern Railroad Company as the subscription was made; and that the bonds issued by the county, and given in payment of its subscription to the railroad company, are valid, and binding upon the county to pay and redeem them according to their tenor.

We answer to the second prayer, that there was no deficiency in the action of the grand jury in making its presentment, or in setting forth the terms in which the subscription should be made.

We answer to the third prayer, that the county of Lawrence was authorized to issue such bonds as they did issue, and pass

to the railroad company in payment of its subscription to the Northwestern Railroad Company.

To the fourth prayer, we answer, that the sale of the county bonds, by the railroad company, at less than par, does not avoid them in the hands of the purchaser.

THE SHIP MARCELLUS—*Baxter, Claimant; Camp, Libellant*

1 In a case of collision between two sea-going vessels, where the only question proposed by the pleadings is one of fact, where there is much discrepancy between the witnesses as to every averment, and where both the courts below have concurred in their decision, it is not to be expected that this court will reverse the decree upon a mere doubt founded on the number or credibility of the witnesses.

2 In such a case the appellant has all presumptions against him, and the burden of proof is thrown on him to show affirmatively that an error has been committed, and if there be sufficient evidence on the record to support the decree which *was* made, the appellant cannot get it reversed by establishing a theory, supported by some of the witnesses, on which a different decree *might* have been rendered.

Appeal from the Circuit Court of the United States for the district of Massachusetts. In admiralty.

Hugh N. Camp, Edward W. Brunsen, and Charles Sherry, partners, doing business in New York city, under the firm of Camp, Brunsen & Sherry, filed their libel in the District Court for Massachusetts, against the ship Marcellus, of Boston, her tackle, apparel and furniture, alleging that they were the owners of one hundred and seventy boxes and forty hogsheads of sugar, worth ten thousand dollars, laden on board the schooner Empire, bound from Boston to Bristol, Rhode Island; that while the schooner, with the sugar on board, was sailing out of Boston harbor, in the narrows between Gallup and Lovell's islands, the ship Marcellus carelessly and negligently ran afoul of her, striking her on her larboard side, nearly amidships, so that she sunk and the sugars were totally destroyed and lost. The circumstances of the collision are minutely set forth in

the libel—the condition of the schooner, the vigilance of her officers and crew, the relative position and course of the two vessels, the state of the wind, the hail from the ship to the schooner, and the reply of the schooner, &c.; from all which the conclusion is stated that the schooner did everything that she could or ought have done to avoid the collision and save the cargo, and that the loss was caused solely by the culpable misconduct of the ship.

The proper process being issued, and the ship arrested, John A. Baxter, one of the owners, for himself and the other owners, namely, William Dillamay and Charles H. Dillamay, of Boston, Josiah Gorham, Alexander Baxter, Sylvester Baker, jr., James B. Crocker, and John Gorham, of Yarmouth, Sylvester Baxter, Asa Lathrop, Owen Bearse, Robert B. Hallet, and Thacher Hinchley, of Barnstable, came and claimed the ship, and she was delivered on the usual stipulations being given.

The answer of the claimants admitted that a collision did take place between the two vessels at the time and place set forth in the libel, but denied, circumstantially and specifically, all the material allegations of the libel which tended to show that it was caused by the fault of the ship. The answer averred that the injury to the schooner was caused entirely by her own fault and negligence; that she was badly and unskilfully navigated; that she might easily have avoided the ship with proper care and effort, and ought to have done so; and that the ship was well and carefully navigated, but on account of the schooner's mismanagement it was impossible for the ship to go clear of her.

The witnesses were very numerous on both sides. The lists were composed of the officers, seamen, and others on board of the ship and the schooner, and of persons who saw the collision from other vessels which were in sight at the time; and in their testimony there was much conflict and contradiction.

The District Court decreed that the libellants recover against the ship Marcellus, her tackle, apparel, and furniture, $9,654 57, with costs. From this decree the libellants took an appeal to the Circuit Court, where the cause was elaborately reviewed

and the evidence thoroughly analyzed by Mr. Justice *Clifford*, who affirmed the decree of the District Court, adding to it the interest which had accrued in the mean time. The libellants then took their appeal to this court. The arguments here were very full, but consisted mainly of discussions on the matters of fact, each party contending that his own view of the case was supported by the preponderating weight of the evidence.

Mr. Russell, of Massachusetts, for the claimants.

Mr. B. R. Curtis, of Massachusetts, for the libellants.

Mr. Justice GRIER. The collision, which is the subject of inquiry in this suit, took place in the narrows, in Boston harbor, between Lovell's island and Gallup island.

The libellants are owners of the schooner Empire, and the appellants of the ship Marcellus. The schooner was going out, the ship coming into Boston harbor. They were sailing in opposite courses, through a channel of about three hundred and sixty feet.

The libellants charge in their libel, that the collision was wholly attributable to the carelessness and negligence of those in the ship. They allege that the wind, just before and at the time of the collision, was south-southwest; that the schooner was sailing on the western side of the channel, close-hauled on the wind, with her starboard tacks aboard, and with all or nearly all her sails set; that she was steering southeast by south, working up to the wind, in order to give the ship as much room as possible; that the ship was sailing up the channel at great speed and with the wind free, so that she might have passed the schooner on the larboard side without difficulty; that as the ship approached towards the point of danger, the schooner hailed her to keep off; that the hail was answered from the ship, requiring the schooner to luff, which was impossible, as she was already close to the wind; that the schooner did not change her course, but that the ship, immediately after she hailed the schooner, luffed, and instantly ran into the schooner, and presently both vessels drifted to the leeward shore.

In their answer, the respondents admit that the collision occurred at the time specified in the libel, and that the ship was running free on her larboard tack, but allege that the collision took place on the easterly side of the channel, and that every possible precaution was taken by the ship, by hailing and otherwise, to prevent the vessels from coming in contact. Their theory is, that it was occasioned entirely through the fault and mismanagement of those in charge of the schooner, and accordingly allege that the wind at the time of the collision was southwest; that the ship between six and seven o'clock was sailing along the leeward edge of the channel, hugging the shore as close as it was possible for her to do with safety; that while so passing, the schooner was discovered some distance ahead coming down the harbor with a free wind, and appearing at first to be going to the windward of the ship, as she should and might easily have done, but that she afterwards changed her course as if going to the leeward, and when she had approached within a short distance of the ship, luffed across her bows, resulting in a violent collision, sinking the schooner and damaging the hull, rigging, and spars of the ship, for which they pray they may be allowed.

The only question proposed by these pleadings is one of fact. In this, as in all other cases of the kind, there is great discrepancy and conflict in the testimony of the witnesses, as to every averment in the pleadings. We have had occasion to remark more than once, that, when both courts below have concurred in the decision of questions of fact under such circumstances, parties ought not to expect this court to reverse such a decree, merely by raising a doubt founded on the number or credibility of witnesses. The appellant in such case has all presumptions against him, and the burthen of proof cast on him to prove affirmatively some mistake made by the judge below, in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered.

When the wind is southwest, it is the general rule that ves-

sels going out shall keep to the windward side of the channel, and the vessels coming in the leeward. The witnesses, who could know best, testify, that throughout the passage down the narrows the schooner was kept close to the wind, and was not suffered to fall off, and did not luff at all. Others may have formed erroneous judgments. But if their testimony be untrue, they must have wilfully perverted the truth. It is a common mistake to attribute the motion of one of two passing bodies to the other. Calculations of time and distance, resting on the loose recollections of witnesses, can seldom be relied upon with much confidence. The collision took place in the evening, when it was not quite dark. The testimony of three of the ship's crew concurs with that of witnesses on the schooner, in establishing the state of facts as alleged in the libel.

The pilot of the ship had observed the approach of the schooner, and directed the mate to go forward and see how she was standing. He did so; and observing that the schooner was heading to windward of the ship, he responded to the order: "all right, she is going to windward;" but in a short time was heard to say: "luff, hard-down, hard-down, luff," which were the first words heard by the man at the wheel; the pilot repeated the words, "hard-down, luff." The wheel was let down, or nearly so, when the order was changed to "hard-up;" but before this last order could have any effect, the collision took place.

Another of the ship's crew gives a similar account, with some difference: that the mate of the ship called out to the schooner "to luff;" and repeating the command to them, "you must luff, heave her hard-down." During this colloquy, the ship luffed, as the witness supposed, in consequence of the pilot having made the mistake, of supposing the mate's order "to luff" was directed to him.

The collision was attributed by some on the ship to the fact, that the mate "*bothered*" the pilot. This testimony, on the part of the crew of the ship, corroborates that of the officers and crew of the schooner. Without any further attempt to vindicate the correctness of the decree, by a minute comparison of the testimony, it is sufficient to say, that the weight of

the testimony is on the side of the charges in the libel, and supports the decree of the court below, which is therefore affirmed.

CLEVELAND *vs.* CHAMBERLAIN.

1. If it be made to appear, in the case of an appeal pending in this court, that the appellant has purchased and taken an assignment of all the appellee's interest in the decree appealed from, the appeal will be dismissed.
2. The rule laid down in *Lord* vs. *Veazie*, (8 How., 254,) where both parties colluded to get up a case for the opinion of the court, is applicable to a case where the appellant becomes sole party in interest and *dominus litis* on both sides.
3. An appellant who becomes the equitable owner of the whole opposing interest, who procures a discontinuance as to his co-defendants, against whom no final decree is made, employs counsel on both sides, and makes up a record to suit himself in order that he may obtain an opinion of this court, affecting the rights and interests of persons not parties to the pretended controversy, is justly chargeable with conduct highly reprehensible and a punishable contempt of court.
4. The third parties, whose rights and interests may be affected by the decision of the court in a dispute alleged to be merely colorable, will be heard on affidavits or other proofs to show that it is not carried on in good faith between the parties who are nominally the appellant and appellee.

This was an appeal by the defendant from the District Court of the United States for the district of Wisconsin.

Newcombe Cleveland, of Illinois, brought his bill in equity in the District Court against the La Crosse and Milwaukie Railroad Company, Byron Kilbourn, Moses Kneeland, James Luddington, D. C. Freeman, Charles D. Nash, of Wisconsin, and Selah Chamberlain, of Ohio, complaining that he had recovered a judgment against the railroad company for $112,271 76, besides costs, which remains unsatisfied, and on which the complainant issued his execution and levied upon

the road of the company, and all its property, real and personal, and upon its franchises, rights and privileges, as by the laws of Wisconsin he had a right to do; that the railroad company fraudulently, and with intent to cheat its creditors, made to Selah Chamberlain a pretended lease of its railroad, except the Watertown division, for an indefinite time, and a sale of all its personal property except what was used on the Watertown division, together with all its rights, privileges and franchises connected with or incident thereto; that Chamberlain entered into possession of the road and took into his costody the property of the company conveyed to him by this fraudulent contract; that with a like fraudulent intent, the company made a similar lease and contract of sale for the Watertown division of their road, (but this lease was for a certain limited time,) and the personal property used thereon, with D. C. Freeman, who, under the contract, went into possession thereof; that while the complainant's action, in which he recovered the judgment already mentioned, was on trial, the railroad company fraudulently confessed judgment to Chamberlain for $629,105 22, though the company did not, at that time, owe him a sum exceeding fifty thousand dollars, and all of the judgment beyond that sum was without any consideration whatever. The bill charges Kilbourn, Kneeland, and Luddington, who were directors of the company, with fraudulently acquiring title to certain lands of the company worth $100,000 by means of a pretended sale made by themselves to another person, who was their agent, for $20,000 in stock of the company. The bill prays that the contracts with Freeman and Chamberlain, and the conveyances to the other defendants of the lands, as well as the judgment confessed by the company to Chamberlain, may be declared fraudulent and void.

The material charges of the bill were denied in the several answers of the defendants. Much evidence was taken on both sides, and the case was most fully heard and examined by the judge of the District Court, who decreed that the contract and judgment of Chamberlain were fraudulent, and, as such, should be set aside. The contract with Freeman having expired by its own limitation, no decree with respect to him was

made, except that he pay a certain part of the costs. Against the other defendants the court made no final decree, but as to the conveyance of the lands to Kneeland and Luddington referred it to a master to ascertain the annual income of the lands they purchased, the value of the improvements made since their purchase, and the interest upon the purchase money paid. The suit against them was afterwards discontinued. The La Crosse and Milwaukie Railroad Company pending the suit had been dissolved, and their charter and property were transferred to another corporation, organized under the name of the Milwaukie and Minnesota Railroad Company. The only party, therefore, against whom a final decree was made, was Chamberlain, whose judgment and contract were set aside as fraudulent. Chamberlain took an appeal to this court.

Mr. Black, of Pennsylvania, on behalf of the Milwaukie and Minnesota Railroad Company, its stockholders and creditors, filed sundry affidavits, and moved that the appeal of Chamberlain be dismissed on the ground that Chamberlain himself was the only party on record who had any interest in the cause either way—that he was conducting the appeal in this court on both sides—and that other parties not named on the record would suffer by the decree which he might thus procure to be made. The motion was set for argument, and notice given to the counsel of Chamberlain.

Mr. Black, in support of his motion. The record with the documents and affidavits on file prove incontestably that Chamberlain bought Cleveland, the plaintiff below, entirely out. Cleveland's interest in the decree from which this appeal is taken, was the amount of his judgment against the La Crosse and Milwaukie Railroad Company for $112,000. Chamberlain has paid him the whole amount of that judgment, and taken an assignment of it. The affidavits prove this. Cleveland has admitted it, and Chamberlain himself has sworn to it in his answer to a bill filed against him by another party, which is here produced. Besides, it is made perfectly clear by the acknowledged fact, that Chamberlain, claiming to be the owner

of the Cleveland judgment, has received and receipted for a part of it out of certain funds of the railroad company, which were applicable to it. In addition to that, we have here affidavits (the truth of which will not be denied) showing that Chamberlain has employed, or at least has agreed to pay, the counsel on both sides of this cause. Those who defend the decree of the court below, as well as those who prosecute the appeal, are in his service.

There being no real dispute between the appellant and the appellee, why should the cause be suffered to stand for a moment on your record? What chance is there of a fair hearing? Chamberlain, as he pays for the arguments on both sides, has the power, if not the right, to control them. Of course he will take care that the cause of the appellee is given away, and the decree of the District Court be reversed. And he wants it reversed, not because there is any conflict between him and the appellee, (for he has made the appellee's interest his own,) but because he desires to affect injuriously and wrongfully the rights of third parties.

The parties on whose behalf this motion is made were bondholders and mortgagees of the La Crosse & Milwaukie Railroad Company, who had advanced two millions of dollars, the money with which the railroad was built. They foreclosed the mortgage and sold out the company, its property, charter, and all. Then they converted their debt into stock, and formed a new company under the name of the Milwaukie & Minnesota Railroad Company. Their stock and franchises in this new company are all they have, or can ever get, for their bonds. They took the road and franchises subject to all legal incumbrances on them. Inasmuch as the transfer to them was after the date of Chamberlain's judgment against their predecessors, and after the date of his lease, they are estopped as privies by the contract and the judgment as completely as the La Crosse & Milwaukie Railroad Company would have been if it had continued to exist. Now, therefore, if Chamberlain by this one-sided arrangement can get his judgment and contract reinstated, and the decree reversed which pronounces them fraudulent, he can have the full advantage of them—they will be incumbrances on the

road, property, and franchises, and the Milwaukie & Minnesota Railroad Company will lose by the contrivance a sum sufficient to reduce the value of their stock very materially.

The record of the case as returned shows one thing which ought not to be overlooked, and that is, that the counsel of Chamberlain whom he employed on one side, and his counsel whom he employed on the other side, agreed and stipulated that certain portions of the record should be omitted and parts only of it be sent up to this court. There is no allegation that this was done for purposes of deception or with any fraudulent intent. It is mentioned to show how easy it is to impose upon the court, if such things be allowed at all, and how wide the door is, which you will open to fraud and imposture, if you sanction such conduct as that of Chamberlain.

The statement of the case is the legal argument which condemns this appeal to be dismissed. Where there is but one interest represented in a cause without any actual controversy to be decided, no court will hear it. Where there is a pretended dispute between parties merely nominal, it is a fraud upon the court, even where the object is to get an opinion for the benefit of the parties themselves; but if the purpose be to injure third parties by collusion between those who are named in the record, it would be a scandal to the administration of justice to let it go on. The case of *Lord* vs. *Veazie* (8 How., 251) was not nearly so strong as this, and there the writ of error was dismissed and the judgment of the Circuit Court pronounced a nullity, with expressions from the Chief Justice of the strongest reprobation. In the case of *Laughlin* vs. *Peebles*, (1 Penn. R., 114,) a writ of error was quashed simply because the party who obtained judgment in the court below had received the amount of it; and in *Smith* vs. *Jack*, (2 W. & S., 102,) the writ was dismissed because the plaintiff in error had sued out an execution for costs.

Mr. Reverdy Johnson, of Maryland, for Chamberlain, opposed the motion. The transfer of the judgment from Cleveland to Chamberlain cannot injure the parties who complain of it. If one of those persons chose to sell and another to buy a thing

to which nobody else had a claim, what right does that give to third parties to intervene? The judgment in the hands of Chamberlain can do no more harm to the bondholders than it would have done if Cleveland had continued to be the owner of it.

The transfer was not made before, but after the appeal was taken to this court. The appeal was taken in good faith to prevent Cleveland from using the erroneous decree which he had obtained in the District Court, in such manner as to destroy the just rights of the appellant. The appeal having come regularly and properly here, it is the duty of this court to determine it without reference to the fact that the appellee has sold his interest in the subject-matter of the dispute. He had a right to assign his judgment. If he had sold to a third party, that would not have been thought of as an objection to the appeal. His right to sell to his adversary is not less clear. In any case his assignee would be, and is, entitled to all the rights which he himself could have exercised.

But it is said that he has employed counsel on both sides. The fact is not admitted; but suppose it to be true for the argument's sake: it was, under the circumstances, not only blameless but meritorious. Having the right to a hearing, it was proper that the hearing should be full, and the cause be thoroughly discussed in all its aspects. Mr. Chamberlain owed it to the courts, owed it to public justice, and, considering the nature of the charges in the bill, he owed it to himself, to see that an argument was made which could not be called one-sided. The counsel alleged to be employed for the appellee have a character altogether too high to permit a suspicion that they would collude with their opponents. The argument will no doubt be conducted fairly, and in good faith to the court as well as to the client.

This is not the case of *Lord* vs. *Veazie*, nor anything like it. In that case the suit was collusively got up, with a fraudulent intention underlying its very inception, and tainting it from the beginning. The court declared the whole proceeding to be a nullity. But here it is not denied that an actual controversy existed between the parties; that it was strongly contested in

the court below; that a decree most seriously affecting the interests of one party was pronounced. From that decree an appeal was taken regularly and fairly for the honest purpose of reversing it, and the fact that one of the parties afterwards sold out to the other does not in any degree liken it to the case cited. The counsel for the bondholders has been misled by the Pennsylvania cases, which are not founded in any general principle, and therefore weigh little or nothing as authority here.

Mr. Justice GRIER. This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. By the intervention of a friend he has purchased the debt demanded by Cleveland in his bill, and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.

There is no material difference between this case and that of *Lord* vs. *Veazie*, (8 How., 254,) when the whole proceeding was justly rebuked by the court as "in contempt of the court, and highly reprehensible." That case originated in a collusion between the parties. In this case the appellee, who was a judgment-creditor of the La Crosse and Milwaukie railroad, filed his bill to set aside a fraudulent conveyance of the debtors' property made to the appellant, and other fraudulent conveyances of their lands made to certain directors of the company, who were also made parties respondent. The case was prosecuted with vigor by the complainant till a decree was obtained, (on the 11th of February, 1859,) setting aside the various assignments, and the case "committed to a master to ascertain and report the annual income of the several lots described in the bill," &c. This was not a final decree. Nevertheless, an appeal was permitted to be entered by Chamberlain on 12th of February, 1859. But the record was not brought up to this court for a year and a half, nor so long as there were parties litigant who had adverse interests. About a month after the decree was entered, Chamberlain became the equitable owner of Cleveland's judgment, and the "*dominus litis*" on both sides.

He then agreed to pay counsel who appeared for Cleveland, the appellee, but, for anything that appears, without the knowledge of the counsel, who, in July, 1860, entered a discontinuance as to the parties, against whom a decree had not been entered.

It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited in this alone, that *there* both parties colluded to get up an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy.

We repeat, therefore, what was said by the court in that case: "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

It is but proper to say, that the counsel who have been employed in the case are entirely acquitted of any participation in the purposes of the party.

This case came on to be argued on the transcript of the record from the Circuit Court of the United States for the district of Wisconsin; and it appearing to the court here, from affidavits and other evidence filed in this case in behalf of persons not parties to this suit, that this appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court, to affect the interests of persons not parties—it is therefore now here ordered and adjudged by this court, that the appeal in this case be and the same is hereby dismissed, with costs.

VANCE *vs.* CAMPBELL ET AL.

1. Where a patentee, suing for an infringement of his patent, declares upon a combination of elements which he asserts constitute the novelty of his invention, he cannot, in his proofs, abandon a part of such combination and maintain his claim to the rest.
2. Much less can he prove any part of the combination immaterial or useless.
3. The combination is an entirety; if one of the elements be given up, the thing claimed disappears.
4. The 9th section of the act of 1837, (5 U. S. Stat., p. 194,) which provides that the suit shall not be defeated where the patentee claims more than he has invented, applies only to cases where the part invented can be clearly distinguished from that claimed but not invented.
5. In a suit for the infringement of a patent right, no notice is necessary to justify the admission of evidence on behalf of the defendant to show the improvements existing at the date of the plaintiff's invention in the class of articles to which it belongs.
6. The rules of evidence prescribed by the laws of a State are rules of decision for the United States courts while sitting within the limits of such State within the meaning and subject to the exceptions contained in the 34th section of the judiciary act.
7. Where a bill of exceptions sets out that a witness was offered, was objected to on the ground of incompetency, and rejected by the court below, but does not state what facts he was called to prove, this court will not presume that his testimony would have been immaterial if it had been heard.

Error to the Circuit Court of the United States for the southern district of Ohio.

This suit was commenced in the Circuit Court at Cincinnati, December term, 1859, by Vance against Campbell, Ellison, and Woodrow. Judgment for defendants. Writ of error sued out by plaintiff. The question argued here and the material facts bearing upon it are fully discussed in the opinion of the court.

Messrs. Lee and *Fisher*, of Ohio, for plaintiff in error.

Mr. Lincoln, of Ohio, for defendant in error.

Mr. Justice NELSON. This is a writ of error to the Circuit Court of the United States of the southern district of Ohio.

The suit was brought by Vance against the defendants in the court below, for the infringement of a patent for certain improvements in cooking stoves.

The patentee recites in his specification, that it has been very difficult heretofore to make the bottom and back plates of the oven sufficiently hot, and equally difficult to prevent the front and top from becoming too much heated. For this difficulty, he says, he has devised a remedy, which consists in a particular arrangement of the flues, for the purpose of equalizing the draught above and below the oven.

To heat the oven equally on all sides, he further observes, it must be uniformly enveloped with heated products of combustion; and, to this end, the flue is divided in front of the oven into two branches, one passing above, the other below the oven, and which reunite near the middle of the back flue, where they enter the pipe *i*, or smoke-pipe, which is made to descend to that point. The patentee then speaks of certain irregularities that would still exist in the distribution of the heat around the oven, to prevent which he places a plate A in front of the cold-air chamber, so as to form a flue in front, whose mouth is at the same distance from the flue above the oven that the lower end of the pipe *i* in the back part of the stove is below the oven; and these flues being at all times unobstructed, their action will be uniform, and the heat be equally distributed under all circumstances on the several sides of the oven. The patentee then states, that he claims as new, and for which he desires a patent, "the combination of the diving pipe *i* with the flues F, arranged as herein described, for the purpose of evenly distributing and equalizing the heat on four sides of the oven, without using or requiring any dampers, as herein set forth."

The main point in the case turned upon the question of infringement. The defendants' stove had no plate A in front of the cold-air chamber, forming a front flue; and, hence, one of

the elements of the plaintiff's combination was not used; and, if so, there would be no infringement. The plaintiff, however, sought to get rid of the objection, by proving that that part of his contrivance and claim were immaterial and useless, and that the diffusion of the heated air around all sides of the oven would be as effectual without as with it. Assuming this proof to be competent to help out the infringement, the patent would stand on the combination of the diving pipe *i* and flues, as arranged, without the front flue, formed by the plate A in front of the cold-air chamber, and the division of that flue called the "mouth" in the specification.

Now, the plaintiff in his declaration sets out the patent, specification, and claim as issued to him by the Government, and founds his action upon them as thus set out, and charges the defendant as having infringed the invention as thus claimed. The infringement as charged is denied. This is the issue presented for trial, and which the defendants were called upon and were bound to prepare to meet. This issue involved the question, whether or not the defendants had infringed the improvements in the cooking stove, consisting of a combination of the diving pipe *i* with the flues, as arranged, one of which was a flue in front of the stove formed by plate A, the flue being one of peculiar construction. It is quite apparent, if this part of the combination is abandoned, and the remaining part of it relied on alone, the issue is changed, and the defendants surprised, the pleadings misleading instead of advising them of the question to be tried.

It is true, by the ninth section of the act of 1837, (5 U. S. Stat., p. 194,) it is provided, that the suit shall not be defeated where the patentee claims more than he has invented; it must be, however, in a case where the part invented can be clearly distinguishable from that claimed, but not invented.

This provision cannot be applied to the present case, for, unless the combination is maintained, the whole of the invention fails. The combination is an entirety; if one of the elements is given up, the thing claimed disappears.

Besides the above view, it is most apparent, from an examination of the specification, that the patentee not only described,

but claimed the front flue formed by the plate A, fig. 2, as a material and important part of the arrangement for distributing equally the hot air on the several sides of the oven. To prevent irregularities, referred to and particularly described, he observes: "I place the plate A, as in fig. 2, so that it will form a flue in front of the cold chamber, whose mouth (as it is called) is at the same distance from the flue above the oven that the lower end of the pipe *i* is above the flue below the oven; and these flues being at all times unobstructed, their action is uniform, and the heat is equally distributed, under all circumstances, on the several sides of the oven." The patentee might as well have undertaken to prove any other part of the combination immaterial and useless, as the part above, and its uses so particularly described. Indeed, according to the doctrine contended for, a patent would furnish no distinct evidence of the thing invented, as that would depend upon what part of the specification and claim the jury might think material or essential.

Several exceptions were taken to the admissibility of evidence offered by the defendants, but without referring to them specially, it will be a sufficient answer to say, that it was competent and relative as showing the state of the art in respect to improvements in the manufacture of cooking stoves at the date of the plaintiff's invention. No notice was necessary in order to justify the admission of evidence for this purpose.

The plaintiff, in the course of the trial, was offered as a witness, and objected to by the defendants as incompetent, and his testimony was excluded. It is admitted that the testimony of the parties to the suit is competent, according to the rules of evidence in the State courts of Ohio.

The thirty-fourth section of the judiciary act provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States. This section has been construed to include the rules of evidence prescribed by the laws of the State in all civil cases at common law not within the exceptions therein mentioned. The point has not been, perhaps, expressly decided in a case reported in this court, but

the principle has been recognised in several cases. (12 Peters, 89; 6 How., 1; 12 How., 361.)

The facts which this witness offered to prove are not stated in the bill of exceptions. We cannot, therefore, disregard the exception upon the idea that the testimony could not have been material, or could not have changed the result of the verdict.

Judgment reversed—venire de novo.

HAUSSKNECHT *vs.* CLAYPOOL ET AL.

1. The rules of evidence prescribed by the laws of a State are rules of decision for the United States courts while sitting within the limits of such State, within the meaning and subject to the exceptions contained in the 34th section of the judiciary act.
2. Where a bill of exceptions sets forth that a witness was produced, was asserted to be competent by his counsel, and was rejected by the court, a court of error will imply that the witness was material to sustain the issue without a direct statement to that effect in the bill of exceptions.
3. Brevity in bills of exception commended.

Error to the Circuit Court of the United States for the southern district of Ohio.

Haussknecht brought trespass on the case against Claypool and Lynn in the year 1859, for an infringement of his patent for an improved running gear for carriages. The suit was commenced in the Circuit Court of the United States for the southern district of Ohio and the damages laid at $5,000. The defendants pleaded the general issue and brought divers witnesses to prove that the plaintiff was not the original inventor of the thing he had patented, but that it had been described in printed works, and was in actual public use at a time anterior to the date of his patent. The plaintiff himself was produced as a witness to sustain his own case. His counsel asserted that by the law of Ohio (sec. 310, Code of Civil Procedure) he was a competent witness in his own behalf. The defendants ob-

jected on the grounds: First, that he was a party to the cause, and, therefore, incompetent even by the laws of Ohio. Second, that no notice of his intention to testify had been given to the defendants or their attorney; and, third, that by a *rule of the court*, parties to suits were incompetent witnesses. These objections the court sustained, and the plaintiff's counsel took a bill of exceptions. Verdict for defendants. Writ of error to Supreme Court of the United States sued out by plaintiff.

Messrs. Lee and *Fisher*, of Ohio, for plaintiff in error. Section 310 of the Ohio Code of Civil Procedure reads thus: "No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime, but such interest or conviction may be shown for the purpose of affecting his credibility." The 34th section of the judiciary act of 1789 provides, "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." It would seem to require no proof to show that a rule of evidence was "a rule of decision," within the meaning of this act. But this court has expressly decided that question: *McNiel* vs. *Holbrook*, (12 Pet., 84.) "The rules of evidence prescribed by the statute of a State are always followed by the courts of the United States when sitting in the State in commercial cases as well as in others." *Sims* vs. *Hundley*, (6 How., 1.) But it may be said that there was a rule in the court below which disqualified this witness. It is only necessary to reply to this that the court below could not abrogate or overcome a statute of the State by a general rule, any better than by a decision. The rule and the ruling stand on the same footing. No notice that the plaintiff would testify as a witness was necessary in the court below. Section 313 of the Ohio code, which requires such notice, was repealed April 12th, 1858. See section 3d of the statute of Ohio, of said date, entitled "An act to amend the 313th and 314th sections of the Code of Civil Procedure."

It is objected that the bill of exceptions does not aver that the rejected evidence was material to the plaintiff's cause.

In *Smith* vs. *Carrington*, (4 Cranch, 62,) this court held, that if evidence were illegally admitted, the court could not inquire into its weight or importance, but would reverse the judgment; and we suppose the converse of this proposition is equally true, and if evidence be illegally rejected, this court will not inquire into its importance, but will reverse the judgment.

Mr. Lincoln, of Ohio, for defendant in error. It is true, as claimed on behalf of the plaintiff in error, "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply." And it is also true, that the Code of Civil Procedure of the State of Ohio provides, in its 310th section, that "no person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise." But the same code, in its 604th and 605th sections, enacts, that its provisions shall not affect "any special statutory remedy," and that "where by statute a civil action, legal or equitable, is given, and the mode of proceeding therein is prescribed, this code shall not affect the proceedings under such statute, until the Legislature shall otherwise provide; but the parties may, if they see fit, proceed under this act, and in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this code, the proceedings shall be conducted in conformity thereto." And it is provided in the same code, section 106, "that every pleading of fact must be verified by the affidavit of the party, his agent or attorney;" and in sections 83, 85, and 92, "that the rules of pleading heretofore existing are abolished," and that the pleadings shall contain "a statement of the facts constituting the cause of action, (or the defence,) in ordinary and concise language." Is an action for the infringement of rights secured by a patent, in which the

pleadings are specifically regulated by the act of Congress, a case to which the provisions of the Ohio code necessarily apply?

It will be perceived that the provisions of the statute of Ohio, which makes the parties to the record competent witnesses, are by no means of universal application. The design of the new system of civil procedure was to abolish all distinctions between the pleadings in cases at law and in equity, and to simplify issues, by requiring the pleadings to be in ordinary language, and to be verified by oath, and to abbreviate trials by permitting the parties to testify. But it was not designed to apply the new rules of evidence to cases where the new system of pleading is inapplicable. The right of the court below, under its power "to make and establish all necessary rules for the orderly conducting of business, provided such rules are not repugnant to the laws of the United States," to prevent by rule the parties to the record from testifying, is very clear.

It would have been manifestly improper for the court below to have adopted the provision of the Ohio code changing the law of evidence in the "civil action," without at the same time adopting the modes of pleading established by the same code, by which each party, in advance of the trial, is advised of the nature of the testimony to be expected from the adverse party, by the verification, under oath, of the statement of his case, in ordinary and concise language. And the court, in establishing a rule which excludes such testimony from the jury, was equally within the bounds of the law, and within the rules of propriety.

But, at all events, the judgment in the present action cannot be reversed because of the exclusion of the plaintiff's evidence. The record discloses nothing more than that the plaintiff offered himself as a witness, that the court refused to permit him to testify, and that he excepted. It is not shown that his evidence, if admitted, would have been material; nor does it appear that the exception was taken at the time. And all presumptions are against the existence of error.

Mr. Justice NELSON. This suit was brought by the plaintiff in error against the defendants for the infringement of a

patent for an improvement in the running gear of carriages. The verdict and judgment were for the defendants.

The only question presented in the bill of exceptions is, whether or not the plaintiff was a competent witness to give testimony in his own behalf. According to the law of Ohio, parties are competent witnesses. The case falls within the opinion of the court just delivered in the case of *Vance* vs. *Campbell and others*. It is objected that the bill of exceptions does not state that the witness was material, and hence there could be no error in his exclusion. The bill of exceptions is brief, presenting only this single question, and stating no more of the case than is necessary to present it, which practice the court commends.

The bill states that on the trial the plaintiff, to sustain the issue on his part, offered himself as a witness, and his counsel claimed he was competent, &c. Though it would have been more in conformity with the usual practice to have stated that the witness was material to sustain the issue, we think that enough is stated to imply the materiality, and that this objection cannot be maintained.

Judgment reversed—venire de novo.

JEFFERSON BRANCH BANK *vs.* SKELLY.

1. It is the general rule, that the construction given by State courts to State laws and constitutions are binding and conclusive upon the Federal courts; but the rule does not extend to cases in which this court is called on to interpret the contracts of States, though they have been made in the form of laws or by functionaries of the State in pursuance of State laws.
2. Fidelity to the Constitution of the United States makes it necessary, that in such a matter this court should not follow the construction of a State court with whose opinion it cannot concur, and it makes no difference in the obligation whether the contract is in the shape of a law or of a covenant by the State's agents.
3. The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it, which the Legislature has accepted with a declaration, that it is to be in lieu of all other taxation.
4. The rule of construction is strict against the corporators and in favor of the public; and neither the right of taxation, nor any other power of sovereignty, will be held to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.
5. But the State may make a contract not to exercise the taxing power, or to exercise it only within certain limits with respect to a particular subject, and such a contract once made cannot be rescinded by a subsequent legislative act.
6. The 60th section of the charter of the State Bank of Ohio, which requires that six per cent. of the dividends shall be set off for the use of the State, which sum the State consents to accept in lieu of all taxes to which the banks or their stockholders might otherwise be subject, is a contract, and a subsequent law increasing the taxes is a violation of the contract.
7. A provision of the State constitution adopted after the charter of the State Bank, that a higher tax might be imposed on all banks than that stipulated for in the charter of the State Bank, cannot be applied to the State Bank and its branches without a violation of the contract

Writ of error to the Supreme Court of Ohio. The Jefferson branch of the State Bank of Ohio brought trespass in the Com-

mon Pleas of Jefferson county against Alexander Skelly, and charged in their declaration that the defendant took and carried away from the banking-house of the plaintiff, at Steubenville, a certain quantity of gold coin of the value of seven thousand dollars, and converted it to his own use. The defendant pleaded specially, in justification, that he was treasurer of Jefferson county, and, as such, required and authorized by law to collect the taxes assessed in the county of Jefferson; that taxes to the amount of $5,568 88.9-10 had been assessed upon, and were then due from, the plaintiff, which it was the duty and right of the defendant to distrain for; and that the supposed trespass consisted in making such lawful distraint. The plaintiff replied that it was a banking corporation, organized under an act of the State Legislature, entitled "An act to incorporate the State Bank of Ohio and other banking corporations;" that, agreeably to the 60th section of said act, the plaintiff had always regularly and punctually paid to the properly authorized officers six per cent. of its profits; that the 60th section of the charter was a contract between the State and the plaintiff to assess or demand no other or greater taxes from the plaintiff than six per cent. on its profits; and that the taxes for which the defendant alleged that he had made the supposed distraint were assessed and demanded in pursuance of a law which was a violation of the said contract, and therefore void. The defendant rejoined, taking issue on the replication.

The question of law thus raised was, whether the State had a right to impose on the bank any taxes other than those which were stipulated for in the 60th section of the charter, the plaintiff asserting, and the defendant denying, that the section referred to was a contract which made any other or greater taxes illegal and unconstitutional. The verdict and judgment in the Common Pleas were in favor of the plaintiff for $6,292 80, with costs. The defendant appealed to the Circuit Court, where a verdict and judgment for the plaintiff were again rendered, but the judgment was arrested, and judgment finally given for the defendant. Thence the cause was taken, on the plaintiff's petition, to the Supreme Court of the State. The judges of the Supreme Court were of opinion that the said 60th section of

the act of the General Assembly of Ohio of the 24th of February, 1845, entitled "An act to incorporate the State Bank of Ohio and other banking companies," under the provisions of which the said Jefferson branch was organized, is not a contract within the meaning, and entitled to the protection, of that clause of the Constitution of the United States which provides that "no State shall pass any law impairing the obligation of contracts," and that, consequently, the subsequent laws under which the increased taxes were assessed and levied were valid. The judgment of the Circuit Court was, therefore, affirmed, and thereupon the plaintiff took this writ of error from the Supreme Court of the United States.

Mr. Vinton, of Washington city, for plaintiff in error. In this case the Supreme Court of Ohio adjudged:

1st. That the 60th section of the charter of the State Bank of Ohio was not a contract between the State and the bank, within the meaning, and entitled to the protection, of that clause of the Constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts."

2d. That the act of the General Assembly of Ohio, of the 13th of April, 1852, under which the tax in question was assessed against the bank, was a valid law, and obligatory on the bank, anything in said 60th section of said bank charter to the contrary notwithstanding; and that, consequently, the tax assessed under said act was a valid tax, and the bank was bound to pay the same.

The identical question presented by this record has heretofore been twice before this court for decision, and twice decided, after very elaborate examination of the question by the court in each case.

The first in the order of time is the case of the *Piqua Branch of the State Bank of Ohio* vs. *Knoop*, (16 How., 369.)

In that case, a tax was assessed upon the property of the Piqua branch, under an act of the Legislature of Ohio, passed in the year 1851, which the State attempted to collect by suit.

This court then decided that the 60th section of the bank

charter was a contract, and that the bank could not be otherwise taxed than in conformity to that contract, and that the act of 1851, which was in conflict with that contract, was invalid.

The other case was that of *Dodge* vs. *Woolsey*, (18 How., 331.) In that case a tax had been assessed on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio, under the tax act of the 13th of April, 1852, which is the same act under which the tax now in question was assessed. This court again went into an elaborate investigation of the question in that case, and again decided that the 60th section of the State Bank charter is a contract, and that the banks organized under it are subject to no other taxation, and that the act of 1852 impaired that contract, and was also invalid, so far as it was in contravention to that section of the bank charter.

If it should be contended by the defendant in error, as it was in the case of the *Piqua Branch Bank* vs. *Knoop*, and again in the case of *Dodge* vs. *Woolsey*, that the construction put upon the 60th section of the bank charter by the State court ought to be conclusive upon the courts of the United States, the answer to it will be found in the case of the *Ohio Life Insurance and Trust Company* vs. *Debolt*, (16 How., 432,) and *Mechanics and Traders' Bank* vs. *Debolt*, (18 How., 380.)

Mr. Murray, of Ohio, for defendant in error. Does the 60th section of the act passed February 24, 1845, entitled "An act to incorporate the State Bank of Ohio and other banking companies," constitute a contract, within the meaning of the 10th section of the first article of the Constitution of the United States, between the State and the banking companies organized under said act, as to the rate of taxation to which such banking companies shall be subjected?

This precise question has heretofore been submitted to this court, and by it decided in the affimative. *Piqua Branch, &c.*, vs. *Knoop*, (16 How., 369.) But it can hardly be claimed that this one decision, made by a divided court, the majority only agreeing in the conclusion arrived at, but wholly disagreeing as to the reasons therefor, so far settled this question that it

is no longer an open one. A renewal of this decision is asked for because the question is one as to the construction of the constitution and laws of the State of Ohio, and it is the duty of this court to follow the construction given by the Supreme Court of that State. *O. L. I. & T. Co.* vs. *Debolt*, (16 How., 431;) *Elmendorf* vs. *Taylor*, (10 Wheaton, 150–9;) *Swift* vs. *Tyson*, (16 Peters, 1–18;) *Shelby* vs. *Guy*, (11 Wheaton, 361;) *Luther* vs. *Borden*, (7 How., 40;) *Neves* vs. *Scott*, (13 How., 271;) *Raymond* vs. *Longworth*, (14 How., 78–9;) *United States* vs. *Morrison*, (4 Peters, 137;) *Green* vs. *Neal*, (6 Peters, 291.)

The State of Ohio had, under the constitution of 1802, no power to exempt property from taxation so as to bind subsequent Legislatures. An act of incorporation, when accepted, can only constitute a contract between the grantor and grantees as to those rights, privileges, &c., which it was in the power of the grantor to grant. The whole doctrine of contracts, as resulting from an accepted charter, is based on the fact that the King of England had no power to revoke a charter or patent which he had once granted, and which had been accepted and acted upon by the grantees. The King never did grant, and had no power to grant, exemption from taxation, either in whole or in part, any more than he could have divested the Government of its right of eminent domain. Any grant of either would have been beyond his power, and void. Consequently it could have formed no part of any valid contract with his grantees. The Legislature of a State, then, even if they have succeeded to a certain extent to the prerogative of the King, have no power to make a grant of rights and privileges which it was not in the power of the King to grant; and if their right to make a contract, which cannot be revoked by a subsequent Legislature, is based upon the power of the King of England in similar cases, it must be taken subject to all the restrictions and limitations which apply to his exercise of this power. But the Legislature of Ohio, at the time of passing the tax law of April 5, 1859, and the prior laws changing the rule of taxation prescribed by the 60th section of the act of February 24, 1845, was inhibited from passing the same.

At the time of the passage of this act of February 24, 1845,

there was upon the statute-book of Ohio, in full force, an act passed March 7, 1842, (Ohio Law, vol. 40, p. 70,) which provided, that all subsequent corporations, whether possessing banking powers or not, were to hold their charters subject to alteration, suspension, and repeal, at the discretion of the Legislature. Now, if the Legislature in this act of February 24, 1845, had provided in express terms that said act and all rights, privileges, franchise, etc., thereby granted, should not, for a given term of years, be subject to alteration, repeal, or suspension, then it might, with some show of reason, be claimed that the prior act of March 7, 1842, was repealed by implication—a mode of repeal, however, which is never favored; but inasmuch as nothing of that kind is contained in said act, we are bound to presume that it was intended to be made in all respects subject to all general acts then in force having reference to corporations of a similar nature. This 60th section of the act of 1845, in several respects, is wholly wanting in those ingredients which are indispensable requisites to a contract.

That it was designed by the Legislature to constitute a contract between the State and banking companies organized thereunder, as to the rate of taxation to which they should be subjected during their existence, will not be presumed.

The contract, if one exists, must be contained in the express terms of the act itself; it must appear therein so plainly and obviously as to be beyond doubt; and if any other construction of the terms of the act than that which makes it a contract can be reasonably given to it, that construction will be adopted. *Providence Bank* vs. *Billings*, (4 Peters, 561;) *Charles River Bridge* vs. *Warren Bridge*, (11 Peters, 420;) *Debolt* vs. *O. L. I. & T. Co.*, (1 O. St. Rep., 573;) *United States* vs. *Arredondo*, (6 Peters, 738;) *Mills* vs. *St. Clair County*, (8 How., 581;) *Perrine* vs. *C. & D. C. Co.*, (9 How., 185;) *Cincinnati College* vs. *The State*, (19 Ohio Rep., 110;) *Richmond Railroad Co.* vs. *Louisiana Railroad Co.*, (13 How., 81;) *Lebanon Bank* vs. *Mangan*, (4 Casey, 452;) *Parker* vs. *Commonwealth*, (6 Barr, 411;) *Bank Pa.* vs. *Commonwealth*, (7 Harris, 152;) *Mott* vs. *Pennsylvania Railroad Co.*, (30 Pa. St. Rep., 24.)

Neither does it follow that by the language used by the Le-

gislature in this 60th section, it was intended or designed to create a permanent measure or system of taxation. *Preble County Bank* vs. *Russell*, (1 O. St. Rep., 313;) *Bank of Columbia* vs. *Okley*, (4 Wheaton, 234;) *Young* vs. *Bank of Alexandria*, (4 Cranch, 397;) *Crawford* vs. *Bank of Mobile*, (7 How., 297;) *B. & S. Railroad Co.* vs. *Nesbit*, (10 How., 396.)

Mr. Justice WAYNE. This case has been brought to this court by a writ of error to the Supreme Court of the State of Ohio.

Its purpose is to revise a judgment rendered by that court, in which it has, among other things, declared, contrary to the uniform decisions of this court upon the same subject-matter, that the 60th section of the charter of the State Bank of Ohio is not a contract within the meaning of that clause of the Constitution of the United States which provides, "that no State shall pass any law impairing the obligation of contracts."

We shall not now reargue the question, nor any point in connection with it, thinking it best to give, without addition, what have been the judgments of this court, when the matter in connection with the charter of the State Bank of Ohio has been before it. The reasoning of the Supreme Court of Ohio has, at all times, had our most respectful consideration. *Hoc non obstante*, however, it is again reproduced by that court as the foundation of its judgment, without other illustration than it had when we first were called upon to review it; and we are now asked to reconsider it by the District Attorney, James Murray, Esquire, upon an intimation, that this court might be induced to reverse its decision in the *Piqua Branch* case, because that judgment of this court involves the construction of the constitution and laws of the State of Ohio differently from what both had been decided to be by the Supreme Court of the State, and that the Supreme Court of the United States should follow or conform to the conclusion of the former, at the same time admitting that there had been an inconstancy of interpretation by the Supreme Court of Ohio in its judgments upon the 60th section of the charter of the State Bank of Ohio.

We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, "though they have been made in the forms of law," or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion: and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State, by its authority.

We have thus given, very much in what has been the language of this court, what has been always its attitude in re

spect to the revisal of the judgments of the Supreme Court of a State upon contracts which have been declared not to be within the protection of the Constitution of the United States.

We will now show, that this opinion may be better understood, in connection with the citations which will be produced to sustain it, the origin of this controversy from its proceedings and pleadings.

It was an action of trespass brought by the plaintiff in error against the defendant Skelly, for forcibly entering the plaintiff's banking-house, and taking and carrying away gold coin, the money of the plaintiff. To this charge the defendant pleaded the general issue, not guilty, and two pleas of justification substantially the same. They are: That the defendant, as treasurer of the county, had received from the auditor for the collection of taxes, a tax duplicate of $5,303 70, which had been assessed in the year 1852 upon the plaintiff's property for State and county taxes, and other purposes; that being unpaid after the time allowed by law for its payment, he had seized and taken from the plaintiffs banking-house $5,568 88 in money of the plaintiff, to satisfy the tax and penalty for default of payment, as he had the right officially to do. To these pleas the plaintiff replied: That the bank prior to 1850 had been incorporated and organized as a banking company, in conformity with an act of the General Assembly entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed the 14th of February, 1845, and as such had carried on business as a branch of the State Bank of Ohio, and was then doing so; that it had at all times, as required by the 60th section of the act, set off to the State six per centum on its profits, deducting from it the expenses and its ascertained losses for the six months preceding; and that the cashier had punctually, within ten days after having done so, informed the auditor of the State that it had been done, and that it had paid the same, whenever required, to the treasurer, upon the order of the auditor, and that they had been and were then ready to pay the amount according to law.

It is alleged, that the bank had performed all required by the 60th section of the act of incorporation, and that from its

acceptance of the act and compliances with it, a contract had been made between the State and the bank, according to the 60th section, that the six per centum on the profits of the bank, to be divided semi-annually and set off to the State of Ohio, should be in lieu of all taxes which the bank and its stockholders, on account of the stock held by them, were bound to pay; and that the assessment set forth in the defendant's pleas of justification was a direct violation of the contract between the State and the banking company. To this replication the defendant made no answer, and a judgment was rendered against them for want of a rejoinder.

In that state of the case, it was carried by appeal into the District Court of Ohio, and there submitted to a jury upon the plea of not guilty, and a verdict was rendered for the plaintiff. But after that judgment, the verdict was arrested by the District Court, upon the ground that the matter set forth in the plaintiff's replication was no answer to the defendant's pleas of justification, and that those pleas were a bar to the plaintiff's recovery.

The case was then carried by appeal to the Supreme Court, and the judgment of the District Court was affirmed, on the express ground that the 60th section of the bank charter was not a contract between the State and the bank, within the meaning of that clause of the Constitution of the United States which provides that "no State shall pass any law impairing the obligation of contracts;" and that the act of the General Assembly, passed the 13th April, 1852, for the assessment and taxation of all property in the State, according to its true value in money, was binding on the Bank of the State of Ohio, and its branches.

Having given the case in its pleading and proceedings in all their irregularities, we now proceed to state what have been the uniform decisions of the Supreme Court of the United States in respect to the protective clause against legislation by the States impairing the obligation of contracts, and particularly of that legislation of Ohio comprehending the present controversy, which its Supreme Court has affirmed to be constitutional, and which is now regularly before us for review

and reversal, in conformity with previous decisions of this court.

First, as to the decisions of this court in respect to the power of a State Legislature to bind the State by a contract, we refer to the case of *Billings* vs. *The Providence Railroad Bank*, that of the *Charles River Bridge Company*, and that of *Gordon* vs. *The Appeal Tax Court*, and to the case of *The Richmond Railroad Company* vs. *The Louisa Railroad Company*, (13 How., 71.) The last, in principle, was identical with that of *The Charles River Bridge* vs. *The Warren Bridge.* The opinion of the majority of the court was put upon the ground that the Legislature of a State had a right to bind the State by such a contract, and the three dissenting judges in that case were of the opinion, as the report of the case will show, not only that the Legislature might bind the State by such a contract, but that it had bound it, and that the charter of the Louisa Railroad Company violated the contract, and impaired its obligation. This court has also decided that the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the Legislature has accepted, with a declaration that it was to be in lieu of all other taxation. *Gordon* vs. *Appeal Tax Court*, (3 How., 133.) The rule of construction in such a case is, that the grant of privileges and exemptions to a corporation are to be strictly construed against the corporators, and in favor of the public; that nothing passes but what has been granted in clear and explicit terms; and that neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.

In respect to the power of a State Legislature to exempt persons, corporations, and things from taxation, and to bind the State by such enactment, we refer to the case of *New Jersey* vs. *Wilson*, (7 Cranch, 164.) The circumstances of that case were these: A legislative act declaring that certain lands should be purchased for the Indians, and that such lands should not be thereafter subject to taxation, it was decided by this court, that such language made a contract between the

Indians and the State, which could not be rescinded by a subsequent legislative act, and that such a repealing act was void under that clause of the Constitution of the United States prohibiting the States from passing any law impairing the obligation of contracts. The case shows what has been the fidelity of this court to the Constitution in this particular. The illustration will be more decisive by briefly stating the circumstances of the case. In 1758 the State of New Jersey purchased the Indian title to lands in that State, and as a consideration for the purchase, bought a tract of land as a residence for the Indians, having previously passed an act declaring that such lands should not be subject thereafter to any tax by the State, any law or usage, or law then existing, to the contrary notwithstanding. The Indians, from the time of purchase, lived upon the land until the year 1801, when they were authorized, by an act of the Legislature, to sell the land. This last act contained no provision in respect to the future taxation of the land. Under it, the lands were sold. In October, the Legislature repealed the act of August, 1758, which exempted the lands from taxation, subjecting them to taxes in the hands of the purchasers. They were assessed and demanded; the purchasers resisted; and, upon the trial of the case, the taxes imposed by the act of 1804 were declared to be unconstitutional. This court then said, the privilege, though for the benefit of the Indians, is annexed by the terms which create it to the land itself, and not to their persons. In the event of a sale, the privilege was material, because the exemption from taxes enhanced its value.

Our reports have other cases of a like kind, passed upon by this court with like results. In every case, the vital importance of a State's right to tax was considered, and the relinquishment of it by a State has never been presumed. The language of the court has always been cautious, and affirmative of the right of the State to impose taxes, unless it has been relinquished by unmistakable words, clearly indicating the intention of the State to do so. This court has always said and acted upon it: "We will not say that a State may not relinquish its right to tax in particular cases, or that a con-

sideration sufficiently valuable to induce a partial increase of it may not exist, but as the whole community is interested in preserving it undiminished, it has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear."

We are aware, that the very stringent rule of construction of this court, in respect to taxation by a State, has not been satisfactory to all persons. But it has been adhered to by this court in every attempt hitherto made to relax it; and we presume it will be, until the historical recollections, which induced the framers of the Constitution of the United States to inhibit the States from passing any law impairing the obligation of contracts, have been forgotten. This court's view of that clause of the Constitution, in its application to the States, is now, and ever has been, that State Legislatures, unless prohibited in terms by State constitutions, may contract by legislation to release the exercise of taxing a particular thing, corporation, or person, as that may appear in its act, and that the contrary has not been open to inquiry or argument in the Supreme Court of the United States.

This brings us to the consideration of the legislation of Ohio, upon which its Supreme Court has passed judgment on the case now before us.

It has been decided three times by this court, that the 60th section of the charter of the State Bank of Ohio was a contract between the State and the bank within the meaning, and entitled to the protection of the Constitution of the United States against any law of the State of Ohio impairing its obligation; and that the acts of Ohio, upon which the Supreme Court of Ohio has assumed the State's right to tax the State Bank of Ohio and its branches differently from the tax stipulated for in the 60th section of the charter, were and are unconstitutional and void.

The first case in the order of time is that of the *Piqua Branch, &c., &c.*, vs. *Knoop.* In that case, we declared the act of 1845 to be a general banking law, the 59th section of which required the bank to make semi-annual dividends, and that the 60th section required the officers of the banks to set off six

per cent. of such dividends in the manner prescribed in it for the use of the State, which sum the State had consented to accept, and would accept in lieu of all taxes, to which the banks or their stockholders might otherwise be subject; that the act was a contract, fixing the amount of taxation, and not a rule or law prescribed until changed by the Legislature of the State of Ohio; that the act of 1851, to tax banks and other stocks the same as property, was an act to increase the tax upon the banks, and that such law being a violation of the State's contract, that the banks were not bound to pay the same; that a municipal corporation, in which is vested some portion of the administration of the Government, may be changed at the will of the Legislature; but that a bank, in which stock is held by individuals, is a private corporation, and its charter is a legislative contract, which cannot be changed without its consent; and in connection, this court again repeated that, by the 60th section of the act of 1845, the State bound itself by contract to levy no higher tax than was mentioned in it upon the bank, should it be organized under that law during the continuance of their charters.

Two years afterward, in 1855, the particulars of the decision, as they have just been stated, were reaffirmed. It also then added, that a stockholder in a corporation has a remedy in chancery against the directors of a bank, to prevent them from doing acts which would amount to a violation of its charter, or to prevent them from any misapplication of its capital, which might lessen the value of the shares, if the acts intended to be done shall amount to what the law deems to be a breach of trust; also that a stockholder in a bank or other corporation had a remedy in chancery against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate purchase, or the denial of a right growing out of it, for which there is not an adequate remedy at law; and if the stockholder who complains be a resident of another State than that in which the bank or corporation has its *habitat*, that he may then resort to the courts of the United States for a remedy.

That the fact, that the people of the State of Ohio had, in the

year ——, adopted a new constitution, in which it was declared that taxes should be imposed upon banks in the manner provided for by the act of 13th April, 1852, cannot be applied to the State Bank of Ohio or its branches, without a violation of the contract contained in the charter of 1845. Having now noticed every essential point made in the argument in support of a claim, to subject the Bank of the State of Ohio and its branches to a higher rate of taxation than that stipulated in its charter, we will close this opinion in the language of the Chief Justice, in Knoop's case: "I think, that, by the 60th section of the act of 1845, the State of Ohio bound itself by a contract to levy no higher tax than the one there mentioned upon the banks or stocks of the banks organized under that law during the continuance of their charters. In my judgment, the words used are too plain to admit of any other construction."

We shall direct a reversal of the judgment of the Supreme Court of Ohio in this case, and direct a mandate to be issued accordingly.

Judgment of the Supreme Court of Ohio reversed.

WASHINGTON AND TURNER *vs.* OGDEN.

1. Where a written agreement for the sale of lands, executed and sealed by vendor and vendee, binds one party to make a deed for the property, and the other to pay a certain sum, part in cash, within sixty days, and the remainder in annual instalments, with a bond and mortgage for the deferred payments, the covenants are concurrent and reciprocal, constituting mutual conditions to be performed at the same time.

2. The vendor, in such a case, is not bound to convey, unless the first instalment be paid, nor is the purchaser bound to pay unless the vendor is able to convey a good title free from all incumbrances.

3. Where the agreement to purchase is expressly made dependent on the "surrender and cancelment" of a former agreement of the vendor to sell the same land to another person, it is a condition precedent, that the former agreement shall be cancelled and surrendered.

4. Where the words of the covenant on the part of the vendor are, that

he will "make a deed" for the property, there is a covenant that the land shall be conveyed by a deed from one who has a good title and full power to convey.

5. A plaintiff who sues upon an agreement containing such a covenant must aver and prove, not merely his readiness to perform it in the words of the contract, but that he had a good title which he was ready and willing to convey by a legal deed.

6. The want of such an averment in the declaration will not be cured by the verdict upon the presumption that the facts necessary to support it have been proved before the jury, if it appears by the record that no such proof was offered.

7. Where the terms of an agreement make the sale of land dependent upon the cancellation and surrender of a previous agreement with another person, the acquiescence of the former vendee or his assigns, or the mutual understanding of all parties interested in the former contract that it shall be regarded as at an end, is not equivalent to a surrender and cancellation of it.

8. Acquiescence expressed by parol and mutual understanding that a title shall be released cannot be made a substitute for a deed of release or surrender; executed and recorded deeds, under seal, can be surrendered and cancelled only by other deeds under seal.

9. An objection to the form of the action or other defect in the pleadings will not be noticed in this court, when it appears from the undisputed facts of the case that the plaintiff is not entitled to recover in any form of action.

Writ of error to the Circuit Court of the United States for the northern district of Illinois.

This suit was originally brought in the Superior Court of Cook county, Illinois, but removed thence to the Federal Circuit Court upon the petition of the defendants and proof that they were both citizens of Virginia, while the plaintiff was a citizen of Illinois.

The plaintiff filed his declaration in debt, claiming a right to recover the sum of thirty-five thousand dollars, being the amount payable and due on the paper copied by Mr. Justice *Grier* in his opinion, with interest thereon from the expiration of sixty days after the date of the paper, to wit, 20th July, 1859. The declaration describes fully the property which

Washington and Turner agreed to buy from Ogden, and which is designated in their agreement merely as the property described in the John S. Wright contract of June 4, 1855. The *narr.* further avers that the contract with Wright (to whom the same land had been previously sold by the plaintiffs) was surrendered and cancelled, and that the plaintiffs were *ready at all times to make a deed to the defendants* for the property sold.

The defendants demurred first, and the declaration was amended. Then pleaded thirteen pleas, craving oyer four times of the paper on which suit was brought, and which was fully set out in plaintiff's declaration. The plaintiff demurred to some of the pleas, and some of the demurrers were sustained and some overruled. The pleadings were at length settled so as to raise the questions—

Whether the plaintiff was ready and willing to perform his part of the contract by making the proper conveyance to the defendants of the lands described in the agreement.

Whether the contract previously made with Wright for the sale of the same lands was surrendered and cancelled within sixty days, agreeably to the terms of the contract between the present parties.

Whether it was necessary that Wright should release his title by a written deed.

Whether the plaintiff, in demanding securities for the deferred payments, which he had no right to ask, absolved the defendants from the obligation of tendering the thirty-five thousand dollars now sued for.

Evidence on both sides was given, documentary and oral. The court decided the points of law and the jury found the facts in favor of the plaintiff, for whom a verdict and judgment were rendered for debt and interest, amounting to $36,481 66.

The defendants thereupon took this writ of error.

Mr. Arrington, of Illinois, for plaintiffs in error. The declaration is fatally defective. It alleges no title in Ogden, nor any right to convey, but merely his readiness to deliver a deed. The contract was an agreement to sell land, and that implies transmutation of property from one man to another. 2 Black-

stone, 446; *Williamson* vs. *Berry*, (8 Howard, 544;) *Thomas* vs. *Van Ness*, (4 Wendell, 549.) A deed might be executed without conveying any title. The declaration should have averred title in Ogden and a readiness to execute such a deed as would be effectual to transfer that title. 1 Chit. Pl., 327; *Thomas* vs. *Van Ness*, (4 Wendell, 549;) *Glover* vs. *Tuck*, (24 Wendell, 153;) *Tyler* vs. *Young*, (2 Scam., 146;) *Burn* vs. *McNulty*, (2 Gilman, 128.) You cannot compel a vendee to take a lawsuit instead of the land. *Bank of Columbia* vs. *Hagner*, (1 Peters, 455.) Performance must always be alleged according to the intent of the contract. It is not sufficient to follow merely the words. 1 Chit. Pl., 325.

The declaration does not allege notice to the defendants of the surrender and cancellation of the Wright contract, and this being a matter peculiarly within the knowledge of the vendor, should have been stated. 1 Chit. Pl., 328; Com. Dig., C. 73, 74; 2 Pars. Cont., 182. These defects in the declaration are not aided by the verdict. 1 Chit. Pl., 673; *Dodson* vs. *Campbell*, (1 Sumner, 319;) *Addington* vs. *Allen*, (11 Wendell, 375.)

The court below assumed that a bare declaration by the plaintiff that Wright's contract was forfeited would be legally equivalent to a surrender and cancellation of it. This was clearly erroneous, and misled the jury. *Caldwell* vs. *United States*, (8 Howard, 366;) *Tucker* vs. *Moreland*, (10 Peters, 58;) *United States* vs. *Beitling*, (20 Howard, 254.)

The court said that if it was the agreement and understanding of all parties in interest that the contract was at an end, then it might be regarded as substantially surrendered and cancelled. This statement tended to mislead the jury, whether as a rule of law it was true or false, for there was no evidence of any such understanding or agreement.

An error still more extraordinary is found in the sentence that "the offer of the property for sale and a declaration of forfeiture after default of payment might be sufficient as showing the exercise of the option on the part of the grantor." It is true that in *Chrisman* vs. *Miller*, (21 Ill., 226,) it was held that the mere act of offering the land for sale after default of the purchaser is sufficient to put an end to the contract. From

this the judge of the Circuit Court deduced the startling inference that the mere offer of Ogden to sell the land to Washington and Turner was, *per se*, a performance of his covenant with them to have the contract with Wright surrendered and cancelled. The surrender and cancellation of Wright's contract was a condition precedent to that which Ogden made with Washington and Turner, and the court had no right to estimate either the importance or necessity of a compliance with it.

Mr. Fuller, of Illinois, and *Mr. Carlisle*, of Washington city, for defendants in error. In actions against a purchaser on a contract for the sale of land, the plaintiff is not bound to show that he has title to the land. The contract admits at least *prima facie* his title, and the *onus* is on the defendant to show that he has not. *Bretthauph* vs. *Thurmand*, (3 Richardson, 216;) *Brown* vs. *Bellows*, (4 Pickering, 179;) *Dwight* vs. *Cutler*, (3 Mich., 566;) *Espy* vs. *Anderson*, (14 Penn., 311.)

Under the Wright contract, neither Wright himself nor his assignee had any interest or estate in the premises, and could acquire none, except by complying with the terms of it. This had not been done, and Ogden had a right to treat the contract as at an end. He exercised that right by selling the property to the defendants. Wright and his assignee, Clapp, both knew this, and acquiesced in it. This was a complete surrender and cancelment of the contract. *Chrisman* vs. *Miller*, (21 Ill., 227;) *Steele* vs. *Bigg*, (22 Ill., 643.) Although the contract was not released of record, that formed no valid objection to the title, as was decided in *Greenleaf* vs. *Queen*, (1 Peters, 138;) *Espy* vs. *Anderson*, (14 Penn., 308.)

The duty of defendants was to pay the money sued for, and execute bonds and mortgage. No notice from the plaintiff was required. The averment of the plaintiff's readiness to perform his part of the contract was sufficient. 1 Chit. Pl., 326; *Rowsen* vs. *Johnson*, (1 East., 208;) *Tierney* vs. *Ashley*, (18 Pickering, 546;) *West* vs. *Emmons*, (5 Johnson, 179;) *Williams* vs. *Bank of United States*, (2 Peters, 96.) A time and place being fixed for the performance by the defendants of their part of the contract, and they not having attended, and the first act

of performance resting on them, the plaintiff could do nothing but be ready to perform his part. In the absence of the defendants, he could do no more. The averment of readiness to perform is sufficient, especially after verdict. 1 Chit. Pl., 359.

Mr. Justice GRIER. The very numerous exceptions to the sufficiency of the pleadings, and the correctness of the instructions given by the court, all depend on the construction given to the covenants of the agreement, which is the foundation of the suit. It is in the following words:

"CHICAGO, *June* 20, 1859.

"We will give M. D. Ogden, trustee Chicago Land Company, sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash within the next sixty days, and the balance in one, two, and three years, in equal instalments, with six per cent. interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the water front on block 35, Elston's addition to Chicago by Robins, a difference in the purchase-money shall be made, corresponding to the value of the property lost. The said M. D. Ogden, trustee, &c., agrees to sell to John A. Washington and Wm. F. Turner, both of Virginia, the above described property for the said sum of sixty-seven thousand five hundred dollars, payable as above; and on the payment of the said thirty-five thousand dollars cash, within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same, for payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright."

It is evident that the covenants of this contract are not independent. They are concurrent or reciprocal, constituting mutual conditions to be performed at the same time. The vendor is not bound to convey, unless the money due on the first in-

stalment be paid; nor is the purchaser bound to pay unless the vendor can convey a good title, free of all incumbrance. The agreement shows that the vendor at that time was not able to give a satisfactory title, having a deed on record, by which he had covenanted to convey the same land to another. It is therefore made a condition precedent by this agreement, that this previous contract should be surrendered and cancelled. The declaration avers that the contract with Wright was surrendered and cancelled on the 28th day of June, and that the plaintiff has been ever ready and willing to receive the money at the time and place, and "*to deliver to defendants a deed of the property.*" But there is no averment in the *narr.* that the plaintiff had a good and sufficient title, free from all incumbrance, which he was ready and willing to convey. It is true, the words of his covenant are, "that he will make a deed" to his vendees on receipt of the first instalment. But the meaning of these words in the contract requires that the deed shall convey the land, and it is not sufficient to aver his readiness to perform, merely according to the letter of the contract. The performance must always be averred according to the intent of the parties. It is not sufficient to pursue the words, if the intent be not performed. The legal effect of a covenant to sell is, that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title.

A sale, *ex vi termini*, is a transfer of property from one man to another. It is a contract to pass rights of property for money. This defect in the declaration cannot be cured by the verdict, under a presumption that the facts necessary to support it have been proved before the jury, because it appears by the record that no such proof was offered to aid the insufficient averments of the declaration.

It appears, also, that the averment with regard to the surrender and cancelment of the contract with Wright, even if sufficiently pleaded, was wholly without proof to support it, and that the court instructed the jury that they might presume it without proof. It is clearly a condition precedent, without the literal performance of which the purchasers were not bound to pay their money. The vendor had, on the 4th of

June, 1855, covenanted to sell this land to John S. Wright, on payment of certain instalments. The vendors had reserved to themselves very stringent and unusual powers of declaring the contract forfeited in case of non-payment of the several instalments. John S. Wright, on the third of July, 1837, by his deed, conveyed all his right and title to the premises to Timothy and Walter Wright. This deed was recorded 13th July, 1837.

T. & W. Wright, on the 3d day of December, 1857, conveyed to James Clapp, and the deed was recorded on the 12th of December, 1857. These deeds could not be surrendered or cancelled by parol. Both the original and the record should have been cancelled and surrendered by act of the parties thereto under seal; if not by all, yet certainly by Clapp. This was not done. The plaintiffs in error had prepared their money. Their agent called on Ogden to obtain an abstract of the title, and a proper surrender or release of the outstanding title, and was instructed to prepare proper bonds and a mortgage. Ogden promised to attend to having a proper surrender executed, but none was shown or tendered to the agent; on the contrary, Ogden handed him a mortgage and notes to be sent to the purchasers to be executed by them. They refused to sign instruments in that form, and returned them to their agent. He returned them to Ogden, stating, among other reasons, that they expected a *proper release or surrender* of the outstanding title, and that in the absence of such a release Ogden could not make a good title nor give possession. A second mortgage and bonds were then drawn and sent to the purchasers by Ogden, which were also objected to, and another *promise* given, "that the *release should be attended to.*"

But no such deed of release or surrender was made, executed, or tendered to the purchasers within the sixty days. Clapp did not execute a release till after the 1st of September, which was antedated as of the 15th of August. On this evidence, which was uncontradicted, it was clearly the duty of the court to have instructed the jury that the plaintiffs below had not made out a case which entitled them to a verdict; on the contrary, the court instructed the jury as follows:

"2d. By the terms of the John S. Wright contract, if default were made in the payment of the instalment due in 1859, it was competent for the Messrs. Ogden, at their option, to declare it forfeited and at an end as a contract for conveyance, and the land might be granted to another. No release or conveyance in writing by Wright or his assignee was absolutely necessary in such case, in order to put an end to the contract to convey. Strictly speaking, Wright, having parted with his interest in the land to Clapp, had no power over the contract; but if he, with the acquiescence and consent of Clapp, after default of payment, delivered the contract to Mr. Ogden, and it was the agreement and understanding of all parties in interest that the contract was at an end, then it might be regarded as substantially surrendered and cancelled. That the offer of the property for sale, and a declaration of forfeiture after default of payment, might be sufficient, as showing the exercise of the option on the part of the grantor."

This instruction was excepted to by defendants. It was a very grave error to instruct the jury that the acquiescence of Clapp, and the mutual understanding of the parties to that transaction, might be regarded by the jury as an actual cancellation and surrender as between the parties to this suit. Acquiescence expressed by parol, and mutual understanding that a title should be released, cannot be made a substitute for a deed of release or surrender, executed and recorded. Deeds under seal can be surrendered and cancelled only by other deeds under seal. No prudent man would accept a title with full notice on record, and knowledge of such an outstanding title. This contract, by its plain terms, is "dependent on such surrender and cancelment being made within the sixty days." It is a condition precedent, without the performance of which, within the term specified, the purchaser had a just right to declare the contract annulled. To entitle the plaintiffs below to recover in this suit, the declaration should have averred that such deeds of surrender and cancellation had been duly executed; that the plaintiff had a perfect title, free of all incumbrances, and was able as well as willing and ready to convey a good title to the plaintiff on the day named in the agreement.

But he was not able to prove such averments, if they had been made, and his case failed both in its pleadings and its proofs; consequently there was error in ruling the demurrers of the plaintiff to the 4th, 6th, and 7th pleas of defendant in favor of plaintiffs. The pleas alleged proper matters of defence to the suit, either in whole or in part. They were sufficient on general demurrer, which goes back to the first error in pleading. And from what we have already said, the first error in pleading is found in the declaration. It is not necessary to discuss more at large the form of the pleadings, or whether the action should not have been convenant and not debt, as the plaintiff was not entitled to recover in any form of action, according to the undisputed facts in evidence.

The judgment of the Circuit Court reversed, and venire de novo.

McCool *vs.* Smith.

1. A statute of Virginia, passed after the 1st of March, 1784, when Virginia ceded to the United States her territory north and west of the Ohio, has not, and never had, any force within the limits of Illinois.
2. In ascertaining who is meant by *next of kin* in a statute of Illinois regulating descents or a distribution, the computation must be made according to the rules of the common law.
3. It is a sound rule, that whenever a Legislature in this country uses a term, without defining it, which is well known in the English law, it must be understood in the sense of the English law.
4. By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested.
5. In Illinois a plaintiff in ejectment cannot recover upon a title which he acquired after the commencement of the suit. Such a recovery would be against an inflexible rule of the common law and an express statute of that State.
6. One statute is not to be construed as a repeal of another if it be possible to reconcile the two together.

Writ of error to the Circuit Court of the United States for the northern district of Illinois.

Hamilton McCool brought ejectment in the Circuit Court against Spencer Smith for the northeast quarter of section eleven, in township 10 north, of range 1 west, of the fourth principal meridian. The defendant pleaded not guilty, and a jury being called, found the following special verdict:

"That the land mentioned in the said declaration was, on the 7th day of June, 1818, duly granted by the United States to Alonzo Redman, for his military services in the late war between the United States and Great Britain; that said Redman was the illegitimate son of Polly Norris; that said Polly Norris had three other illegitimate children, named Eleanor Fogg, Joseph Melcher, and Sophia Norton; that Eleanor Fogg died without issue in the year 1824; that Joseph Melcher died without issue in the year 1814; that Alonzo Redman died without issue in the year 1825; that Polly Norris died without any other issue than as above stated, in the year 1837; that Sophia Norton married Reuben Rand in the year 1816; that Reuben Rand died in June, 1853; that Sophia Rand, on the 23d day of June, 1854, by her quit claim deed of that date duly executed, conveyed said land to one Levi F. Stevens; that said Stevens, on the 21st day of April, 1855, by his quit claim deed of that date, duly conveyed said land to Spencer Smith, the plaintiff.

"That the General Assembly of the State of Illinois passed an act, entitled 'An act to amend an act concerning the descent of real property in this State, approved February 12, 1853,' which act was approved by the Governor on the 16th day of February, 1857, which act is in the words and figures following, viz:

"'SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* That in all cases where any person shall have died, leaving any real property, before the passage of the act to which this is an amendment, which, by the provisions of the act to which this is an amendment, would have descended to any illegitimate child or children, such child or children shall be deemed and adjudged to be the owner of such real property, the same as if such act had been in force at the time of such death, unless such property shall have been proceeded against, and the title thereto vested in the

State, or other persons, under the law of this State concerning escheats.

"'SECTION 2. In all such cases, hereinbefore specified, where any such illegitimate child or children shall have sold and conveyed such real property by deed duly executed, or where the same would have descended by the provisions of the act to which this is an amendment, and shall have been conveyed by deed by the person to whom the same would have descended, then such conveyances shall vest the same title thereto in the grantee as by this act is vested in such illegitimate child, from the date of such deed, and in all actions and courts such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance.

"'SECTION 3. This act shall be in force from and after its passage.'

"That said lands have never been proceeded against, and the title thereto vested in the State, or other persons, under the law of this State concerning escheats.

"We further find, that John Brown, collector of taxes, in and for the county of Warren, and State of Illinois, did, on the 25th day of May, 1840, sell said land to Isaac Murphy, for the taxes due to the State and county aforesaid, upon said land, for the year 1839, and that he did, on the 9th day of September, 1843, in pursuance of said sale by deed of that date, convey said land to the said Murphy; that said collector, in making such sale and conveyance, did not comply with the law authorizing the sale of lands for taxes, and that said deed was for that reason invalid as a conveyance of the legal title. That said Murphy claiming said land in good faith, under said deed, improved, occupied, and cultivated the same, and paid all the taxes assessed thereon, for and during the years 1843, 1844, 1845, and 1846. That said Murphy, on the 7th day of April, 1847, by his deed of that date, conveyed the said land to Hamilton J. McCool, the defendant, who immediately thereafter took possession thereof, and has been in the actual possession thereof ever since, claiming the same in good faith, under said conveyances, and that he has paid all the taxes assessed upon said land for and during the years 1847, 1848, 1849, 1850,

1851, 1852, 1853, 1854, 1855, and 1856. That the taxes so paid to the said State and county, by the said Murphy and McCool, amount to the sum of one hundred and nine dollars. If from these facts the court is of the opinion that the plaintiff is entitled to recover, &c., then we find for the plaintiff, and that said plaintiff is the owner of the land, in fee simple, and assess his damages at one cent; otherwise, we find for the defendant."

Upon this verdict the Circuit Court gave judgment for the plaintiff, and the defendant took his writ of error.

Mr. Browning, of Illinois, for plaintiff in error. Redman being an illegitimate child, his mother could not take under the ordinance of 1787, which speaks only of children, descendants, parents, next of kin, &c. When words denoting kindred are used, either in laws or private instruments, without other additions, they include none but legitimate kindred. 2 Kent's Com., 212–13; 4 Kent's Com., 413–14; 3 Cruise Dig. Tit., 29, ch. 2, sec. 8, and note; 2 Domat., p. 26, Art. 2455; p. 49, Art. 2497 and 8; p. 88, Art. 2571; p. 211, Art. 2861; p. 280, Art. 3029; p. 283, Art. 3036; p. 178, Articles 2793 and 4; Illinois Stat. of Wills, sections 46, 47, and 53; *Bayley* vs. *Mollard*, (1 Russel & Mylne, 575;) S. C. 4 Cond. Eng. Chancery R., 565; *Wilkinson* vs. *Adams*, (1 Ves. & Bea., 422;) *Swaine* vs. *Kennedy*, (1 Ves. & Bea., 469;) *Beachcroft* vs. *Beachcroft*, (1 Madd., 234;) *Sherman* vs. *Angel*, (1 Bailey Eq. R., 351;) *Collins* vs. *Hoxie*, (9 Paige, 88;) *Durant* vs. *Friend*, (11 Eng. Law and Eq. R., 2;) *Owen* vs. *Bryant*, (13 Eng. Law and Eq. R., 217.)

The Illinois statute of 1829 provided, not that bastards should inherit from each other, or that their mother should inherit from them, but only that they should inherit from their mother. At any rate it does not embrace this case, for Redman died four years before it was passed.

The act of 1853 did provide, that upon the death of an illegitimate person leaving no husband, wife, or children, his or her estate should go to the mother; and if there was no mother, then to the mother's next of kin. But this act was prospect-

ive, and did not meet a case like this, where the decedent had died long before.

It was after the commencement of this suit that the plaintiff procured the act of 1857 to be passed, which is set forth in the special verdict, and which declares that the act of 1853 shall relate back to the cases of illegitimate persons who died before its passage. As a law which impairs existing rights, its validity cannot be sustained. *Gaines et al.* vs. *Buford*, (1 Dana, 499;) *Holden* vs. *James*, (11 Mass., 404;) *Hoke* vs. *Henderson*, (4 Dev., 7;) *Walley's Heirs* vs. *Kennedy*, (2 Yerg., 554;) *Bank* vs. *Cooper's Securities*, (2 Yerg., 600;) *Jones* vs. *Perry*, (10 Yerg., 69;) *Picquet's Appeal*, (5 Pick., 65;) *Lewis et al.* vs. *Webb*, (3 Greenl., 326.) Was it a legislative grant of public land by the State? The title was not vested in the State by a judgment of escheat, and therefore the grantee could take nothing, certainly nothing more than the inchoate right of the State. Ill. St. of Esch., Rev. Code of 1845, p. 225; 3 Blackstone Com., 259; *Fairfax's Devisee* vs. *Hunter's Lessee*, (7 Cranch, 625–6;) 2 Curtis, 690–1; *Craig* vs. *Bradford*, (3 Wheat., 599;) S. C. 4 Curtis, 308; 3 Com. Dig., Tit. Escheat, page 598, bottom paging; *Den* vs. *Simpson*, (Cam. & Nor., 192;) *Marshall* vs. *Loveless*, (Cam. & Nor., 233;) *McCrury* vs. *Allender*, (2 Har. & McHen., 409;) *Doe* vs. *Horniblea*, (2 Hayw., 37.)

If a proceeding had been instituted against the land as escheated, the present defendant would have been made a party, and his defence would have been unanswerable. He had bought the land from the State at a tax sale, paid for it, and been in possession fourteen years. But the grant was not to the plaintiff. If it vested title in anybody, it was either in Sophia Rand, who would have inherited under the act of 1853, or else in her grantee, Levi F. Stephens. True, Stephens attempted to convey to the plaintiff, but he had no title, and as his deed was merely a quit claim, his subsequently acquired title did not inure to the benefit of the plaintiff. Jac. Law Dict. *Grant Dellany* vs. *Burrett*, (4 Grl., 493;) *Funk* vs. *Dart*, (14 Ill., 307;) *Phelps* vs. *Kellog*, (15 Ill., 135.)

Even admitting that the act of 1857 was valid, conceding that it could operate retrospectively, and granting that it vested

a title in the plaintiff himself, still he could not recover in this action, because it was commenced before he acquired his title. Such is the rule of the common law, and the ejectment statute of Illinois is emphatic and clear to the same effect. Section 3 provides that no person shall recover in ejectment unless he has title *at the time of commencing the action.*

Besides all this, the defendant was completely protected by the statute of limitations, which declares that seven years' possession of land, with payment of taxes, shall entitle the occupant to be adjudged the legal owner to the extent of his proper title.

Mr. Kellogg, of Illinois, for defendant in error, argued that the mother of Redfield was his next of kin within the meaning of the law of descents, though the son was illegitimate; that his illegitimate sister could inherit, through her mother; and that the act of 1857 was constitutional.

1. The subtleties and refinements of the common law are not adopted in Illinois. In *Hays* vs. *Thomas*, (Breese, 136,) the Supreme Court of that State held that the civil law mode of ascertaining who are next of kin ought to be adopted in construing our statute; and therefore the mother is to be regarded as next of kin to her son. This is conclusive.

2. An illegitimate child may inherit land from the mother. The Illinois statute of descents declares, as its first proposition, that estates of persons dying intestate shall descend to his or her children and their descendants in equal parts.

That at common law, the word *child*, when used in statutes of this character, was limited to one born in lawful wedlock, is undeniable. But does the English law on this subject prevail in Illinois? No. From the earliest history of that State the policy of her legislation has been to change the English law. The statute of Virginia, passed in 1787, made bastards capable of inheriting from their mother, and transmitting inheritances on her part. This positive enactment, directly contravening the common law, became and was the law of Illinois until 1845, when the Legislature of the State expressly adopted the Virginia statute, by providing that the children of a single woman

should not be excluded from taking her property by inheritance on account of their illegitimacy. Following this act of 1845, and amendatory of it, was the act of 1857.

Even at common law, bastards are recognised as children for every purpose but that of succession. Tenn. Rep., 101. They may take under a devise as children of their mother: Com. Dig., *Bastard*, E. They are punishable for incest: *Regina* vs. *Chaffin.*

It is established by the authority of *Hays & Thomas* that the statutes of distribution are to be construed by the civil law. By that law an illegitimate person may inherit from the mother, she being sufficiently certain, though the father is not.

The very point was decided in *Heath* vs. *White*, (5 Conn., 228,) that the word children in a statute for the purpose of inheriting from the mother shall be construed to include illegitimate children; and the same doctrine was expressly held in *Burlington* vs. *Fosby*, (6 Va., 83.)

3. The act of 1857 was constitutional and valid. To make a statute void it must be shown that it comes in direct conflict with some constitutional prohibition. It is not enough that it is retroactive, or divests antecedent rights, or gives remedies for defects in a title which would otherwise have been fatal, or affects pending suits, or gives a party rights which he did not possess before, unless it also impairs the obligation of a contract, or has the character of an *ex post facto* law. *Satterlee* vs. *Matthewson*, (2 Pet., 380;) *Watson* vs. *Mercer*, (8 Pet., 110;) *Charles River Bridge* vs. *Warren Bridge*, (11 Pet., 509;) *Wilson* vs. *Baptist Educ. Soc.*, (10 Bach., 318;) *Syracuse Bank* vs. *Davis*, (16 Bach., 188;) *Underwood* vs. *Lilly*, (10 Serg. & Rawle, 97;) *Tate* vs. *Stoolzfoas*, (16 Serg. & R., 35;) *Hepburn* vs. *Kurtz*, (7 Watts, 360;) *Baugher* vs. *Nelson*, (9 Gill, 299;) *Goshen* vs. *Stonington*, (4 Conn., 410;) *Mather* vs. *Chapman*, (6 Conn., 54;) *Beech* vs. *Walker*, (6 Conn., 190;) *Booth* vs. *Booth*, (7 Conn., 365;) *Norton* vs. *Pettibone*, (7 Conn., 316.) But this act of 1857 took away no existing right; it simply construes the acts of 1845 and 1853 by making them relate to previous as well as to subsequent cases. It confirms rights, but does not destroy them.

Mr. Justice SWAYNE. This was an action of ejectment

in the court below. Smith was plaintiff, and McCool defendant. A special verdict was found by the jury. The court rendered judgment for the plaintiff. The defendant has brought the case here by a writ of error, and is the plaintiff in error in this court.

The material facts of the case, as shown in the record, are as follows:

Polly Norris had four illegitimate children. Their names were: Alonzo Redman, Eleanor Fogg, Joseph Melcher, and Sophia Norton.

Alonzo Redman was the patentee of the land in controversy. He died without issue in the year 1825.

Joseph Melcher died without issue in the year 1814.

Eleanor Fogg died without issue in the year 1824.

Sophia Norton married Reuben Rand in the year 1816. Reuben Rand died in June, 1853.

Polly Norris died in 1837 without having had any other issue than those named.

Sophia Rand, on the 23d day of June, 1854, by her quit-claim deed of that date, duly executed, conveyed the land in controversy to Levi F. Stevens. Stevens, on the 21st of April, 1855, by a like deed of that date, conveyed the land to Smith, the plaintiff.

The first law of Illinois, making the blood of bastards heritable, was passed in 1829. This was wholly prospective, and is no otherwise material in this case than as showing the sense of the Legislature of the necessity of such legislation to produce that result.

On the 12th of February, 1853, the Legislature passed another law upon the same subject. It provides, that "on the death of any such person"—

His or her property shall go to the widow or surviving husband and children, as the property of other persons in like cases.

If there be no children, the whole property shall vest in the surviving widow or husband.

If there be no widow or husband, or descendants, the property shall vest in the mother and her children, and their de-

scendants: the mother taking one-half; the other half to be equally divided between her children and their descendants.

If there be no heirs as above provided, then the property shall vest "in the next of kin of the mother, in the same manner as the estate of a legitimate person."

This act also was prospective, and did not affect this case.

On the 16th of February, 1857, the Legislature passed an act amending the preceding act.

The first section provides, that where any person shall have died before the passage of the amended act, leaving property, which by the provisions of that act would have descended to any illegitimate child or children, such child or children shall be deemed the owner of such property, "the same as if such act had been in force at the time of such death," unless the title shall have been "vested in the State, or other persons, under the law of this State concerning escheats."

The second section provides, that in all the cases before specified where such illegitimate child has conveyed the property by deed, duly executed, "or when the same would have descended by the provisions of the act to which this is an amendment, and shall have been conveyed by deed by the person to whom the same would have descended, then such conveyances shall vest the same title thereto in the grantee, as by this act is vested in such illegitimate child from the date of such deed, and in all actions and courts such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance."

This act took effect from its date.

It is claimed by the counsel of the defendant in error that, "at the time of the cession of the northwestern territory to the General Government by the State of Virginia, the statute of that State directing the course of descents, passed in 1785, and which took effect January 1st, 1787, provided as follows:

"In making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien. *Bastards also shall be capable of inheriting, or of transmitting inheritance on the part of*

their mother, in like manner as if they had been lawfully begotten of such mother."

It is claimed, also, that this statute continued in force in Illinois during the whole period of her Territorial existence, and after she became a State to a period later than the death of Alonzo Redman.

To this proposition there is a conclusive answer.

The General Assembly of Virginia, by a resolution of the 20th of October, 1783, authorized her delegates in Congress to execute a deed, ceding to the United States all her "right, title, and claim, as well of soil as jurisdiction," to the territory northwest of Ohio. The deed was executed on the 1st of March, 1784. From that time, except as to the reservations expressed in the deed, which in nowise affect the question here under consideration, Virginia had no more claim to, or jurisdiction over that territory, than any other State of the Union.

It is also claimed, that the act of the Legislature of Illinois of 1819, which was in force at the time of the death of Alonzo Redman, gave his estate, under the circumstances, to "the next of kin," and that applying the civil law interpretation to those terms, his mother was such "*next of kin*," and hence took an estate of inheritance in the land in question under that act. Breese's Reports, 136, *Hays* vs. *Thomas*, is relied upon as authority for this proposition. In that case, the principle was applied as between legitimate persons claiming under a legitimate decedent. The same remark applies to *Hillhouse* vs. *Chester*, (3 Day's Rep., 166;) which the case of *Hays* vs. *Thomas* followed.

In *Hillhouse* vs. *Chester*, the court say:

"It cannot be pretended that the plaintiff is *next of kin* to Mary, if we give the same construction to the words which they have received in the English law."

"It has always been held that, to ascertain who this person is, the computation is to be made *according to the rules of the civil law.*" "Our statute, which directed that, in such an event, the estate of the intestate, both real and personal, should go to

the *next of kin*, was enacted at a time when the aforesaid statute of Car. II, and the construction given to it, was perfectly known. It is a sound rule, that whenever our Legislature use a term without defining it, which is well known in the English law, and there has been a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law."

The class of adjudications in England referred to were never claimed to affect the legal condition of bastards there. How can the same principle, decided in *Hays & Thomas*, have that effect in Illinois?

It is also claimed that the legal status of Alonzo Redman, at the time of his death, is to be determined by the civil and not by the common law; and it is insisted, that by the provisions of the civil law legitimate and illegitimate children stood upon a footing of equality. We have not deemed it necessary to examine the provisions of the civil law referred to, because, in our judgment, they have no application to the subject. When Alonzo Redman died, the common law of England was in full force in the State of Illinois.

The ordinance of 1787 guaranteed that "judicial proceedings" in the Territory should be "according to the course of the common law. "In 1795, the Territorial governor and judges adopted that law for the Territory.

By an act of the Legislature of Illinois, of the 4th of February, 1819, it was provided:

"That the common law of England, and all statutes or acts of the British Parliament made in aid of the common law prior to the 4th year of the reign of King James the 1st, excepting the second section of the sixth chapter of XLIII Elizabeth, the eighth chapter XIII Elizabeth, and ninth chapter XXXVII Henry VIII, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority."

This act has been in force ever since its date:

3 Scam., 301, *Penny* vs. *Little;* idem, 120, *Boger* vs. *Sweet;* id., 396, *Stewart* vs. *The People;* 5 Gil., 130, *Seeley* vs. *Peters.*

The Wills act of 1829, section 47, that of 1845, section 53, and the act of 1853, all, by the clearest implication, recognise the heritable disabilities of the illegitimate in the absence of enabling statutes. Such is also the theory of the act of 1857.

By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested. This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it.

The legal position of Alonzo Redman, at the time of his death, was what the common law made it. In the eye of that law, he was *filius nullius*. He had neither father, mother, nor sister. He could neither take from, nor transmit to, those standing in such relations to him, any estate by inheritance.

These views bring us to the conclusion that no title to the land in controversy was ever vested in Polly Norris, and none in Sophia Rand, nor in the plaintiff below, until the act of February 16, 1857, took effect.

This suit was commenced on the 2d day of July, 1855. Conceding that the act of 1857 vested in the defendant in error a valid title, can he recover in *this action?* The rule of the common law is inflexible, that a party can recover in ejectment only upon a title which subsisted in him at the time of the commencement of the suit. *Johnson* vs. *Jones*, decided at this term. So regardful has the State of Illinois been of this principle, that she has embodied it in a statute. Her ejectment act provides that—

"No person shall recover in ejectment unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover possession thereof, or some share, interest, or portion thereof, to be proved or established at the trial."

If the plaintiff below can succeed in this action, it must be because the act of 1857 impliedly repeals this provision as to this case. If there were no such statutory provision, the act of 1857, being in derogation of the common law, would be construed strictly. "A repeal by implication is not favored." "The leaning of the courts is against the doctrine, if it be

possible to reconcile the two acts of the Legislature together." Sedg. Stat. and Cons. Law, 127; 4 Gill and J., 1, *Canal Co.* vs. *Railroad Co.;* 5 Hill, 221, *Bowen* vs. *Lease;* 2 Barb. S. C. R., 316, *Williams* vs. *Potter.*

We see nothing in the act of 1857 which indicates a purpose to contravene this common law principle and supersede this statutory provision as respects this action. *It is possible* to reconcile the two acts. It may well be that the Legislature intended to vest the title retrospectively for the purpose of giving effect to mesne conveyances and preventing frauds, without intending also to throw the burden of the costs of an action of ejectment, then pending, upon a defendant, who, as the law and the facts were at the commencement of the action, must have been the successful party. A stronger case than this must be presented to induce us to sanction such a result by our judgment. If the plaintiff below can recover, it must be in action brought after the 16th of February, 1857. He cannot recover upon a title acquired since the commencement of this suit.

In holding otherwise, the court below committed an error.

Several other very important questions have been discussed by the counsel of the parties. We have not considered them, and intimate no opinion in regard to them.

The judgment below must be reversed, and the cause remanded, with instructions to enter a judgment for the plaintiff in error upon the special verdict.

VERDEN *vs.* COLEMAN.

1. A patent was granted to a pre-emptor in 1841 for a tract of land which had been previously assigned, by the direction of the President, to a Pottawatomie Indian, under the terms of the treaty with that tribe. The patent was adjudged to be a valid grant of land by the Supreme Court of Indiana: *Held*, that this case is not within the clause of the 25th section of the judiciary act, which confers jurisdiction upon this court to re-examine judgments or decrees of State courts adverse to "an authority exercised under the United States."
2. The fact that the title set up for the Indian in this case is under a treaty, does not avail to give this court jurisdiction, because neither the Indian himself nor any one claiming through him is party to the suit.

Writ of error to the Supreme Court of Indiana.

Coleman filed a bill in equity against Verden in the Benton county circuit, Indiana, to foreclose a mortgage. The complainant set out a note given by Verden to him for $2,315, and a mortgage on six pieces of land to secure its payment, and prayed a decree of foreclosure. The defendant, in his answer, admitted the making of the note and the execution of the mortgage; and set up, by way of avoidance, the following facts: That he purchased, at the time the note and mortgage were given, six pieces of land, five from the complainant and one from Samuel Coleman, for the gross sum of $4,315, of which he paid down $2,000, and gave the note and mortgage to secure the balance, $2,315. The whole six lots were included in the mortgage, and the whole constituted one transaction. But the defendant alleged, that for one of the six lots, the value of which alone was greater than the sum specified as due on the note and mortgage, he had got a worthless title. The title which he got rested upon a patent given to one Hewett in 1841, as a pre-emptor. He alleged that the land patented to Hewett had been reserved by the treaty of 1832 with the Pottawatomie Indians, to one To-pen-na-be, a member of the tribe, and that previous to the date of Hewett's preemption title the President of the United States had selected

and located the tract in question and assigned it to the Indian to whom it legally belonged at the date of the patent. The defendant set out the documents upon which To-pen-na-be's title rested. In reply, the complainant insisted that Hewett acquired the legal title as pre-emptor, and that To-pen-na-be acquired none by the treaty and the proceedings had under it. He set out the documents upon which the Hewett title rested. The defendant demurred to the replication, but the demurrer was overruled and a decree of foreclosure entered. He appealed to the Supreme Court of the State, where the decree was affirmed. He, thereupon, removed the cause to the Supreme Court of the United States by a writ of error under the 25th section of the judiciary act.

Mr. Gillet, of Washington city, and *Mr. Mace*, of Indiana, for plaintiff in error.

Mr. Baird, of Indiana, for defendant in error.

Mr. Justice GRIER. Does this case come within the 25th section of the judiciary act?

The bill filed in the State court is for the foreclosure of a mortgage. The defence set up by the mortgagor was, that the consideration of the note which the mortgage secured was the purchase money of the land mortgaged; that the title to one of the tracts was through a patent of the United States to Hannamah Hewett; that this patent did not convey a good title, because in 1832 the United States concluded a treaty of purchase of a large tract of country with the Pottawatomie Indians; that by the terms of this treaty a section was reserved for an Indian named To-pen-na-be, to be located under direction of the President; that before the date of the patent to Hewett for this quarter section the whole section, including it, had been assigned to To-pen-na-be.

The patent was, nevertheless, granted to Hewett because of a prior equity by settlement.

The Supreme Court of Indiana decided that the patent to Hewett was a valid grant of the land. This decision will not

bring the case within the 25th section. Nor can we claim it because of the title set up under the treaty with the Indians, because neither To-pen-na-be nor any one claiming under him is party to the suit.

This court has decided in the cases of *Owings* vs. *Norwood*, (5 Cranch, 344,) and of *Henderson* vs. *Tennessee*, (10 How., 311,) that "in order to give jurisdiction to this court the party must claim the title under the treaty for himself, and not for a third person, in whose title he has no interest."

This case is, therefore, dismissed for want of jurisdiction.

Franklin Branch Bank *vs.* The State of Ohio.

The sixtieth section of the act of the Ohio Legislature incorporating the State Bank contains a contract for a fixed rule of taxation upon that bank and its branches, and a subsequent act, which attempts to assess a larger tax by a different rule is unconstitutional.

Writ of error to the Supreme Court of Ohio. The State of Ohio, by Mr. Walcott, her Attorney General, brought suit in the Supreme Court of Franklin county against the Franklin Branch of the State Bank of Ohio, claiming the sum of $4,076 30, as due from the bank to the State for taxes assessed pursuant to an act of the Legislature, passed 5th April, 1859. The bank pleaded that the 60th section of the charter was a contract, by which the State bound herself to levy no other or greater taxes on the State Bank or its branches than what are stipulated for in that section, and that the act of 1859, under which the taxes claimed in this case are assessed, is void, as being a violation of the contract. The plaintiff demurred. The court gave judgment against the defendant for the sum claimed. The defendant took the case into the Supreme Court of the State, where the judgment of the county court was affirmed. There upon the bank took this writ of error.

Mr. Stanbery, of Ohio, for the plaintiff in error.

No argument was made in this court for defendant in error.

Mr. Justice WAYNE. The single question in this case is, whether the 60th section of the statute of Ohio, entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, constitutes a contract for a fixed amount and mode of taxation; and whether the statute of Ohio, passed April 5, 1859, entitled "An act for the assessment and taxation of all the property in this State, and for levying taxes thereon, according to its value in money," impairs that contract.

The amount of tax due from the Franklin Branch, &c., &c., upon the basis of the 60th section, was $1,216 42 for the year 1859; the amount assessed against it, under the act of the 24th February, 1855, was $4,076 30 for the same year. The case, of course, turns upon the true construction of the 60th section; and this court has just said, in the case of the *Jefferson Branch of the State Bank of Ohio, &c.*, vs. *Skelly*, (No. 143,) that the 60th section contains a contract for a fixed rule of taxation, and that the act of April 15, 1853, which attempts to assess a larger tax, by a different rule, was unconstitutional. See also the cases of *Knoop* vs. *Piqua Bank*, (16 Howard, 369;) *Dodge* vs. *Woolsey*, (18 Howard, 331;) *Mechanics and Traders' Bank* vs. *Debolt*, (ibid., 380.) In all of these cases this court held, that the 60th section was a contract, and that the various State laws, which attempted to change the rule of taxation fixed by such contract, were void.

We affirm again the unconstitutionality of the law of Ohio under which the tax was assessed and levied against the Franklin Bank, and direct the reversal of the judgment of the Supreme Court of the State of Ohio now before us by a writ of error.

The clerk of this court will, under the direction of this court, issue the proper mandate.

LEONARD ET AL. *vs.* DAVIS ET AL.

1. If it be stipulated in a contract that a duty arising out of it shall be performed by a particular officer, the performance of such duty by deputies, under his direction, will not satisfy the terms of the contract, nor bind the parties, except in cases where it was known that such officer was accustomed to act by deputies.
2. Where parties contract for the sale of a quantity of logs, to be delivered at a future time, and the vendee binds himself to take all *merchantable* logs at a certain price, the vendor does not, by his assent to such contract, make warranty that all the logs he delivers shall be merchantable, but only leaves it optional with the vendee to reject such as are not.
3. Logs floating in the water are in the constructive possession of the owner, and when sold a symbolical delivery is sufficient to pass the title.
4. When the terms of sale are agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment or delivery; the buyer becomes the owner and takes the risk of all subsequent accidents to the goods.
5. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment.
6. But if the goods are sold upon credit, and nothing is agreed upon as to the time of their delivery, the vendee is immediately entitled to the possession and the right of property vests at once in him.

Error to the Circuit Court of the United States for the district of Michigan.

This was assumpsit brought in March, 1858, in the Circuit Court of the United States for the district of Michigan, by F. B. Leonard and C. P. Ives, citizens of the State of New York, against C. Davis, a citizen of Michigan, A. E. Loomis and J. C. Dore, citizens of Illinois, and T. Newell, a citizen of Connecticut, partners in the lumber business at Muskegon, in the State of Michigan, under the firm name of C. Davis & Co. The suit was brought on a written contract for certain saw-logs. The

defendants pleaded the general issue, with notice of set-off, averring that but a part of the logs ever came to their possession, and of this part but a few were merchantable, the balance of them being worthless, and claiming damages for the inferior quality of the logs. Verdict and judgment for defendants, with costs. Motion for new trial denied. A writ of error to the Supreme Court of the United States was sued out by plaintiff.

The facts in controversy are stated very fully in the opinion of Mr. Justice *Clifford.*

Mr. Russell, of Michigan, for plaintiffs in error.

Mr. Van Arman, of Illinois, for defendants in error.

Mr. Justice CLIFFORD. This is a writ of error to the Circuit Court of the United States for the district of Michigan.

Some brief reference to the pleadings in the cause will be necessary, in order that the precise nature of the controversy may be clearly understood. It was an action of assumpsit brought by the present plaintiffs, and the declaration contained two special counts, framed upon a certain written agreement signed by the parties.

According to the allegations of the first count, the defendants, on the 6th day of November, 1856, bought of the plaintiffs a certain described parcel or lot of pine saw-logs, situated in and about the Muskegon river and lake, in the county of Ottowa, and State of Michigan, and the claim as there made was for the entire amount agreed to be paid as the consideration for the purchase and sale of the lumber.

Referring to the second count, it will be seen that it was, in all respects, substantially the same as the first, except that the pleader assumed throughout that the agreement between the parties was executory; and, consequently, alleged that the plaintiffs agreed to sell, and that the defendants agreed to purchase the same parcel or lot of pine saw-logs as that described in the first count, averring readiness to perform on the part of the plaintiffs, and default on the part of the defendants.

Process was duly served upon the defendants, and on the 30th day of March, 1858, they appeared and pleaded the general issue, giving notice in writing at the same time of certain special matters to be given in evidence under that plea.

Among other things, they alleged in the notice, that not more than seven hundred thousand feet of the saw-logs agreed to be furnished by the plaintiffs ever came to their hands, and that not more than one-fourth part of the quantity so received was merchantable; and that, through that default and wrong of the plaintiffs, they, the defendants, suffered damages to the amount of five thousand dollars, for which amount they claimed to recoup the damages demanded by the plaintiffs. They also averred, that the plaintiffs were indebted to them in the sum of three thousand dollars for money lent and money paid and advanced; and they also gave notice that they would prove such indebtedness at the trial, by way of set-off to the damages claimed by the plaintiffs, as more fully set forth in the transcript. Such was the substance of the pleadings on which the parties went to trial.

Before proceeding to state the evidence, and the rulings and instructions of the court, it becomes necessary to advert to the situation of the saw-logs, and the surrounding circumstances at the time the agreement was made. Both parties agree that the lot or parcel of logs in controversy had been cut in the forest during the winter preceding the date of the contract by one A. B. Furnam, and had been by him transported to the river and upper waters of the lake, and driven down the same to the association boom, so called, where the larger portion of the logs were situated at the time the agreement was executed. Divers persons own timber lands bordering on the upper waters of that lake, and during the winter season of the year cut saw-logs, either for sale or to be transported over those waters to their mills, to be manufactured into boards. Such logs are usually branded with the initials of the owner's name, or some other mark by which the property of one owner may be distinguished from that of another; and all the logs thus collected during the winter season, although belonging to different individuals, are floated down the river during the spring

freshet in one "drive," so called, and secured in the association boom, which is in the lake, and is large enough to contain the whole quantity, and afford ample space to enable the different owners to select their own marks and arrange the logs in rafts to be transported to their private booms.

Claim was made by the plaintiffs for the entire amount of the consideration agreed to be paid for the logs specified in the contract. To maintain the issue on their part, the plaintiffs introduced the contract described in the declaration, and offered evidence tending to prove the situation and quantity of the logs; and that the defendants, or one them, had admitted that they had neglected to measure and scale the logs according to the agreement. One of the defendants was the treasurer of the association or incorporation owning the boom, where the logs, or the principal portion of them, lay at the time the contract was made.

Prior to the date of the contract, the same defendant had presented a draft to the plaintiffs for the price or charge of driving down the river and into the boom of the association a certain quantity of saw-logs, equal in board measure to fourteen hundred and forty-four thousand feet. Said logs belonged to the plaintiffs, and they offered the draft, with the receipt of the defendant thereon, to show that the defendants, or some of them, had knowledge of the quantity and locality of the logs at the date of the agreement.

To the admission of that evidence the defendants objected, and the court excluded it, and to that ruling the plaintiffs excepted. Various other exceptions also were taken by the plaintiffs to the rulings of the court in the course of the trial, to which more particular reference will presently be made.

Five prayers for instruction were presented by the plaintiffs, but the court refused the entire series, and instructed the jury substantially as follows: That the contract declared on was executory; that the title to the logs did not pass till after admeasurement; that admeasurement was equally for the benefit of both parties; and that the boom-master was made the common agent for that purpose. That if the jury found from the evidence that it was impracticable for the boom-master to do

the scaling alone, and it was the custom of the association for him to have assistants, then the scaling in this case might be lawfully done by such assistants under his orders. That it was equally incumbent upon the plaintiffs and defendants to have the logs scaled and measured, and that the plaintiffs could only recover for such logs as had been scaled and come to the possession of the defendants. That the contract imported a warranty that the logs were merchantable, and that the defendants were entitled to a reasonable opportunity to ascertain the quality of the logs. That if the jury found that the quality could not be determined till after the logs had been rafted up and taken to the defendants' boom, and then only by sawing them up, or chopping into them, they, the defendants, had a right to do so; and further, that if the jury found that the unmerchantable logs were entirely worthless, the defendants were entitled to recoup their damages for such defects, without returning the logs, or giving notice to the plaintiffs.

Under the instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted both to the refusal of the court to instruct as requested and to the instructions given.

Comparing the terms of the contract with the instructions given to the jury, it is obvious that the former was misconstrued by the court, and that injustice has been done to the plaintiffs.

Referring to the contract, it will be seen that the first sentence thereof declares that the defendants "bought of" the plaintiffs "a quantity of pine saw-logs, got out last winter by A. B. Furnam, supposed to be about fourteen hundred and forty-four thousand feet, in board measure, at the rate of four dollars and fifty cents per thousand for those afloat in the booms and bayous near the head of the lake, and four dollars and twenty-five cents per thousand feet for those on the bank, or in marsh near the lake and boom."

All of the logs sold were to be counted, measured, and scaled by the boom-master, meaning the person in charge of that business at the association boom, where the logs, or the principal portion of them, were situated when the contract was

made, or by such other person as the parties might agree on, as the logs were rafted up preparatory to be transported to the private boom of the defendants.

Recurring again to the agreement, it will be seen that it bears date on the sixth day of November, 1856, and by its terms the defendants were to pay for all the logs rafted up that fall, on the fifteenth day of December following; and for all such as were not rafted up until the next spring, they were to pay monthly at the end of each month during the rafting season of the succeeding year. But it is evident that the parties well understood, that a certain portion of the logs included in the sale would remain back, even after the close of the next rafting season; and they accordingly provided that the balance, not then rafted up, should be settled for by the defendants as soon as they could be measured and the "scaling" completed.

By the terms of the contract, the defendants were to take all the merchantable logs in the described lot or parcel; and inasmuch as the time and amount of the payments would be affected by the promptitude or negligence of the defendants in rafting up the logs, it was expressly stipulated that they should raft up and secure as many of the logs as they could that fall, and as many as possible of the residue during the next spring, before the annual "drive" came down.

Beyond question these provisions were inserted in the contract for the benefit of the plaintiffs, and it is quite obvious that they were necessary to the protection of the rights of the plaintiffs, because the defendants were not required to make payments any faster than they could raft up and secure the logs, so as to render them available for the purpose for which they were purchased. Such of the logs as remained back, after the annual "drive" of the succeeding spring came down, were to be scaled where they lay, whether on the banks, in the booms or bayous, and were to be paid for by the defendants at the contract price, without further delay to raft them up. Whether the logs were merchantable or not, was to be determined by the boom-master, who was specially designated in the contract to count, measure, and scale them for the parties. He might perform that duty himself, or if he had deputies

who usually assisted him in performing that work, and that custom was known to these parties at the time the contract was made, then he might properly cause the work to be done by such deputies under his direction; and such a performance of the duty assigned to him in the contract would be a lawful performance of the same, and would be obligatory upon both of these parties.

All the logs, however, were to be counted, measured, and scaled by the boom-master, or such other person as the parties might agree on; and unless the boom-master had regular deputies who were accustomed to assist him in such duties, and that custom was known to the parties at the time the contract was made, then it is clear that the work could only be done by the person designated in the contract, unless the parties substituted another in his place.

Merchantable logs only were bought and sold by the parties, but it is a great mistake to regard that provision as a warranty of the logs on the part of the plaintiffs. Unless the parties were destitute of all experience, they must have known that in so large a lot of logs there would be some, and perhaps many, that would not scale as merchantable; and it was doubtless from that consideration that the provision was inserted, that the defendants should take all of that description, and, of course, they were not bound to take any of inferior grades. Regarded in that light, it is evident that the provision was for the benefit of both the seller and purchaser, as it furnished a clear and unmistakable description of what was bought and sold: we say bought and sold, because it is evident from what has already been said that the title to the logs passed to the defendants. Most of the logs were in the association boom at the time the contract was made; and as they were floating in the water, the law did not require an actual delivery, in order to vest the title in the defendants. While floating in the water, they were only in the constructive possession of the owner; and, under such circumstances, a symbolical delivery is all that can, in general, be expected, and is amply sufficient to pass the title. *Ludwig* vs. *Fuller*, (17 Me., 166;) *Boynton* vs. *Veazie*, (24 Me., 288;) 2 Kent's Com., 492; *Macomber* vs. *Par*

ker, (13 Pick., 175;) *Hutchings* vs. *Gilchrist*, (23 Vt., 88;) *Gibson* vs. *Stevens*, (8 How., 384.)

When the terms of sale are agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale, says Chancellor Kent, becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment. But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him. 2 Kent's Com., (9th ed.,) 671; *Bradeen* vs. *Brooks*, (22 Me., 470;) *Davis* vs. *Moore*, (13 Me., 427.)

Nothing in fact remained to be done in this case, so far as the sale and purchase were concerned. Defendants bought and plaintiffs sold, without condition or reservation, and the measurement was simply to ascertain the amount to be paid by the defendants. Sellers had nothing to do but to receive the agreed price, unless the boom-master refused to act, which contingency did not happen him in the case. *Cushman* vs. *Holyoke*, (34 Me., 292;) *Riddle* vs. *Varnum*, (20 Pick., 280.)

It is clear, therefore, that the title in the logs passed to the defendants at the time the contract was executed. *Cunningham* vs. *Ashbrook*, (20 Mi., 553;) *Cole* vs. *Transp. Co.*, (26 Vt., 87.)

Having stated our views as to the construction of the contract constituting the foundation of the suit, the errors in the instructions given to the jury will be manifest without any additional explanations; and we need only say, in this connection, that they are of a character to affect the merits of the controversy, and lead necessarily to the reversal of the judgment.

Some of the rulings at the trial, to which exceptions were also taken by the plaintiffs, present, directly or indirectly, the same legal questions as those involved in the instructions given to the jury, and in respect to all such the explanations already given will furnish a proper guide at the next trial. That remark, however, does not apply to the first and third exceptions,

which were well taken upon other and distinct grounds. Evidence was offered under both those exceptions, tending to show the quantity of the logs, which was a material matter in dispute at the time.

It cannot be doubted that the evidence offered had some tendency to support the issue; and if so, it was the duty of the court to receive it, and allow it to be weighed by the jury. We forbear to remark upon the other exceptions, because the explanations already given as to the true construction of the contract will sufficiently demonstrate the error in the rulings.

In view of the whole case, we are of the opinion that the rulings and instructions of the Circuit Court were erroneous. The judgment is accordingly reversed, with costs, and the cause remanded, with direction to issue a new *venire.*

UNITED STATES *vs.* JACKALOW.

1. To give a Circuit Court of the United States jurisdiction of an offence not committed within its district, it must appear, not only that the accused party was first apprehended in that district, but also that the offence was committed out of the jurisdiction of any State, and not within any other district of the United States.
2. Whether a particular place is within the boundaries of a State is not a question of law for the court, but a matter of fact for the jury to determine.
3. A special verdict finding that the offence was committed by the prisoner at a place designated, but omitting to find that it was outside the limits of any State, must be set aside.

This was an indictment against John, *alias* Johnny, *alias* John Canoe, *alias* Jackalow, a native of the Loo Choo Islands, for piracy on the high seas, found and tried in the Circuit Court of the United States for the district of New Jersey, and came into the Supreme Court on a certificate of the judges that they were divided in opinion.

The jury, in a special verdict, found that the offence charged

in the indictment was committed by the prisoner at a certain place described and designated, but did not find whether that place was within the jurisdiction of any State, within any district of the United States, or upon the high seas. Did this verdict authorize the Circuit Court to pronounce judgment of death against the prisoner? That was the question on which the judges divided.

Mr. Bates, Attorney General, and *Mr. Keasley,* of New Jersey, for the United States.

No counsel appeared for Jackalow.

Mr. Justice NELSON. This case comes before us on a division of opinion of the judges of the Circuit Court of the United States for the district of New Jersey.

The first count in the indictment charges that the prisoner, with force and arms, on the high seas, in waters within the admiralty and maritime jurisdiction, on board of an American vessel called the "Spray," piratically, feloniously, and violently did assault one John F. Leete, the master of the vessel, putting him in bodily fear, and did feloniously, &c., seize, take, and carry away thirty pieces of gold coin, &c., of the goods and effects of the said master, contrary to the form of the statute, &c. The indictment also avers that the district of New Jersey is the district in which the prisoner was found and first apprehended for the offence.

The jury found a special verdict, that the offence charged in the first count was committed by the prisoner on board the "Spray," which at the time was lying in the waters adjoining the State of Connecticut, between Norwalk harbor and Westchester county, in the State of New York, at a point five miles eastward of Lyons's Point, (which is the boundary between the States of New York and Connecticut,) and one mile and a half from the Connecticut shore at low-water mark.

The indictment was found under the 3d section of the act of Congress of May 15, 1820, which enacts that if any person shall, upon the high seas, or in any open roadstead, or any

haven, basin, or bay, or in any river, &c., commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company, &c., or the lading thereof, &c., on being convicted before the Circuit Court of the United States for the district into which he shall be brought, or on which he shall be found, shall suffer death.

There is a proviso which declares that nothing in the section shall be construed to deprive any particular State of its jurisdiction over the offence, when committed within the body of a county, or authorize the courts of the United States to try such offenders after conviction or acquittance for the same offence in a State court.

The 2d section of the 3d article of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

A material question in this case, in view of this provision of the Constitution, was, whether or not the offence was committed out of the jurisdiction of any particular State, because, if not, inasmuch as it was not committed within the State of New Jersey, the Circuit Court of the district of that State had no jurisdiction. That jurisdiction depends upon two facts: first, that the offence was committed out of the jurisdiction of any other of the States of the Union; and, second, that the prisoner was first apprehended in the district of New Jersey.

Crimes committed against the laws of the United States out of the limits of a State are not local, but may be tried at such place as Congress shall designate by law, but are local if committed within the State. They must then be tried in the district in which the offence was committed. (15 How., 488, 6th amendment of the Constitution of U. S.)

In many of the statutes prescribing offences against the laws of the United States, there is an express limitation excluding offences committed within the jurisdiction of a State. The acts of 1790 and 1825 are of this description.

Under these statutes the question presented in this case could

not arise, as the offence could not be committed within the limits of the State.

We agree, however, that the omission of the limitation in the act of 1820 constitutes no objection to the legality and force of the act, as it is competent for Congress to prescribe the punishment of offences committed on the high seas, open roadsteads, in any haven, basin, or bay, or in any river where the sea ebbs and flows, as there described, although within the limits of a State. But in these cases, as we have seen from the constitutional provision referred to, the indictment and trial must be in a district of the State in which the offence was committed.

Now, the special verdict finds that the offence in this case was committed upon the "Spray," lying in waters adjoining the State of Connecticut, between Norwalk harbor and Westchester county, in New York, at a place five miles eastward of Lyons's Point, and a mile and a half from the Connecticut shore. Whether this *place* thus described is out of the jurisdiction of a State or not, is not found, and is, of course, necessarily left to the court to determine. The learned judge of the District Court, sitting in the circuit with the presiding judge, in a very carefully considered examination of the question, came to the conclusion that the place where the offence was committed was within the jurisdiction of New York; and it appears that two of the eminent judges of the highest court of the State of New York entertained different opinions on this question. (3 Seldon, 295.)

We have not referred to this boundary of New York for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying that the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement, belongs to the jury. All the testimony bearing upon this question, whether of maps,

surveys, practical location, and the like, should be submitted to them under proper instructions to find the fact.

We do not think the special verdict in this case furnishes ground for the court to determine whether or not the offence was committed out of the jurisdiction of a State, and shall direct that it be certified to the Circuit Court, to set aside the special verdict, and grant a new trial.

UNITED STATES *vs.* KNIGHT'S ADMINISTRATOR.

1. After a cause has been argued and decided, the court will not hear a motion to change the decree based on affidavits taken to show facts which do not appear in the record.
2. This court will not suffer its judgment upon an appeal to be influenced in any respect by new testimony offered here, even in a case which is within its general chancery powers, much less where it is exercising merely the special jurisdiction conferred by Congress in respect to California land claims.
3. The necessity for this rule, and the legal principles on which it is founded, discussed by the Chief Justice.
4. The court does not doubt its power to open a judgment rendered at the present term and continue or rehear the cause, if, *upon the record*, one of the judges who concurred in the decision supposes it to be erroneous.

This cause (a California land claim brought here on appeal by the United States from the decree of the District Court) was reached on the docket at the present term, was called in its regular order, and was argued by counsel on both sides; the opinion of the court upon it was delivered, and a decree pronounced, that the decree of the District Court be reversed and the cause remanded, with directions to dismiss the petition of the claimant. (See *ante*, p. 227.)

At a subsequent day of the term, *Mr. Reverdy Johnson*, for the claimant, moved the court so far to modify its order entered therein, as to remand the cause to the court below for

further evidence and proceedings, and offered in support of the motion sundry affidavits to show by this new testimony that the court had fallen into error in some conclusions of fact stated in the opinion, and also that some of the testimony was not within the knowledge or power of the appellee when the case was heard in the District Court, but has been discovered since.

Mr. Black, for the United States, hoped the court would relieve him from the duty of making an argument on the motion; thought that it ought not to be heard at all, and gave his reasons for that opinion.

Mr. Johnson maintained the propriety and regularity of the motion, and respectfully insisted on his right to be heard.

Mr. Chief Justice TANEY. The court cannot receive the depositions, nor hear an argument upon the motion. The point has already been decided at the present term in the case of *The United States* vs. *Hensley*, and a similar motion overruled.

In the case of *Southard et al.* vs. *Russell*, (12 How., 139,) the court held that it could not look beyond the record as transmitted from the inferior court, nor suffer its judgment to be influenced in any respect by new testimony offered here. And that case was before us in the exercise of the general chancery powers conferred by the Constitution, in which a broad discretionary power may be exercised in order to promote the purposes of justice; for in a case prosecuted within that jurisdiction the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered. 16 How., 547.

But the jurisdiction which the court exercises in this case is a special one, created by act of Congress, and its mode of proceeding and powers are regulated and defined by the law; and it cannot, under any supposed analogy to proceedings in chancery, exercise any power beyond that which the act or acts of

Congress have given. 6 Pet., 470, *United States* vs. *Nourse.* These acts of Congress give this court the power to hear and determine the case upon the proceedings and evidence taken in the court below certified to this court; but no power to receive or consider any new evidence, although discovered since the decree was passed. Indeed, it would have been inconsistent with the policy upon which these acts of Congress were passed to confer this power upon the court. This special jurisdiction was created in order to ascertain promptly the extent of the grants which had been made by the Mexican Government to private individuals, and how much of the public domain still remained in the hands of the Government at the time of the cession to the United States, and had become subject to the disposition of this Government. And if a proceeding like the one now proposed was sanctioned, it would lead to interminable delays in almost every case where the decision was against the claimant, and it would be difficult to say when the rights of the United States could be regarded as finally settled in any case while a Mexican still made claim to the land under what he might allege to be a Mexican grant. And we may judge, from the character of the testimony offered in the cases which have already been before the court upon these Mexican claims, what would be the extent of the fraud and perjury to which such a privilege would lead, when the claimant had learned from the decision of the court what were the weak points of his case, and was strongly tempted by the magnitude of his claim to seek for and discover some new testimony to cure its defects.

We do not doubt the power of the court to open the judgment it has rendered at the present term, and continue or rehear the case, if, upon the record before us, any one of the judges who concurred in the decision had since seen cause to doubt its correctness. But in the absence of any such doubt the motion of the appellee is overruled.

Motion refused.

Flanigan et al. *vs.* Turner.

A respondent sued in admiralty for repairs to a vessel cannot deny that he is sole owner if the vessel has been sold by the order of another court, and he has claimed and received the proceeds as sole owner.

This was an admiralty suit *in personam*, commenced by the libel of Andrew Flanigan, John S. Beacham, George P. Beacham, Lenox Beacham, and Samuel Beacham, partners trading as A. Flanigan & Co., against Robert Turner, owner of the steamboat Susquehannah, in the District Court of the United States for the district of Maryland. The libellants claimed $2,762 for work done and materials furnished in repairs to the Susquehannah at the request of Turner, who was either owner or agent for the owner. Turner answered that Flanigan & Co. were joint owners of the boat with him and others, and, therefore, had no right to recover against him for the work. He also alleged and showed that a bill was pending in a State court, brought by himself against these libellants and others, to dissolve the partnership, sell the vessel, and after paying expenses, &c., divide the proceeds ratably among the several owners. This cause was then suspended until that in the State court should be decided. The last mentioned proceeding went on, the vessel was sold under it, and Turner claimed the proceeds as sole owner; the other parties consented, and the court so ordered. The present cause was then pressed in the District Court, and a decree made there in favor of the libellants for the amount found to be due for their work and materials—$2,665 73, with interest from 1st July, 1857, and costs. Turner, the respondent, appealed to the Circuit Court, where the decree was changed to $2,827 88. Turner appealed to the Supreme Court, and attempted to reverse the decree of the Circuit Court upon the grounds which will be found stated in the opinion of Judge *Nelson*.

Mr. Barrol, of Maryland, for respondent.

Mr. Perrine, of Maryland, for libellants.

Mr. Justice NELSON. This is an appeal from a decree in admiralty of the Circuit Court of the United States for the district of Maryland.

The libel was filed by the appellees against Turner, the appellant, *in personam*, for materials and repairs on the steamboat Susquehannah, in the port of Baltimore. It was filed 25th February, 1858.

The respondent set up, by way of plea, that he had previously filed a bill in equity against the libellants and others in the Circuit Court for Baltimore city, as joint owners and partners with him in the Susquehannah, for the purpose, among other things, of charging them with their proportionate share of the expenses of the repairs claimed; that the defendants in that bill had put in their answers, and that the suit was still pending. This plea was overruled; and the respondent answered the libel, setting up, substantially, the same matters as stated in the bill of complaint.

Further proceedings in the admiralty suit were suspended, by an order of the district judge, to await the result of the suit in equity in the Baltimore court, that suit having been first commenced, and jurisdiction of that court over the subject-matter having first attached.

A receiver was appointed in the equity suit, and, under an interlocutory order of the court, the vessel was sold and proceeds brought into the court, to abide the result of the litigation.

Subsequently, Turner, the complainant, appeared in court and dismissed his bill in equity, and then claimed the fund in court, the proceeds on the sale of the Susquehannah, as belonging to him, he being the only person interested or entitled to it. There being no opposition to the application, as, indeed, there could not be, the defendants, in the bill in equity, in their answers, having not only denied any joint interest in the vessel, but insisted that the complainant was the owner, the application was granted, and the proceeds paid over.

After the bill in the Baltimore City court was dismissed. the

suit in the admiralty proceeded, and, on the 4th January, 1859, a decree was rendered by the District Court in favor of the libellants, for $2,665 73, and interest, which, on appeal to the Circuit Court, was affirmed, with some modifications as to the amount.

The principal ground of the defence to the libel was, that the libellants were joint owners of the vessel with Turner, and hence the court had no jurisdiction of the case, either to settle the partnership accounts, or to adjust in any way the equities of the joint owners.

But the answer to this defence is, that the proofs in the case are full to show, that the libellants were not joint owners of the Susquehannah; but, on the contrary, that she was owned solely by the respondent. She was purchased by him from the Philadelphia, Wilmington, and Baltimore Railroad Company 7th November, 1856, and the conveyance taken in his own name. He afterwards attempted to sell the vessel to an association in Baltimore, of which the libellants, or a part of them, were members, but failed to complete the sale. The dismissal of the bill in equity, in which he attempted to charge these libellants, among others, for the expenses of the purchase and repairs of the Susquehannah, and receiving the proceeds of her sale, which were in court, upon the allegation that he was solely interested in the fund, go far to confirm the other proofs in the case, that the libellants had no interest in the vessel, as owners, at the time of the repairs; and, as is admitted, they were made at his request, that they were made on his credit.

The expenses of the repairs and of the materials furnished the vessel were satisfactorily proved, and, unembarrassed with the attempt to prove the joint ownership, the case is a very simple and plain one. That attempt having failed, the decree below was right, and should be affirmed.

Decree of the Circuit Court affirmed.

THE WATER WITCH—*Clifton, Claimant; Sheldon, Libellant.*

1. Two consignees of a cargo libelled the ship by which it was carried for damage suffered on the voyage, and the owner of the ship libelled the whole cargo for freight and primage. The District Court heard the three causes as one, and finding the damages to be greater than the freight, dismissed the libel of the owners and decreed in favor of the consignees for so much as the damage to the cargo exceeded the amount of the freight. The consignees submitted, but the claimant of the ship appealed in all the cases to the Circuit Court: *Held*, that the Circuit Court was right in modifying the decrees of the District Court, so as to give to the owner of the ship the amount of his freight and the consignees the whole sum due them as damages.
2. The claimant of the vessel has no right to complain here of such change in the decree, because it benefited him by giving him the costs of his suit.
3. The parties cannot split up the claim for damages by applying a part to extinguish the claim for freight, and taking a decree for the remainder.
4. A ship which has received a cargo, carried it to the consignees at the port of destination, and then libelled the cargo for freight, is estopped to deny her liability to deliver in like good order as received, with the usual exceptions.
5. A party who has made advances on the cargo of a ship, and been treated as consignee by the owners, has such a title as enables him to libel the ship for damages to the cargo.
6. Where the contract between the shipper and the master refers to the "capacity of the vessel," a doubtful inference may be drawn that the cargo was to be carried on deck; but this inference is repelled by the fact that the shipper refused to let such an agreement have a place in the bill of lading, and bound himself to pay under-deck freight.
7. Where a cause in admiralty turns on a question of fact, and the evidence is conflicting, and both the courts below decide the same way, it is not for this court to hear arguments whether eleven deponents ought to be believed on one side rather than ten on the other, for the weight of testimony is not always with numbers.

Appeal from the Circuit Court of the United States for the southern district of New York.

Sheldon filed his libel in the District Court of the United States for the southern district of New York against the brig Water Witch. The libellant claimed to be the consignee of two hundred and two bales of cotton, which had been shipped on board of that vessel at Lavacca, Texas, for transportation to New York, there to be delivered to him on payment of freight. The libel alleged that through the negligence of those in charge of the vessel, bad stowage and other careless management, the cotton was greatly injured. The answer put in issue the various allegations of the libel, and alleged affirmatively that the "contract mentioned in the libel did not, nor could in anywise, bind the said vessel, nor was the same authorized or assented to," and the same had expired.

This cause, with two others—one against the vessel for damage to other portions of the cotton belonging to another party, and the other by the owner of the brig against the entire cargo, to recover freight and primage—were tried together, before the District Court, which decided that the vessel was liable for the "sea damage" to the cotton consigned to the libellant. An interlocutory decree was accordingly entered, and after reference to a commissioner the parties agreed upon the amount of the "sea damage," and the commissioner made his report accordingly; upon the coming in of which, a final decree was entered for the damages so ascertained, deducting therefrom the amount of freight chargeable upon the libellant's cotton.

The claimant appealed from this decree (and the decrees in the other cases) to the Circuit Court, and the three causes were again heard together before Mr. Justice *Nelson*, who modified the decrees below, and decreed the whole amount of the damages, without deducting the freight on the cotton. The claimant appealed to the Supreme Court.

The facts of the case are briefly as follows: In May, 1854, the brig Water Witch, the property of Clifton, but at that time chartered by a firm in New Orleans, lay in the Bay of Matagorda, Texas, waiting for a cargo. A quantity of cotton having offered for shipment, a special contract was made

between the shipper at Lavacca and one Mitchell, who represented the charterers. By this contract the shipper was to deliver the cotton at Lavacca, to be received on lighters by Mitchell, and placed by him, at his expense, on board the vessel, to be carried to New York, for the freight of one and a quarter cents per pound. The vessel lay at the port of Indianola, situate in the same bay as Lavacca, but several miles distant from that place. The cotton was carried on lighters from Lavacca to the vessel. After it was delivered from the lighters, and received on board, the master refused to sign the bills of lading, upon the ground that the cotton was not in good order and condition. The agent also objected to the bills of lading, because they did not contain a stipulation that part of the cotton might be shipped on deck. The shipper refused to admit such a stipulation, as it was not contained in the agreement between the parties. Pending the dispute, the master sailed for New York with his cargo. The shipper, on learning that the vessel had sailed, leaving the bills of lading unsigned, forwarded them to the consignees named in them, with a letter stating the circumstances. The consignees made advances upon the cotton. On the arrival of the vessel at New York, the master notified the consignees, and discharged his cargo, but in a badly damaged condition. He also demanded his freight, which they refused to pay. Whereupon the several parties instituted their suits.

Mr. Donohue, of New York, for appellant. The libellants, Sheldon & Co., show no title or interest in the cotton to sustain their libel. They were not owners or shippers of the cotton nor assignees of any contract, by bill of lading or otherwise, on the part of the vessel or its owners, which brought them into any relation of contract with, or claim against, the vessel. They made no advances upon the faith of any bill of lading or other contract of the vessel, and there is no evidence that their advances, in whatever shape, exceed the value of the cotton as it came to their hands. The whole right or claim for damage is still vested in the owners of the cotton, and the relation of these libellants to those owners would not bar the latter from an independent

or subsequent suit. For these reasons, irrespective of the merits of the controversy, the libels for damage should be dismissed.

The owners and shippers of the cotton (supposing the libellants to represent them) have no claim for damages against the vessel or its owners, unless such damage arises from some breach of contract with, or duty towards the shippers, obligatory on the vessel and its owners. No such contract or duty can arise, unless entered into or assumed by the owners of the vessel, directly or through some authorized agent.

Mitchell, the party who made this contract, was the agent or broker of the charterers, and had no employment for, or authority from, the vessel or its owners. It was competent for the charterers to make such contract as they saw fit with shippers, and they would be bound by it. The vessel they had no authority to bind. But, if the contract in any way affected the vessel or its owners by way of contract or duty, no breach of contract or duty thereunder has been shown by the libellants. The vessel took proffered cargo to the extent of its capacity, stowing its hold full, and then taking a deck load. If the shippers were unwilling to ship cargo on deck subject to all the risks of such lading, and the contract with Mitchell entitled them to under-deck lading of the whole quantity named, they should have withheld the cargo, and sought indemnity for not taking it. As the vessel gave no admission of good order on receipt of the cotton; as, by all the evidence, it appears that the cotton was badly damaged when put on board, and as the voyage shows marine disaster, which accounts for all the sea damage, the burden is on the shippers to show both bad stowage and damage therefrom. The Circuit Court clearly erred in increasing the claim of the libellants on their damage. There was no appeal by them, and the Circuit Court could not increase the damage.

Mr. Owen, of New York, for respondent. The respondent was the consignee of the cotton in question, and entitled, not only to receive the same, but also to maintain this action for the damage which it sustained on the voyage to New York. No reasonable doubt could be entertained upon this subject

if the bills of lading which were transmitted by the shipper to the respondent had been signed by the master of the vessel, or by some person lawfully authorized. *Lawrence* vs. *Minturn*, (17 How., 100;) *McKinlay* vs. *Morrish*, (21 How., 343.) The fact that the bills of lading were not so signed does not, under the circumstances of this case, affect the question, for the respondent was, in fact, the consignee, and was so recognised and treated by both parties. A bill of lading, duly signed by the master, is not essential to a legal and valid consignment. Goods may be consigned verbally, as well as by writing. *The Peytona*, (2 Curtis, 26, 27.) Even admitting that the respondent was not a consignee created in the customary way, still he was the agent of the shipper, and expressly authorized "to recover the cotton, and proceed against the vessel for damages," which authority, coupled with his interest in the cotton, by reason of the advance made thereon, entitled him to maintain this suit. *Houseman* vs. *The North Carolina*, (15 Peters, 40, 49;) *Fritz* vs. *Ball*, (12 How., 466;) *McKinlay* vs. *Morrish*, (21 How., 343;) *Lawrence* vs. *Minturn*, (17 How., 100.)

Having received the cotton on board, the vessel became responsible for its proper stowage and protection during the voyage. The contract, though silent as to the place where the cargo is to be carried, clearly implies that it was to be carried under deck. Such is the legal effect of bills of lading where nothing is mentioned on the subject. *Vernard* vs. *Hudson*, (3 Sumn., 405;) *The Peytona*, (2 Curtis, 21.) In the absence of any express agreement upon the subject the law determines the question between the parties, and requires the cargo to be carried under deck. *The Rebecca*, (Ware, 188;) *The Paragon*, (Ware, 326.)

The vessel was liable, under the circumstances, for all damages, except such as arose from the "act of God." The water which accumulated in the hold was not simply an act of God, but it arose from the "fault or negligence of man." *The Rebecca*, (Ware, 188;) *Crosby* vs. *Grinnell*, (9 Leg. Obs., 281;) (2 Greenl. Ev., p. 212, § 219;) *The Reeside*, (2 Sumn., 267.)

Mr. Justice GRIER. The decree in favor of the libellant

in the Circuit Court was for a much larger sum than that rendered in the District Court, and as there was no cross appeal by the libellant, the decree of the Circuit Court is now challenged as erroneous for that reason; but this apparent inconsistency will be found not to exist in reality, by a short reference to the history of the case, as exhibited by the record.

The libellant claimed as consignee of two hundred bales of cotton shipped on board the Water Witch, to be carried from Lavacca, in Texas, to New York. The libel charged that the cotton had been greatly injured by reason of bad stowage and want of care on the part of the master and crew of the vessel.

As an excuse for not tendering freight, the libel alleged that the damage to the cotton far exceeded the freight and primage. Another consignee filed his libel at the same time for that portion of the cotton consigned to him, with the same allegations, and the claimants of the ship filed their libel against the cotton for freight and primage. These three suits, all depending on the same facts, were tried as one.

The great question of the case was, whether the damage, which it was admitted the cargo had received, was caused by the fault of the vessel, or before it was received on board—that is, whether it was sea damage, or country damage; and, if sea damage, whether the vessel was liable for it. The District Court decided that the vessel was liable for the sea damage, and sent the cases to a master to report the amount of sea damage suffered by the cotton, and the sums severally due by the consignees for freight. Having these data by the report, that court, instead of entering a decree for each libellant for the sum found due to him, made a set-off of the freight due the ship against the amount of damage suffered by the cotton, giving a decree for each consignee for the balance, deducting freight, and dismissing the libel of the owners. The claimant of the ship appealed, in all the cases, to the Circuit Court. The several amounts found due by the master's report were adopted by that court, and the decree in each case corrected, so that the decree for the several consignees was for the whole damage, without set-off, and a decree in favor of the ship for

freight found to be due on the cotton, leaving the set-off to be made by the parties, or by order of the District Court. The amendment made by the Circuit Court was in fact beneficial to the owners of the ship, as they recovered costs in their own suit. The court rightly decided "that the parties could not split up the claim for damages by applying a portion in extinguishing the freight money, and then ask a decree for the excess of this sum."

The appellants have, therefore, no reason to complain of the decree on this ground.

The amount of sea damage, as assessed in the report, was admitted to be correct. The refusal of the master of the ship to sign bills of lading could not affect the case. The ship having received the cargo, and carried it to the consignees in New York, and then libelled the cargo for freight, is estopped to deny her liability to deliver in like good order as received, with the usual exceptions.

It has been contended, that the language of the written contract between Mitchell and Forbes permitted the cargo to be carried on deck, and that the phrase "*capacity of the vessel*" admitted of such construction; but the fact that the owners of cargo refused to have such an agreement made a part of the bills of lading, and the agreement to pay under-deck freight, repel any such doubtful inference from the phrase. The evidence does not support the allegation of any agreement by the shippers, that the cotton, or any portion of it, should be carried on deck. The objection that Sheldon was not consignee, or if so, had no title to support the action, has no foundation in fact or in law. The claimants treated him as such, and as such he had made advances on the cargo.

Whether this sea damage was caused, as charged in the libel, by the fault of the master or the ship, was a question of fact, and encumbered, as usual, with a mass of conflicting testimony and opinions. The weight of the testimony, as decided by the judges of both courts, inclined in favor of the libellant, and we see no reason to differ from them. The weight of testimony is not always with numbers, and this court should not have their time spent in hearing arguments whether the eleven

deponents on one side ought to be believed rather than ten on the other. In such cases, the concurrent finding of two courts ought to satisfy the losing party.

The decree of the Circuit Court is affirmed, with costs.

White's Administrator *vs.* The United States.

This court will not award a *mandamus* to the judge of the District Court, commanding him to permit the intervention of one claimant in a proceeding instituted by another for the confirmation of a distinct title under a Mexican grant.

Thomas B. Valentine, for himself and other parties in interest, presented his petition to the Supreme Court setting forth that he held the title of Juan Miranda, to whom a grant was made by the Mexican Government of a tract of land in California known by the name of the Arroyo de San Antonio; that one Ellen E. White, administratrix of Charles White, deceased, petitioned the Land Commission for confirmation to herself of another title derived from Manuel Ortega for the same land, and her proceeding came by appeal into this court, where an order was made remanding the cause to the District Court, so that the claimants under Miranda might have an opportunity to contest the claim of White agreeably to the 13th section of the act of 1851; that the mandate was filed in the District Court and a motion made by the petitioner for leave to intervene, which was refused by the District Court in disregard of the order of this court. The petitioner, being without other remedy, prays for a *mandamus*.

Mr. Black, of Pennsylvania, and *Mr. Green*, of Missouri, for the relator.

Mr. Cushing, of Massachusetts, for White.

Mr. Bates, Attorney General, for the United States.

Mr. Justice GRIER. The motion for a *mandamus* in this

case is founded on a mistaken apprehension of the judgment of this court as it is reported in 23 Howard, 249.

Ortega had married the daughter of Miranda; they lived as one family, and entered into possession of the land claimed. Ortega's title purported to be founded on a petition to Governor Alvarado, dated 12th June, 1840; a reference report and marginal decree signed by Alvarado, 10th of August, 1840, "which was returned to him to serve as a security during the other operations indicated." It was never completed by a final grant, and was not to be found among the archives, but its execution was proved by Alvarado himself. Miranda, in 1844, petitioned for a grant of the same land, alleging that he had been in possession of the land for more than four years. This informé was in the usual form, and is found among the archives. The court being divided in opinion as to the authenticity of the Ortega title, (and a majority expressing a doubt,) at first decided to send the record back to the District Court, to have the conflicting claims of the father and son-in-law settled by a proceeding under the 13th section of the act of 1851. But our attention was afterwards drawn to the fact, that the proceeding, under the proviso in this section, was intended only for cases where both parties claimed under a confirmed Mexican grant by derivative titles, and as Ortega and Miranda claimed under several and distinct titles, the case did not come within the provisions of the 13th section. The court then reversed the decree of the District Court, and not being fully satisfied on the evidence as to the genuineness of Ortega's papers, sent the case back for further examination. There was no order that a stranger to the record should be allowed to interplead and set up another grant, as a reason why the claimant's title should not be confirmed, for it appears from the opinion of the court that they objected to the proceeding because the Miranda grant had been used to combat that of Ortega in this proceeding. The first decree did not order the court below to allow the claimants under Miranda to interplead in this suit; and if it had done so, it was wholly annulled and set aside by the order and decree afterwards made on the 1st of May, 1860. It was like a judgment in a common law

case, where a judgment is reversed and a *venire de novo* ordered; and the reason given by the court was, "that the District Court might not be trammeled in their future consideration of the case on all its merits."

The motion for a mandamus is therefore refused.

Ex Parte Gordon.

1. A writ of prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ.
2. Neither a writ of error, writ of prohibition, nor *certiorari*, will lie from this court to a Circuit Court of the United States, in a criminal case.
3. The only mode of bringing a criminal case into this court is upon a certificate of the judges of the Circuit Court that their opinions are opposed upon a question raised at the trial.
4. No party has a right to ask for such a certificate, nor can it be made consistently with the duty of the court, if the judges are agreed and do not think there is doubt enough upon the question to justify them in submitting it to the judgment of this court.
5. After a party has been convicted and sentenced in the Circuit Court for a criminal offence, and after a warrant is in the hands of the marshal, commanding him to execute the judgment, the Circuit Court itself has no power to recall it; and certainly this court, having no appellate power over the proceeding, cannot prohibit a ministerial officer from performing the duty which the Circuit Court has legally imposed upon him.

This was an application by Nathaniel Gordon for an alternative writ of prohibition to the judges of the Circuit Court of the United States for the southern district of New York, and its officers, and the United States marshal, to restrain them from further proceeding in a case wherein the said Gordon had been found guilty of piracy and sentenced to death; and also for a writ of *certiorari* commanding the judges to send up the papers, process, and all proceedings in the said cause, to

this court. The facts averred by the petitioner are substantially stated by the Chief Justice in the opinion of the court.

Mr. Dean, of New York, presented the petition and moved for an alternative writ of prohibition, and also for a *certiorari* to bring up the proceedings.

Mr. Chief Justice TANEY. Nathaniel Gordon has filed a petition to this court, stating that he has been indicted and convicted in the Circuit Court of the United States for the southern district of New York of the crime of piracy, under the act of Congress prohibiting the African slave trade, and sentenced to death by the court, and a warrant issued and placed in the hands of the marshal of that district, commanding him to carry the sentence into execution on the seventh day of this month; that there were irregularities and errors in the proceedings against him, and that he had moved for an arrest of judgment in the Circuit Court, which motion had been overruled; and had also moved to have the case certified to this court as upon a division of opinion, in order that the proceedings against him might be revised here, but this application had also been refused; that the President of the United States has granted him a respite of the sentence until the twenty-first day of this month, and he fears that it will be carried into execution on that day unless it is prevented by the interposition of this court; and, upon this statement, he, by his counsel, moves for an alternative writ of prohibition directed to the Circuit Court and its officers; and also for a *certiorari*, returnable at the same time, directing the Circuit Court to return the papers, process, and proceedings in the case.

This motion cannot be sustained. It appears by the statement in the petition, that the party has been tried, and found guilty of the crime of piracy, and sentenced to be executed by a court of the United States, possessing competent jurisdiction, and from whose judgment no appeal is allowed, by law, to this tribunal; for, in criminal cases, the proceedings and judgment of the Circuit Court cannot be revised or controlled here, in any form of proceeding, either by writ of error or pro-

hibition, and, consequently, we have no authority to examine them by a *certiorari*. And the only case in which this court is authorized even to express an opinion on the proceedings in a Circuit Court in a criminal case is, where the judges of the Circuit Court are opposed in opinion upon a question arising at the trial, and certify it to this court for its decision. But, certainly, the party had no right to ask for such a certificate, nor could it have been granted consistently with the duty of the court if the judges agreed in opinion, and did not think there was doubt enough to justify them in submitting the question to the judgment of this court.

But this motion asks the court to do even more than exercise an appellate power where none is given by law, for the case has now passed out of the hands of the court, and the warrant is in the hands of the marshal commanding him to execute the judgment of the court. The Circuit Court itself has not now the power to recall it, and, certainly, it would be without precedent in any judicial proceeding to prohibit a ministerial officer from performing a duty which the Circuit Court had a lawful right to command, and had by its process, regularly issued, commanded him to perform, and in a case, too, where no appellate power is given to this court to revise or control in any respect the judgment or proceedings of the Circuit Court. We are not aware of any case in which a similar motion has heretofore been made in this court in a criminal case. In a civil case, *Ex Parte Christie*, (3 How., 292,) a motion was made for a prohibition to be issued to the District Court of the United States for the district of Louisiana, to prohibit it from further proceedings in a certain case of bankruptcy then before it, upon the ground that it had transcended its jurisdiction in entertaining these proceedings. But this court was of opinion that it had not exceeded its jurisdiction, and the question as to its power to issue the writ was not necessarily involved in the decision of the case. In the conclusion of the opinion, however, after a very elaborate argument on the powers of the District Court, under the bankrupt law, the court said, (page 322,) that although the question was not absolutely necessary to be decided, yet they deemed it

proper to say, as the point had been fully argued, that this court possessed no revising powers over the decrees of the District Court sitting in bankruptcy; that the District Court had not interfered with, nor in any manner evaded or obstructed, the appellate authority of this court by its proceedings, and the court knew of no case where the court is authorized to issue a writ of prohibition to a District Court, except in the cases expressly provided for by the 13th section of the judiciary act of 1789—that is to say, where the District Courts are proceeding as courts of admiralty and maritime jurisdiction.

The result of this opinion is, that a prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ. We concur in this opinion, and the rule applies with equal force to the case before us as it did in the case referred to.

Motion refused.

FOSTER *vs.* GODDARD.—GODDARD *vs.* FOSTER.

1. An exception to a master's report is not in the nature of a special demurrer, and is not required to be so full and specific.
2. It is only necessary that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse.
3. An exception so made brings up for examination all questions of fact and law arising upon the report of the master, relative to that subject.
4. Where parties associated in trade contract that one partner shall receive a certain share of the profits arising from the sale of goods, deducting "the actual expenses that may appertain to the goods themselves," taxes, clerk-hire, and advertising are as clearly chargeable among these *expenses* as storage, commission or insurance.

Cross appeals from the Circuit Court of the United States for the district of Massachusetts.

The facts, pleadings, and points of this case are so fully stated by Mr. Justice *Swayne*, that any other report of them cannot be made without repeating what he has said in his opinion.

Messrs. Bartlett and *Sohier*, of Massachusetts, for complainant.

Mr. Goodrich, of Massachusetts, for respondent.

Mr. Justice SWAYNE. These are cross appeals of the same cause in equity. Foster is the complainant, and Goddard the respondent. The record is voluminous. The questions presented for our consideration are questions of fact. No legal question arises in the case, with the exception of a single point touching the form and effect of exceptions to a master's report. The case involves nothing else that can be of interest in any other case. We have considered it with all the care which the magnitude of the amounts involved, and the fulness of preparation and ability with which it has been presented, demand at our hands.

Upon some of the points pressed in the argument at bar, we have found difficulty in reaching conclusions satisfactory to ourselves, and such as we could all unite in. In the end, we have been able to do so.

We adopt the analysis of the case presented in the opening brief of the counsel of the complainants. It has the double merit of brevity and extreme clearness:

"The bill alleges the execution by the parties of two several contracts, bearing date, respectively, June 24, 1843, and May 7, 1849.

"By the first of these complainant was to proceed to Valparaiso, remain there five years, and devote himself exclusively to the transaction of respondent's business, for which he was to receive, at the end of said five years, a portion of the net profits. By the second contract the complainant was to proceed to the west coast of South America, and devote his time to the management of respondent's business in those parts, and also in Mexico and California, for which he was to receive, on his return, a portion of the profits of the business, in the trade which complainant should have conducted to completion. This agreement also provided that complainant might terminate the contract at any time, by giving so much notice that any voyage respondent might have commenced previous to the

receipt of such notice should receive the benefit of complainant's services to its final accomplishment. The prayer was that an account might be taken, and respondent decreed to pay complainant what was due.

"On the 3d of August, 1857, the respondent filed his answer, in which he admits the execution of said contracts, the rendition of the services by said Foster, and the possession of books of account, from which the amount, if any, due said Foster can be ascertained; alleges reasons for his delay in making up said accounts, and avers that the last mentioned contract determined on 31st of December, 1850.

"On the 13th of August the complainant filed an amended bill, setting forth more particularly the mode in which the business was conducted, and the accounts kept and rendered to respondent, through the house of Alsop & Co.

"To this respondent filed an answer on the 4th of September, 1857. To this the general replication was filed, and the cause, by consent, was sent to a master to take an account, with special instructions. On the 8th May, 1858, the complainant, by leave of the court, withdrew his replication, and filed another amendment, alleging an agreement between the parties, that the second voyage of the ship Crusader should be taken and deemed within the said first agreement. To this the respondent filed an answer denying the allegation. The general replication was then filed, and the cause was then committed to the same master, with instructions similar to those formerly given.

"The master made his report June 2d, 1858, to which the respondent alleged ten exceptions.

"The cause came on for hearing before the Circuit Court, for the first circuit, at the October term, 1858. The learned judge, by his decree, sustained the first and tenth of the exceptions, and overruled the rest, and ordered the master's report to be reformed accordingly, which was done.

"From this decree the complainant and the respondent severally appealed."

We have considered all these exceptions with care. The argument at bar was confined chiefly to the first, second, third,

and tenth. The complainant objects to the action of the court touching the first and tenth, which were sustained. The defendant objects, because the second and third were overruled. In regard to the fourth, fifth, sixth, seventh, eighth, and ninth exceptions, it is sufficient to remark, that we see no reason to doubt the correctness of the master's findings to which they relate. In this we concur with the court below. They were not pressed by the defendant's counsel in the argument at bar. We deem it unnecessary to discuss the evidence, or the legal views by which the master's conclusions are sustained.

Before proceeding to consider the four remaining exceptions, we deem it proper to advert to an objection made to their form by the counsel for the complainant. It is said that such an exception is in the nature of a special demurrer, and that these are not so full and specific that the court can consider them.

Such is not the rule of this court. All that is necessary is, that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and of law arising upon the report of the master relative to that subject. The exceptions in this case are sufficiently full. They are in accordance with the experience of each member of the court in the administration of equity jurisprudence elsewhere.

We come now to the consideration of the exceptions which have been specially named.

"Second exception: For that the said master has erroneously charged this respondent with the sum of seventeen hundred and eighty-nine dollars and eighty-nine cents, the amount of a loss made in the prosecution of the business aforesaid, by a sale of goods to the New England Worsted Company, for which they have not paid, but refuse to pay."

The master's report, touching this subject, is as follows:

"The company were charged, on the books of Goddard, with the sum of $2,173 04, on the balance of an account due for wool; but the amount due was in dispute between them In 1850 or 1851 the company tendered in payment about

$1,500, which Goddard declined to receive. Nothing further was done by either party until January, 1857, after the claim had been outlawed three years, when the company offered the sum of $1,789 89, but Mr. Goddard refused to receive it, and also declined to permit Foster to receive his proportion of that sum.

"It is contended by the respondent that he had a right to conduct his own business in his own way, being responsible to Foster only for any want of good faith, and that he was neither bound to accept a sum less than what he believed to be due, nor to institute a suit to recover what he claimed; and that if any loss has thereby occurred, it is properly chargeable to the business.

"The management of the business, including the collection of the accounts, was under the absolute control of Goddard, and in conducting it he was responsible, I think, only for the exercise of good faith and ordinary diligence. He was not bound to accept the sum less than what he believed to be due; and if he had instituted a suit to recover the full amount, Foster would have undoubtedly been bound by the result. But was he at liberty to do neither? As between parties situated as were these, the authorized duty to collect being vested solely in one, and the amount of the compensation of the other depending, in a measure, upon the manner in which that duty should be performed, was it reasonable prudence or diligence for Mr. Goddard to decline either to receive what the debtor offered to pay, or to enforce the payment of what he himself claimed to be due? It is well settled, that if executors or trustees allow a debt against a solvent debtor to become outlawed, they are chargeable with the amount."

There is no complaint that the master has misapprehended the facts or stated them incorrectly. We are entirely satisfied with the views he has expressed and the conclusion at which he arrived.

"Third exception: For that the said master has allowed to the complainant, under the contract of June 24th, 1843, one-tenth of the profits made by this respondent in the construction and subsequent sale of a vessel commonly called the Valdivia,

which vessel was not employed in, nor put into, the business of this respondent, carried on under the contract aforesaid."

Upon this subject the master reported:

"This was a new ship, built by Mr. Ewell under a contract made by him with Mr. Goddard; was launched on the 15th of October, 1846, and was sold by Mr. Goddard to the United States Government the 7th December, 1846, at a profit. The validity of this claim depends upon the construction to be given to the following clause in the agreement of 1843:

"And furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attendant thereon to be charged or credited in the general account. It is also understood that said Foster's interest of one-tenth is liable to the full extent for all the risks and casualties in the business, attendant upon the goods and vessels.

"This vessel was never actually employed in the business of this trade. On the other hand, there is evidence tending to prove that she was originally contracted for by Mr. Goddard, was built and was designed for this trade; that Mr. Goddard had engaged a part of her outward cargo; that these facts were communicated by him to Mr. Foster; and that, under instructions from him, Mr. Foster had procured a portion of her first return cargo. She was sold, (so far as the evidence shows,) however, before any cargo had been laden on board of her at Boston.

"March 17th, 1846, Goddard wrote to Foster: 'I have contracted for a new ship of 550 tons, in the hopes of having one that will make her outward passage in sixty-five or seventy days; what shall be her name? I understand that Valdivia, the name of a province,' &c.

"Again, August 22d, 1846: 'Capt. Millet waits for the Valdivia, which will be despatched in November.'

"October 12th: 'The Valdivia will be launched to-morrow, and will be our next ship. She will not, however, sail earlier than the 1st to the 15th December, it being impossible to obtain any cotton goods before that time, *although engaged some time since.*'

"October 13th, the next day: 'Don't sell anything to arrive by the Valdivia.'

"January 5th: 'Doubtless you will be surprised, perhaps disappointed, in seeing this vessel (the Santiago) instead of the new ship; but the truth is, I have been tempted to sell her to our Government for some nine or ten thousand dollars above cost, cash in hand. She is now called the Supply.'

"It is contended by the respondent, that the complainant was only entitled to a share of the profits of such vessels as were actually employed in the trade, and not of those which might have been designed for the business, but not actually employed in it; that although Goddard may have intended the Valdivia for this trade, yet that he abandoned that intention before carrying it into effect, and that the agreement of 1843 did not restrict him from pursuing business on his private account.

"This agreement contemplated not only the *employment* necessarily of vessels carrying on this trade, but also as subservient to the main business, *the dealing* in vessels to a certain degree as subjects of trade; and this branch of the business was under the exclusive control of Goddard. It may be true that he was at liberty to pursue other business; but none the less for that reason was all that appertained to this agreement a distinct and independent business, and so to be preserved. Whatever act Goddard did, he did it with reference to one business or the other; either for the joint or for his private account. Whatever property was procured by him was procured *eo instanti* for one business or the other, and thereafter belonged to that business, and its character in this respect could not depend upon any subsequent purpose of Goddard, suggested by the results of the particular adventure. The proper effect, therefore, of the fact that Mr. Goddard was not restricted from other business is, that he was thereby bound still further, if possible, to preserve, with the most scrupulous exactness and good faith, the two businesses entirely distinct, marked and unconflicting, so that there should be neither temptation nor opportunity, after having procured a vessel on one account, to subsequently change its destination, according as the adven

ture promised a profit or a loss. Whatever Goddard did under this agreement was at the common risk, and for the common benefit. If, in the honest exercise of his discretion, he had purchased a vessel for this trade, which proved immediately after the purchase wholly unfit for the business, and she was sold at a loss, can it be doubted that this loss would have been properly chargeable in the general account? On the other hand, if he had purchased, or by mutual consent had built a vessel for this trade, and the same had been sold at a profit before being employed, that profit, as it seems to me, equally belongs to the general account."

We have only to add, that if the Valdivia had been burned at any time before she was sold, we cannot doubt that Foster, under the circumstances, must have borne his share of the loss. He could not be liable if loss were to be borne, and excluded if profit were made.

The following is the first exception. It was sustained by the court:

"First exception: For that the said master has not allowed to the said respondent, and has not permitted him to debit the business of this respondent, carried on by him under the contract dated June 24, 1843, sundry sums of money paid by the said respondent in the regular and usual course of his said business for clerk-hire, taxes, and advertising, to wit: thirty-eight hundred and thirty-eight dollars and seventy-eight cents for clerk-hire, seventeen hundred and eleven dollars and ninety cents for taxes assessed upon the property employed in said business, and three hundred dollars paid for advertising his said business; the said sums amounting in the aggregate to fifty-eight hundred and fifty dollars and sixty-eight cents, all which were proper expenditures in the course of the said business."

The solution of the question presented by this exception must depend upon the construction given to the following clause of the first agreement between the parties:

"In consideration of which said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one-tenth of the net profits of his business in that trade, after de-

ducting interest, at the rate of six per cent. per annum, on the capital invested; and all costs and expenses of whatever name and nature that may be incurred, both at home and abroad, in sailing, victualling, manning, keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum."

If the charges for taxes, clerk-hire, and advertising claimed are allowed, it must be under the terms, "the actual expenses that may appertain to the goods themselves." We are all of opinion that those terms are comprehensive enough to include these items. It was certainly not the intention of the parties that the defendant should make a donation by any expenditure in the business. The computation should be made as if he were engaged in no other business. The items in question are as much a part of "the actual expenses," appertaining "to the goods themselves," as storage, commission, or insurance. They rest on the same foundation, and the same language in the contract which affords a warrant for including the latter applies with equal force to the former.

"Tenth exception: For that the said master has allowed the complainant one-fourth of the profits made by this respondent in the use and employment of a vessel called the Harriet Erving, and its cargoes, during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill, which vessel and cargoes, and the profits resulting therefrom during the said voyage, were not embraced in the contract of May 7th, 1849, nor by any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent."

The provisions of the contract of 1849, to be considered in connection with this exception, are as follows:

"That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard's business in those countries, such as the sale and purchase of merchandise, and any

other property, collecting freight moneys, procuring freights and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for, and protect from impositions, unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability.

"In consideration for which, said Goddard engages that said Foster shall, on his return, be entitled to one-fourth part of the net profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting, &c.

"It is understood that said Foster is to leave in the hands of said Goddard, bearing interest, what funds he may have—less two thousand dollars, to be paid him before leaving this country—and that neither the same nor any portion of his profits shall be abstracted, until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time, by giving said Goddard so much notice that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood that said Goddard has the right to annul this agreement whenever he may choose to do so; and furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon."

It is not material to inquire whether this agreement made the parties co-partners. It provided a definite mode of terminating the agreement by Foster. Pursuant to that provision, Foster, on the 22d of February, 1850, addressed a letter to Goddard, giving him notice that he proposed to join the house of Alsop & Co., of Valparaiso, on the 1st of January following, and on the day preceding to terminate the agreement between Goddard and himself. In that letter he said:

* * * "After our long and satisfactory connection to-

gether, I must say that I leave it with many regrets; and I doubt not but the feeling is mutual. The truth is, however, that the connection, to a certain extent, will still exist. But, by the articles of this house, no active partner can have any interest out of the establishment, and they are bound down in the most particular manner."

The letter, it seems, was received by Goddard about the 1st of April, 1850. On the 13th of that month he replied in a letter to Foster, "I am very glad to learn your decision to join the house, it being what I would have advised for your own interest."

In Foster's reply of the 29th of May, 1850, he says:

* * * "I did not expect you would be able to say whether you intended sending Mr. Erving immediately or not. Be that as it may, you may rely with safety upon my exertions and interest in your favor as much as ever, and also as if you had an agent upon the spot."

On the 1st of January, 1851, Foster, according to the notice given by his letter of the 22d of February, 1850, entered the house of Alsop & Co. From that time new relations subsisted between him and Goddard. He ceased to be bound or able to "devote his whole time in those parts, as also in Mexico and California, exclusively to the management of said Goddard's business in those countries, such as," &c., (see contract.)

All the requirements of the contract as to Foster's services were the consideration of Goddard's agreement as to Foster's compensation. After the 1st of January, 1851, Foster could not, as an honest man, without the consent of Alsop & Co., (which is not shown,) have "any interest out of the establishment." According to the notice given by Foster, and accepted by Goddard, the contract between them was to terminate on the 31st of December, 1850. The complainant's bill avers that it did then terminate.

"And your orator further showeth that the said co-partnership business was forthwith entered upon and conducted by your said orator and the said Goddard until the thirty-first day of December, A. D. one thousand eight hundred and fifty, when the said agreement was terminated by the said orator's

giving due notice to the said Goddard in the manner provided for in and by said agreement."

The Harriet Erving sailed from Boston for Valparaiso upon the voyage in question on the 21st of August, 1850, more than four months after Goddard received Foster's notice. She arrived at Valparaiso on the 8th of December, 1850; sailed for Coquimbo on the 27th of the same month; for Talcuhano on the 4th of January, 1851; and in the same month for Boston, where she arrived on the 7th of April, 1851. The new agent of Goddard arrived at Valparaiso about the 1st of November, 1851. The selling of the Harriet Erving's outward cargo commenced soon after her arrival at Valparaiso, and was continued down to June, 1853. The entire amount of the net proceeds was $205,620 74. All the sales were made by Alsop & Co., who received commissions amounting in the aggregate to $9,736 26. Nearly one-half of the cargo in value was sold before Foster entered the house of Alsop & Co. Upon that part which was sold after that time, he was entitled to a share of the commissions, as a member of that firm. Before Foster entered the house, all sales, in the course of the business, had in form been made by Alsop & Co., who received a commission for both selling and guaranteeing. The homeward cargo of the Harriet Erving had all been provided by Foster before her arrival at Valparaiso. Numerous letters from Goddard to Foster are produced, containing isolated expressions, which seem to imply that he regarded Foster as having an interest of some sort in this voyage of the vessel.

After a careful examination of this part of the case, we are brought to the following conclusions:

1. That the agreement of May 7, 1849, was wholly put an end to on the 31st day of December, 1850, by the parties, in the manner therein provided.

2. Its termination at that time was not waived by either of the parties.

3. If it were not terminated at that time we should be compelled, under the circumstances, to regard the averment of the bill upon that subject as conclusive.

In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. 9 Cranch, 19, *Simms* vs. *Guthrie et al.;* 9 Pet., 483, *Harrison* vs. *Nixon;* 10 id., 178, *Boone* vs. *Chiles;* 3 Barb's C. R., 613, *Trip* vs. *Vincent et al.;* 3 Ohio R., 61, *Bank United States* vs. *Shultz;* 5 Dana, 552, *Sadler* vs. *Grover;* 1 J. J. Marsh, 237, *Breckenridge* vs. *Ormsby.*

4. That the complainant not having "conducted to completion," within the life of the contract, "the business in that trade" growing out of this voyage of the Harriet Erving, that branch of the case is not within the contract of May 7th, 1849, and hence not before us.

It follows, in our judgment, that the court decided correctly in sustaining this exception.

It may be that the complainant has a valid claim to be paid for his services under an implied contract upon the principle of *quantum meruit.* But as that is an inquiry outside of the case as now before us, it is neither necessary nor proper that we should express any opinion upon the subject.

The decree of the Circuit Court must be affirmed, with costs.

HOYT *vs.* SHELDEN, EX'R OF THOMPSON, AND THE LONG ISLAND RAILROAD COMPANY.

1. This court cannot review the proceedings of a State court, on the ground that the judgment or decree violates the Federal Constitution, unless it appears from the record that the point was distinctly raised in the court below.

2 The clause in the Constitution on which the party relies, and the right claimed under it, must have been called to the attention of the court, and the decision of the court, with the subject so before it, must have been against the right claimed; otherwise no writ of error will lie.

In error to the Superior Court of the city of New York.

This was a writ of error to the Superior Court of the city of

New York, "being possessed of the record and proceedings upon a *remittitur* from the Court of Appeals of the State of New York." It was a bill in equity, filed in the Supreme Court of the State of New York, by Jesse Hoyt, the plaintiff in error, against Abraham G. Thompson, George B. Fisk, the Long Island Railroad Company, and the Statutory Representatives of the State of Michigan. All the defendants except the representatives of the State of Michigan demurred. The demurrers were argued before one of the judges of the Supreme Court, who overruled them. From this decision the defendants appealed to the general term of the Supreme Court, when, under a State statute the case was transferred to the Superior Court of the city of New York, where the appeal was argued, and the decision of the Supreme Court overruled, the demurrers allowed, and the bill dismissed. From this decision the plaintiff appealed to the Court of Appeals, where the judgment of the Superior Court was reversed, and the demurrers overruled, but defendants had leave to answer. About this time the defendant, Abraham G. Thompson, died, and Henry Shelden was qualified as his executor, and was made a party defendant. The Superior Court, on receiving the *remittitur* from the Court of Appeals, rendered judgment for the plaintiff on the demurrers, and ordered the defendants demurring to answer to the bill. Shelden and the Long Island Railroad Company filed their answers. Testimony was taken, and the court made a decree for plaintiff. Shelden appealed from this decree of a single judge at a special term, to the general term of the Superior Court, and obtained a reversal of it, with an order for a new trial. From the decision of the general term the plaintiff Hoyt took the cause to the Court of Appeals, which affirmed the judgment of the Superior Court, made it final against plaintiff, as he had stipulated that it should be, and remitted the record and proceedings to the Superior Court. The Superior Court, on filing the *remittitur* from the Court of Appeals, ordered that final judgment be rendered against the plaintiff, and that his bill be dismissed. Thereupon plaintiff sued out a writ of error from the Supreme Court of the United States to the Superior Court, in which he made Shelden, as

executor of Thompson, and the Long Island Railroad Company, defendants in error. Pending this writ of error Shelden died, and Edward G. Thompson, as his successor, and as administrator with the will annexed of Abraham G. Thompson, was made a party by order of this court.

The power and jurisdiction of this court to review the proceedings of the State court was denied by the defendant's counsel.

On the part of the plaintiff in error, it was contended that by a certain act of the New Jersey Legislature, and by the record of a judicial proceeding in the Court of Chancery of the same State, the title to the property in dispute was vested in the persons under and through whom he claimed it, and that the State court of New York in deciding against him, and dismissing his bill, refused to give full faith and credit to the records and judicial proceedings of the State of New Jersey, as required by Art. IV, Sec. 1, of the Federal Constitution. The right which he had under the Constitution being refused him in the State court, his remedy was to reverse the proceeding on a writ of error from this court.

The defendants' answer to this was, that no such question had been raised in the State court. No claim of any right under the Federal Constitution was asserted, nor was the attention of the court called to it in any manner whatever. It is not enough that such a point *might have been* made. It must appear that it *was actually* made.

Mr. Hoyt, of New York, for plaintiff in error.

Messrs. Blatchford and *Stoughton*, of New York, for Thompson's administrator.

Mr. De Forrest, of New York, for the Long Island Railroad Company.

Mr. Chief Justice TANEY. This being a writ of error directed to a State court, it is incumbent upon the plaintiff, in order to give jurisdiction to this court, to show that one of the

questions enumerated in the twenty-fifth section of the act of Congress of 1789, Ch. 20, arose at the trial, and that a right he claimed under the Constitution of the United States, or an act of Congress, was decided against him.

In the argument here, he alleges that the construction and effect of the first section of the fourth article of the Constitution was drawn in question, and the right to the property in dispute, which he claimed under it, was decided against him.

The section referred to is in the following words:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceeding of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

And he now contends that, by virtue of the act of the Legislature of New Jersey, and the proceedings and decree of the Court of Chancery of that State, and the sale by the receivers under the authority of that court, as set forth in the bill of complaint, the right to the property in controversy vested in the vendees, under whom he claims title; and that the State court, by deciding against him, refused to give full faith and credit to the records and judicial proceedings in New Jersey, as required by the clause in the Constitution above quoted.

But, in order to give this court the power to revise the judgment of the State court on that ground, it must appear upon the transcript, filed by the plaintiff in error, that the point on which he relies was made in the New York court, and decided against him; and that this section of the Constitution was brought to the notice of the State court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in 18 How., 515, *Maxwell* vs. *Newbold and others*, as well as in many other cases to which it is unnecessary to refer.

This provision of the Constitution is not referred to in the plaintiff's bill of complaint in the State court, nor in any of the proceedings there had. It is true, he sets out the act of the Legislature of New Jersey, the proceedings and decree of the Chancery Court of that State under it, and the sale of the property

in dispute by the authority of the court, which, he alleges, transferred the title to the vendee, under whom he claims, and charges that the assignment set up by the defendants was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the State court, were questions which depended for their decision upon principles of law and equity, as recognised and administered in the State of New York, and without reference to the construction or effect of any provision in the Constitution, or any act of Congress. This court has no appellate power over the judgment of a State court pronounced in such a controversy, and this writ of error must, therefore, be dismissed for want of jurisdiction.

THE STEAMER ST. LAWRENCE—*Meyer et al., Claimants; Tupper et al., Libellants.*

1. The jurisdiction of the Federal courts in admiralty and maritime cases is given in general terms by the Constitution, and the extent of it is to be ascertained by a reasonable and just construction of the words used when taken in connection with the whole instrument.
2. No State can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits.
3. Congress may prescribe the forms and mode of proceeding in the tribunals it establishes to carry this power into execution.
4. Brief history of the legislation of Congress upon this subject.
5. Congress has given to this court the authority to alter and change the forms and modes of proceeding, and it was under this authority that the 12th rule of admiralty practice was made in 1844, which permitted a proceeding *in rem* wherever the State law gave a lien
6. It was by virtue of the same authority that the rule was changed in 1858, and the privilege denied to a suitor of taking out process *in rem*, on the mere ground that State law made his claim a lien.
7. But the abrogation of the rule of 1844 by that of 1858 does not imply that the court had become convinced, in the interval, that it wanted jurisdiction in cases to which the former rule applied. The

abrogation meant merely that various considerations made it advisable not to permit that particular form of process to be used by persons who might claim it on the sole ground that the State law gave them a lien, where none was given by the maritime code.

8 The courts could not enlarge or diminish their own jurisdiction by a rule of practice, but they have power over their own process and mode of procedure, and it was in the exercise of this latter power that the rule of 1844 was both made and repealed.

9. The change in the rule was prospective in its operation, and does not defeat a suit previously commenced.

10. A lien for supplies is not waived by a material man who accepts the notes of the owner for the amount due, if it was understood by the parties that the lien should continue.

Appeal from the Circuit Court of the United States for the southern district of New York.

William H. Meyer and Edwin R. Wilcox filed their libel in the District Court against the steamer St. Lawrence, her engine, tackle, apparel, &c., for supplies to the value of $2,500, payment of which had been demanded and refused. The libellants averred that the St. Lawrence had been in the port of New York ever since the supplies were furnished, and they had a lien on her by the law of the State. (Rev. St., Title viii, Ch. 8.) Lewis H. Meyer and Edward Stucken made claim as owners, and answered to the libel that the supplies were furnished on the credit of John Graham, and not of the vessel; that the libellants settled and accounted for them with Graham, took his notes for the amount agreed on, and discharged the vessel; that the respondents are *bona fide* purchasers of the vessel, in good faith, without notice of the libellants' claim.

The evidence taken in the cause showed that the supplies were furnished, the amount and value being ascertained to the satisfaction of the claimants' proctor. It was proved also that John Graham was the owner of the vessel at the time, and that he gave his notes for the amount of the libellants' claim, but it was expressly stipulated between him and the libellants that their lien against the vessel should not be discharged or released unless the notes were paid. The notes were after-

wards surrendered. The claimants purchased the vessel after all these transactions, and there is no proof that they had any notice of the libellants' claim against her.

The District Court decreed in favor of the libellants; the decree was affirmed by the Circuit Court, and the claimants appealed.

Mr. Lane, of New York, for the claimants, argued that this contract was not within the admiralty jurisdiction, and cited *The General Smith*, (4 Wheaton, 438;) *Pratt* vs. *Reed*, (19 How., 359;) *Maguire* vs. *Can*, (21 How., 248;) *The John Jay*, (17 How., 400;) 2 Brown Civ. Law, 116.

The rule of the Supreme Court does not give jurisdiction. The power to make rules is in the act of Congress, 5 Stat. at Large, 518, but does not authorize the opening of the court to a suitor or shutting it on him.

If there was a lien, it was waived by taking notes on time for the amount of the supply. Innocent purchasers for value could not be affected as with a lien upon the vessel while the claim of the libellant was in that condition. *The Bark Shusan*, (2 Story, 468;) *The Brig Chester*, (1 Sumner, 86;) *The Schooner Action*, (Alcott, 288;) *Ramsey* vs. *Allegre*, (12 Wheaton, 613.)

Mr. Williams, of New York, for the libellants. This contract is in its nature a maritime contract. 2 Brown, Civil and Maritime Law, 75; Conkling's Admiralty, 52; 1 Kent, 379; 3 Kent, 168; Jacobs and Sea Laws; Life of Sir Leoline Jenkins, vol. I, 16; *The Favorite*, (2 C. Robinson, 226;) *The General Smith*, (4 Wheaton, 438;) *Ramsey* vs. *Allegre*, (12 Wheaton, 611;) *Andrews* vs. *Wall*, (3 How., 568;) *Peyroux* vs. *Howard*, (7 Pet., 324.)

The Federal courts have jurisdiction in all cases of maritime contracts, and will give to the libellants the relief they are entitled to. The local law giving a lien upon the vessel, this court will enforce that lien. Conkling, 57; *New Orleans* vs. *Phœbus*, (11 How., 184;) *Roach* vs. *Chapman*, (22 How., 132;) Benedict's Admiralty, 11; 5 Cranch, 61; 1 Pet., 328; *The Pacific*, (1 Blatchford, 585.)

The rule of court does not affect the right of the libellants. The jurisdiction is not derived from the rule. It might be in conflict with the right to sue in this particular form, if the change had taken place before the suit was commenced. But it was made afterwards, and is prospective.

Mr. Chief Justice TANEY. This is an appeal from the decree of the Circuit Court for the southern district of New York, sitting as a court of admiralty.

The case as presented by the transcript is this: The appellees in the summer and fall of 1855 were requested by John Graham, the owner of the steamer St. Lawrence, who resided in New York, to make sundry repairs to the vessel, and to furnish materials for that purpose. The steamboat was then lying in the harbor of New York, which was her home port. The libel states that at the time these repairs were made, and materials found, the laws of New York gave them a lien for the amount on the vessel; and they pray that the steamer may be condemned and sold to satisfy their claim. The application for process against the vessel was founded upon the 12th rule of admiralty practice, prescribed by this court in 1844, (3 How.,) which authorized this mode of proceeding, where the local law gave a lien upon the vessel for supplies or repairs in a domestic port. This rule was altered at December term, 1858, and process *in rem* denied to the party unless a lien was given by the maritime law. The alteration took effect on the 1st of May, 1859, (21 How.,) and the libel in this case was filed, while the former rule was still in force.

There is no question as to the amount due, the proctor for the claimants having assented to the report of the commissioners. But the claimants allege in their answer, that these materials were furnished and repairs made upon the personal credit of Graham, and that the libellants accounted with him, and took his notes for the amount after the work was done. They allege further, that they afterwards purchased the vessel from Graham in good faith, and without notice of this claim; and insist, that as the lien claimed is not created by the maritime law, but solely by a statute of New York, it cannot be

enforced in a court of admiralty, because a statute of a State cannot enlarge the jurisdiction of a court of the United States.

With reference to the last mentioned objection, it may be proper to notice it, more particularly as it is founded upon a misconception of the object and effect of the rules above mentioned.

The objection is founded upon the assumption, that these rules involve a question as to the extent of the admiralty jurisdiction granted by the Constitution. And as the court could not, consistently with its duty, refuse to exercise a power with which it was clothed by the Constitution and laws, the appellants insist that the alteration made by the rule in 1858 must be regarded as an admission that the court had fallen into error when it adopted the rule of 1844, and had exercised a jurisdiction beyond its legitimate boundary; and if the admiralty court had not the right to enforce a State lien in a case of this kind, the rule then in force could not enlarge its jurisdiction, nor authorize the decree of the Circuit Court which supported and enforced this lien.

The argument would be unanswerable, if the alteration related to jurisdiction; for the court could not, consistently with its duty, refuse to exercise a power which the Constitution and law had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right.

But there is a wide difference between the power of the court upon a question of jurisdiction and its authority over its mode of proceeding and process. And the alteration in the rules applies altogether to the character of the process to be used in certain cases, and has no relation to the question of jurisdiction.

Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal Government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance,

with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States.

This difficulty was increased by the complex character of our Government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.

Yet Congress may undoubtedly prescribe the forms and mode of proceeding in the judicial tribunals it establishes to carry this power into execution; and may authorize the court to proceed by an attachment against the property, or by the arrest of the person, as the Legislature shall deem most expedient to promote the purposes of justice.

A brief history of the legislation of Congress upon this subject will explain the grounds upon which the rule of 1844 was adopted, and also the reason that induced the court to change it; and will also show that no question of jurisdiction was supposed to be involved in the adoption of the original rule, nor in the change that was afterwards made.

After the passage of the judiciary act of 1789, Congress, at the same session, passed the act prescribing the process to be used in the different courts it had just established, (1 Stat., 93;) and by that act directed that, in the courts of admiralty and maritime jurisdiction, the forms and modes of proceeding should be according to the course of the civil law.

This act left no discretionary power in the admiralty courts, or in the Supreme Court, in relation to the modes and forms of proceeding. And it is evident, that if the courts of admiralty in this country used the process *in rem*, or process by

attachment of the property, in all cases in which it was authorized in countries governed by the civil law, it would unavoidably in some cases come in collision with the common law courts of the State where the parties resided, and where the property was situated, and where other parties besides the owners or builders, or equippers of the ship, might have an interest in, or a claim upon, the property, which they had a right to assert in the courts of the State.

But this difficulty was soon seen and removed. And by the act of May 8, 1792, (1 Stat., 275,) these forms and modes of proceeding are to be according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law. And these forms and modes of proceeding are made subject to such alterations and additions as the respective courts might deem expedient, "or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any Circuit or District Court concerning the same." And the power here conferred upon this court was afterwards enlarged by the act of August 23, 1842.

It was under the authority of these two acts that the rule of which we are now speaking was made in 1844; and afterwards, by virtue of the same authority, altered by the rule adopted at December term, 1858.

It was manifestly proper, and perhaps necessary, that this power should be confided to the court; for, it being the province of this court to determine what cases came within the admiralty and maritime jurisdiction of the United States, its process and mode of proceeding in such cases should be so framed as to avoid collision with the State authorities, where rights of property were involved, over which the State had a right to legislate, without trespassing upon the authority of the General Government. The power was, therefore, given to the court, not only to make rules upon this subject, but to make them from time to time, so that, if any new difficulty should arise, it might be promptly obviated, and the modes of proceeding and the process of the admiralty courts so moulded as to accomplish that object.

The case of *The General Smith* (4 Wheat., 438) was decided upon these principles, and the right to proceed against the property regarded as a mere question of process and not of jurisdiction. And the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed *in rem* in the admiralty court to enforce it; but where the supplies are presumed by the maritime code to be furnished on the personal credit of the owner or master, and the local law gives him no lien, although the contract is maritime, yet he must seek his remedy against the person, and not against the vessel. In either case, the contract is equally within the jurisdiction of a court of admiralty. And it is obvious, from this decision, that the court considered the process *in rem* or priority given for repairs or supplies to a domestic vessel by the courts of admiralty, in those countries where the principles of the civil law have been adopted, as forming no part of the general maritime code, but as local laws, and therefore furnishing no precedent for similar cases where the local law is otherwise; consequently they form no part of the admiralty and maritime jurisdiction conferred on the Government of the United States. This case was decided in 1819, and has always since been followed and regarded as a leading one in the admiralty courts. Its authority was recognised in the cases of *Peyroux* vs. *Howard*, (7 Pet., 324;) and *The New Orleans* vs. *Phœbus*, (11 Pet., 275,) and in others to which it is unnecessary to refer. And while process against the vessel was denied in the case of *The General Smith*, because the law of Maryland gave no lien or priority, it was used and supported in the case of *Peyroux* vs. *Howard*—a similar case—upon the ground, that the party had a lien on the vessel by the law of Louisiana, and as the contract was within its jurisdiction, it ought to give him all the rights he had acquired under it; yet, certainly, the court never supposed that the admiralty jurisdiction was broader in Louisiana than in Maryland.

When this court framed the rules in 1844, it, of course, ad-

hered to the practice adopted in the previous cases, and by the 12th rule authorized the process *in rem* where the party was entitled to a lien under the local or State law. But in the rules then adopted, this rule as well as the others are explicitly adopted as "a rule of practice," and, consequently, liable to be altered from time to time, whenever it was found to be inconvenient, or likely to embarrass the legitimate business of the court. And there could be no embarrassing difficulties in using the ordinary process *in rem*, of the civil law, if the State law gave the lien in general terms, without specific conditions or limitations inconsistent with the rules and principles which governed implied maritime liens; and whenever this was the case, the process to enforce it promoted the convenience and facilities of trade and navigation by the promptness of its proceedings. It disposed at once of the whole controversy, without subjecting the party to the costs and delay of a proceeding in the chancery or common law courts of the State, to obtain the benefit of his lien, if he failed to obtain satisfaction in his suit against the person in the court of admiralty.

The State lien, however, was enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power, which the court might lawfully exercise for the purposes of justice, where it did not involve controversies beyond the limits of admiralty jurisdiction. In many of the States, however, the laws were found not to harmonize with the principles and rules of the maritime code. Certain conditions and forms of proceeding are usually required to obtain the lien, and it is generally declared forfeited or regarded as waived after the lapse of a certain time, or upon some future contingency. These conditions and limitations differ in different States, and if the process *in rem* is used wherever the local law gives the lien, it will subject the admiralty court to the necessity of examining and expounding the varying lien laws of every State, and of carrying them into execution, and that, too, in controversies where the existence of the lien is denied, and the right depends altogether on a disputed construction of a State statute, or indeed, in some

cases of conflicting claims under statutes of different States, when the vessel has formerly belonged to the port of another State, and become subject to a lien there by the State law.

Such duties and powers are appropriate to the courts of the State which created the lien, and are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was established to administer.

Moreover, cases may, and, indeed, have arisen, where a third party claimed a lien prior and superior to that of the libellant under the provisions of a State statute. And where such a controversy arises in a proceeding *in rem*, the admiralty court clearly has not power to decide it, and adjust the priorities in dispute, and would be compelled to abandon and recall its process whenever the controversy assumed that shape.

The proceeding, therefore, *in rem*, upon the ground that the local law gave the lien, where none was given by the maritime code, was found upon experience to be inapplicable to our mixed form of Government. It was found to be inconvenient in most cases, and absolutely impracticable in others, and the rule which sanctioned it was therefore repealed. And the repealing rule provided, that the new rule should not go into operation until the day named in it, because it would have been unjust to those who had already proceeded under the rule of 1844, or might institute proceedings under it before they were aware of the alteration, to subject them to costs and delay by a sudden and unexpected change of a rule of practice.

The case before us was commenced before the change in the rule; and, as there was an undoubted lien acquired under the State law, we think the court had a right to enforce it upon the principles above stated, since no provision of the New York statute, as far as it affected the case, was inconsistent with a maritime lien; and the execution of the process involved no inquiries beyond the legitimate authority of the court.

The remaining question is, has this lien been forfeited or waived? It does not appear to have been forfeited or waived

under any provision in the New York statute, nor was it waived upon the principles of maritime law by the acceptance of Graham's notes, unless the claimants can show that the libellants agreed to receive them in lieu of and in place of their original claim. The notes, in this instance, have been surrendered, and were filed in the proceedings in the District Court. And the language of the court in the case of *Ramsey* vs. *Allegre*, (12 Wheat., 611,) and of Judge Story in commenting upon that case in 3d How., 573, necessarily imply that if the notes had been surrendered, the party would have a right to stand upon his original contract, and to seek his remedy in the forum to which it originally belonged, as fully as if the notes had never been given.

In this case the proof is positive, by the testimony of a witness who was present at the time the notes were given, that it was understood by the parties that they were not to discharge or affect his lien, and that the vessel was to continue liable for his claim as before. And although the respondents appear to have purchased without notice of this incumbrance, their want of caution in this respect cannot deprive the libellants of a legal right, which they have done nothing to forfeit.

The decree of the Circuit Court is therefore affirmed, with costs.

LAW *vs.* CROSS.

1. An agent may sue his principal in his own name on the contract by which he was employed, though he be a member of a mercantile house through which the correspondence necessary in the transaction of the business was carried on.
2. The partners of the agent would not be parties to his contract with his principal, even if he agreed to make them sharers in the profits of it.
3. It is not erroneous for a judge of the Circuit Court to disregard the written points of counsel and charge the jury in his own way, if he submits the facts fairly and gives his opinion fully on every question of law arising in the case.
4. Where an agent goes beyond the letter of his instructions, the principal must within a reasonable time repudiate the act, or else be bound by his acquiescence.
5. The customary meaning of a word among merchants is a matter of fact for the jury to decide upon evidence.
6. A letter written by the master of a vessel to an agent of the owner, advising what shall be done for the owner's interest in an emergency created in part by the act of the master himself, which advice was followed by the agent to whom it is addressed, may be given in evidence as part of the *res gestae.*
7. Where an agent buys an article for his principal and the price goes down, another agent of the same principal has no authority to repudiate the contract unless specially directed to do so.

Writ of error to the Circuit Court of the United States for the southern district of New York.

This was assumpsit brought in the Circuit Court by Alexander Cross, a subject of the British Queen, against George Law. The declaration (or complaint) contained the common counts, which the defendant answered with the plea of *non-assumpsit* and a notice of set-off.

It appeared on the trial that Law, the defendant, established a line of steamers to run between Panama and San Francisco. The line was composed of the *Isthmus*, the *Republic*, the *Columbus*, and the *Antelope*, which left New York to take their places

in the line at different times, in the spring of the year 1850. The defendant employed Cross, the plaintiff, as his agent to make purchases of coals for the use of these ships. He (the plaintiff) was a member of a firm consisting of himself and four others, who were engaged in trade at Valparaiso, under the name of Cross, Hobson & Co., and at San Francisco under the name of Cross & Co. The defendant addressed his letters uniformly to Alexander Cross, but they were answered in the name of Cross, Hobson & Co.

The plaintiff made several purchases of coals for the defendant's ships under, and, as he alleged, agreeably to the special orders of the defendant. But for some of those purchases the defendant denied his liability to pay, averring that his directions concerning them had been disregarded and violated.

When the Antelope was about to sail for the Pacific, the defendant advised Cross of the fact, and directed him to purchase for her 350 tons of good coal *at Valparaiso*, and draw for the price. This was repeated twice afterwards. The plaintiff advised the defendant promptly that coal was scarce at Valparaiso, but he had purchased a lot for the Antelope at the fine port of Coquimbo, one day's sail further north. The coal was kept at Coquimbo, ready to supply the Antelope when she would come. But she arrived at Valparaiso, long after she was expected, in a crippled condition, and was obliged to stop there for repairs. The master, by way of saving time, thought it best to buy other coals at Valparaiso, where they could be put on board while the repairs were in progress. Being so supplied, he recommended that the coals purchased by Cross at Coquimbo should be sent to San Francisco. This advice was adopted, the coals were shipped for San Francisco, at a freight of $17 per ton, and the defendant was informed of the whole transaction, without delay.

The defendant also directed the plaintiff to purchase two cargoes of coal *afloat*, and send them to San Francisco as soon as possible. Within four days after the receipt of this order, the plaintiff answered that the order had been filled by the purchase of 500 tons, the cargo of the *Lady Lilford*, to be delivered by that vessel at San Francisco; and 444 tons more, the

cargo of the *Duncan*, which was then at sea, with the right to cancel the contract if she failed to arrive in sixty days. Full details as to prices and freight accompanied this communication. The cargo of the Lady Lilford was duly delivered at San Francisco, received and paid for. The Duncan arrived within the stipulated time, but her master being unwilling to carry the coals further, they were shipped on board two other vessels. The *Charles V.* took 350 tons, and the balance, together with the 300 tons at Coquimbo, went by the *Amelia.* Oliver Charlick, the general agent of the defendant at San Francisco, refused to accept the coals brought by the two last named vessels, and after various delays and much negotiation, they were sold at auction for whom it might concern.

The plaintiff's claim was for the price of the cargo bought at Coquimbo for the Antelope, the price of the Duncan's cargo bought for the general purposes of Law's line, with the freights, duties, expenses, and commissions, less the amount of the sales at San Francisco.

After the evidence was closed the defendant's counsel divided the law of the case into twenty-eight points, and requested the court to instruct the jury on each of them. Mr. Justice *Nelson*, who presided at the trial, gave his opinion of the legal principles involved without reference to this request. The substance of the charge, omitting details, and briefly stated, was this:

1. Cross had a right to sustain this action in his own name, though he was the partner of others, who did some or all of the business; because the contract was made by the defendant with Cross alone, and the correspondence showed that the defendant never recognised anybody but him as being concerned.

2. It was a question for the jury to determine whether the purchase of the Duncan's cargo, while the vessel was still at sea, was a purchase of coal *afloat* in the proper sense of the word as used in the defendant's order, but in the opinion of the judge it could make no substantial difference whether the contract was before or after the arrival of the vessel at the port of Valparaiso.

3. Whether the plaintiff's purchase of coal at Coquimbo for the Antelope was within the order to buy it at Valparaiso, so as to make the defendant responsible for the price of it, might be doubtful, under the peculiar circumstances of the case; but the shipping of that coal to San Francisco was undoubtedly beyond the authority given to the plaintiff; and the advice of Captain Hackley, the master of the Antelope, that it should be sent there, did not help the matter. But,

4. If the defendant was informed that his agent had, on his own judgment, departed from his instructions, he (the principal) was bound, within a reasonable time, to advise the agent that he did not mean to ratify his acts. Otherwise, he must be taken to have acquiesced in what was done, and was concluded from disputing the agent's authority. This rule, the judge said, was essential to secure just dealing between principal and agent, but whether this case came within its operation was a question of fact for the jury.

5. No authority to Charlick, the defendant's agent at San Francisco, had been shown, which made his repudiation of Cross's acts equivalent to a repudiation by Law, the common principal of both; but if specific authority to that effect had been given, it would be sufficient.

Under these instructions the jury found a verdict in favor of the plaintiff for $15,933 79, on which the court gave judg ment, and the defendant took this writ of error.

Mr. S. D. Law, of New York, and *Mr. Gillet*, of Washington city, for the plaintiff in error.

Mr. Lane, of New York, for defendant in error.

Mr. Justice GRIER. The objection that this suit should have been brought in the name of Cross, Hobson & Company, instead of Alexander Cross, has no support, either in law or the facts in evidence. The contract on which the suit was brought was with Cross alone. Law had established a line of steamers on the Pacific, to run from Panama to San Francisco. It became necessary to supply them with coal at Valparaiso,

and to have purchases of it made there, in expectation of their arrival round the cape, and for supplies at San Francisco.

Cross being in New York in January, 1850, and about to go to Valparaiso, was employed by Law to make purchases of coal for him at Valparaiso. His letters of instruction are all directed to Cross alone, and contain no intimation of any other party in the transaction. Cross was a member of the mercantile firm of Cross, Hobson & Co., doing business in Valparaiso. The same firm had a house also in San Francisco. Through these houses much of the correspondence necessary in the transaction of the business was carried on. That Cross was a member of each of these firms, was but an accident in the case, and would not necessarily make them parties to the contract more than if any other individual or firm had been his agents; and even if Cross had agreed to make them equal shares in the profits arising from the contract, they did not thereby become parties to it. The firm had no contract with Law on which they could sustain a suit, or be liable to him. Much stress was made in the argument of this case, that the firm, in their correspondence with Law, giving information of what had been done, used the words "*we*" and "*us.*" There was certainly no grammatical impropriety in the use of these pronouns; but the inference that the firm were not acting for Mr. Cross, and that Law had made some contract with them which does not otherwise appear, is certainly not a necessary one either in law or in fact. Every letter of instruction as to purchase of coal was sent by Law to Cross individually. His letter of instruction also to the master of the Antelope directs a consignment of the vessel to Cross, and not to the firm. The letters of credit were to Cross alone, on the faith of which he alone could draw bills to make the necessary payments.

A congeries of instructions, so called, amounting to the number of twenty-eight, were requested. The court, without confusing the jury with a special answer to each one of these propositions, properly submitted the facts to the jury, and gave them instructions as to the law. A large number of

these points, which involve questions of law, were ruled in the charge as requested by the counsel.

The case was argued here, in some measure, as if it had been an appeal in admiralty, or motion for a new trial.

To comment on all the objections attempted to be raised in the case would be tedious and unprofitable. It will be sufficient to notice the real questions in the case, and the instructions given by the court. If these were correct, the court below were not bound to answer specifically each question in the catechism, nor this court to comment thereon.

I. As to the cargo of the Duncan, it was objected that there was no authority to the agent to make such purchase.

The defendant had, by his letter of May 28, 1850, instructed the plaintiff as follows:

"I want you to purchase me two cargoes of coal afloat, and send it to San Francisco as soon as possible; consign it to your house there for me," &c. This cargo was purchased on its way to Valparaiso, with an option to refuse it if it should not arrive in sixty days. The coal afterwards arrived, but the master of the vessel refused to take it to San Francisco, and another vessel was chartered to take it. There was some dispute as to what was meant by the term "*afloat*," and testimony was given as to its meaning among merchants.

The court submitted the question to the jury.

We can discover no error in this instruction.

II. As to the coal purchased at Coquimbo, and afterwards sent to San Francisco by the Amelia, Law had instructed Cross to buy 350 tons of coal at Valparaiso for the Antelope, which was expected to arrive at Valparaiso by the first of June; but she did not arrive till 28th of August, in consequence of delay in starting and detention on the way. In July Cross wrote to Law that he had purchased the coal for the Antelope, not at Valparaiso, but at Coquimbo, stating as a reason that coal was scarce and difficult to procure, and he was fearful the vessel might arrive and not find a supply, and Coquimbo was but a day's sail further on the way, the coal cheaper, and a safer and easier place to ship it. But when the Antelope arrived after-

wards, she was so much disabled as to require repairs, and being delayed at Valparaiso for that purpose, the master preferred to have other coal purchased at Valparaiso, which could be put on board while his vessel was being repaired, and directed the coal at Coquimbo to be sent to San Francisco.

The defendant objected that this purchase was not within his instructions.

It presented a case where the agent, acting, as he supposed, for the best interest of his distant principal, under the circumstances, had nevertheless gone beyond the letter of his instructions. But, as the coal was purchased for the principal, it belonged to him if he chose to accept it. If the price had risen, and Cross had sold it, Law might justly have claimed the profit; and when informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace, and apparent acquiescence, have the benefit of the contract if it should afterwards turn out to be profitable, and retain a right to repudiate if otherwise.

The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence. The rule is said to be a "stringent one upon the principal in such cases, where, with full knowledge of the acts of the agent, he receives a benefit from them, and fails to repudiate the acts." See *Hoyt* vs. *Thompson*, (19 N. Y., 218.)

Whether there was such acquiescence or not the judge left fairly to the jury.

III. The letter of Hackley was part of the *res gesta*, and properly admitted. The court instructed the jury that Mr. Law was bound by his advice or direction, because it was outside of his authority. The defendant cannot complain of this instruction.

IV. On the arrival of this coal at San Francisco the price of coal had fallen, and it became the interest of Law to have the loss thrown on Cross. Accordingly, Charlick, Law's agent to attend to his steamboats on the Pacific, assumed the power of repudiating the contract, and set up as a pretence that the coal was not good. As he refused to receive it, the coal was

consequently sold for the benefit of whom it might concern, and bid in by Charlick for a sum which paid the freight only, leaving the price paid for the coal by Cross unpaid.

The court properly instructed the jury that the authority of Charlick, as shown, was not such as to authorize him to repudiate the purchase, leaving it to the jury to say, from the evidence, whether the defendant had communicated to Charlick any specific authority to reject the coal, and also whether the coal was of proper quality or not, and what was the contract, or whether there was any parole contract between Cross and Charlick.

There can be no error imputed to this instruction, except that the jury were left to presume a private instruction to Charlick, of which there was no evidence. But plaintiff in error cannot complain of errors in his favor.

These are all the material points in the case that were properly raised on the trial below, and it is not necessary to vindicate our decision by a more minute examination of the facts. The court below has given correct instructions as to the questions of law really involved in the case, and properly refused to confuse the case by a specific answer to each of the twenty-eight points. Those not answered in the instructions we have noticed were either answered affimatively or were wholly irrelevant.

Judgment of the Circuit Court affirmed.

UNITED STATES *vs.* VALLEJO.

1. The decree of the Spanish Cortes relative to crown lands passed in 1813, being inapplicable to the state of things which existed in Mexico after the revolution of 1820, could not have continued in force there unless expressly recognised by the Mexican Congress, and not then without being essentially modified.
2. The Spanish system of disposing of public lands was very different from that provided for by the Mexican law of 1824, and the regulations of 1828. The two laws being repugnant and inconsistent, the former was repealed by the latter.
3. The law of 1824 and the regulations of 1828 are the only laws of Mexico on the subject of granting the public lands in the territories, (excepting those regulating towns and missions,) and the authority of the governors and other officers is defined by them.
4. A paper, purporting to be a grant of public land, but not registered, recorded, or noted in the proper book, is inconsistent with the known practice of every well regulated government, which requires that all such acts shall be enrolled.
5. A false note of the attesting secretary at the bottom of the grant, to the effect that it has been registered, is a serious objection to the claim under it.

Don Mariano Guadalupe Vallejo petitioned the Land Commission at San Francisco for confirmation of his claim to the tract known by the name of *Suscol*, bounded on the north by Tulucay, and Suisun on the east, and south by the Straits of Carquines, Mare Island, and Napa Bay. It includes the city of Benicia, the town of Vallejo, the navy-yard of the United States, and the depot of the Pacific Steamship Company, and contains altogether about eighteen square leagues.

The documents introduced to show title in the claimants were: 1. A colonization grant to Vallejo, dated 15th March, 1843, in the usual form, and with the usual conditions, signed by Micheltorena as Governor, and countersigned by Francisco Arce as Secretary *ad interim*. 2. Another grant, bearing the date of June 19, 1844, reciting that Vallejo had requested the

purchase of the tract for the sum of five thousand dollars; that the Governor had sold it to him for that sum, and received payment; and declaring him to be owner of the land without restriction. This paper also purported to be signed and countersigned by Micheltorena and Arce. 3. A certificate dated 26th of December, 1845, signed by Pio Pico as Governor, and attested by José Maria Covarrubias, setting forth that both the grants above mentioned had been approved by the Departmental Assembly on the 26th of September, 1845. These papers were all produced from the private custody of the claimant himself. Neither of the grants is referred to in Jimeno's catalogue, or recorded in the Toma de Razon, nor is any espediente found for either of them among the archives. The journals of the Departmental Assembly show that these grants were not before that body, either on the 26th of September, 1845, as certified by Pico, or on any other day. The following official letter, dated at Angeles, March 16, 1843, addressed to "Colonel D. Guadalupe Vallejo, military commandant of the line from Santa Juez to Sonoma," signed *Micheltorena*, and sealed with the seal of the Departmental Government, was also produced by the claimant, and proved to be authentic by reference to the recorded correspondence of the Governor for the period to which it belonged:

"I transmit to you the title of the place named Suscol, this Government regretting that it cannot accept the first of the offers which you made; because the supreme government of the nation has ordered that all back pay be suspended, which became due before the 1st of October, 1841, which will serve you as a rule with respect to your subordinates; which suspension was made to continue until the public treasury should be released from its embarrassments, and by which even I had to suffer a loss of a considerable amount, of some thousands of dollars; but I do accept the offer of the five thousand dollars in articles of the produce of the country for the troops, on account of the imperious necessity which I have for them, in order to maintain them, for which purpose I send the schooner California, that you may have the goodness to load her with

five hundred fanegas of maize, two hundred and fifty of fijoles, two hundred arrobas of dried meat, and five hundred pairs of shoes, or the material for making them, which I am told it will not be difficult for you to send; and surmising also that it will not be very inconvenient for you, I earnestly request that you will send me two thousand dollars in silver, in consideration of the fact that the treasury of the department is short of funds, as it has not received anything since my arrival, there having been no arrivals of vessels; and besides this, the troops of my expedition are daily furnished with cash in hand, as they are subject to a mode of payment, administration, and customs different from the presidial troops, as you know, in the same manner as the rest of the national army, and for which sum it will be exceedingly grateful. All of which I communicate to you for your information, assuring you at the same time of my consideration and esteem. God and Liberty!"

J. B. R. Cooper testified that he was captain of the California, a goleta or schooner of eighty-five tons burden, belonging to the department, and used to carry mails, troops, and supplies up and down the coast; that about the year 1842, or 1843, he took a full cargo of supplies, consisting of wheat, corn, barley, beans, peas, blankets, tanned leather, shoes, and deer skins, from Petaluma to San Diego; that these supplies were for Governor Micheltorena, and furnished by Vallejo; that the Governor told him Vallejo had offered $20,000 for Suscol, and the witness understood these supplies were to go in payment.

Four witnesses (but the character of one was impeached) testified that the ranch was occupied by Vallejo for a long time before, as well as after, 1843; they speak of no occupancy by any other person, and say that he had buildings on it, many thousands of horses, cattle, and hogs, with extensive cultivation. It appeared, however, that the ranch was originally used by the mission of San Francisco Solano, and the first improvements on it were made by the padres. In 1839 it was taken by the Government for military purposes, and it was under the supervision of Colonel Vallejo, because he was the commandant of the northern frontier, with his headquarters at Sonoma

and his private residence near by, at Petaluma. Three witnesses on the part of the United States testified that they knew the land; that it was called the "Rancho Nacional;" that it was occupied and cultivated by soldiers of the Mexican army down to the time of the American conquest, when they were driven away; that all the stock upon it was public property, and used as such to supply the soldiers with beef, &c.; and that Vallejo had possession of it for the Government as a military officer; but they never heard of any private claim to it until long after the conquest.

Watson, a witness produced by the United States, swore, that in 1848 he proposed to purchase a part of the land from Vallejo, and Vallejo then told him that he had bought it from the Suscol Indians; but he expected the United States Government would swindle him out of it, and refused, for that reason, to sell with a warranty of title.

The evidence given by the claimant to establish the authenticity of the grants was contained in the deposition of Pablo de la Guerra, who declared on his oath that he knew the handwriting of Micheltorena and Arce, and that their signatures to the two grants were genuine, to the best of his knowledge and belief. Arce, the attesting and official witness, was not called. After the evidence was closed and the cause submitted, a motion was made on the part of the United States to open it for the purpose of calling Arce on their part. This motion was founded on two affidavits expressing the belief of the affiants that Arce would prove the grants to be false. It was resisted, and the court refused to take off the submission.

The claimant took the deposition of I. D. Marks, who testified to conversations with Micheltorena in Mexico after he was Governor of California, in which Micheltorena told him that he had extraordinary powers as Governor, and that his acts had been approved. The same witness was also told by José Fernando Ramirez, Secretary of State of Mexico, that full powers to grant lands in California had been delegated to Micheltorena by Santa Anna, under the Bases of Tacubaya.

The District Court affirmed the decree of the Land Com-

mission, approving the title and confirming the claim for the whole tract described in the petition; whereupon the United States took this appeal to the Supreme Court.

Mr. Black, of Pennsylvania, and *Mr. Green*, of Missouri, for the United States. Both these grants are destitute of what the court has often held to be indispensable—namely, a record. The grant of 1843 is not on Jimeno's index, and that of 1844 is not on the Toma de Razon. Neither is there an espediente for either of them. These defects are so clearly fatal, that an argument concerning them is useless. The absence of a registry and an espediente, prove that no such grants were ever issued. The journals of the Departmental Assembly show that the certificate of approval is also a sheer fabrication.

The evidence in support of these grants would be wholly insufficient to establish even a private paper. The claimants called Pablo de la Guerra to prove the handwriting of the signatures, and did *not* call Arce, who was in full life, and within the jurisdiction of the court. Nay, when the claimants closed the evidence without calling the subscribing witness, the United States proposed to call him, but the motion was successfully resisted. This court is bound to presume that the claimants kept away the only witness in the world who knew when, how, and by whom the papers were made, for fear that the truth, if told, would overthrow their case. The law does not allow any other construction to be put on such conduct.

The only genuine paper produced is the letter from Micheltorena to Vallejo. But it is really inconsistent with every part of the case which the claimants have attempted to make out. It refers to a title for the place called Suscol. What title? In whose favor? It is dated the day after the first grant, and more than a year before the other. Would the Governor have made a colonization grant if he intended to sell? And after making a bargain to sell, would he transmit a title reciting a naked grant, without a consideration, before he received the purchase money? Of the two offers, which the Governor says Vallejo has made him, neither is intelligibly defined. He says he cannot accept the first, because back pay

is suspended; but he accepts the offer of $5,000 in produce, and he urgently requests that Vallejo will send him $2,000 besides in silver. There is not a word in all this to indicate that the offers had any reference to the land. No doubt Vallejo was in debt to the Government; Micheltorena was dunning him, and Vallejo was offering to set off his back pay or to discharge a part of the claim in produce. The latter proposition the Governor acceded to, but insisted at the same time on having some cash besides. If the other side of the correspondence had been produced—that is, Vallejo's letter containing the offers—the whole could have been understood. Why was it kept out of sight? For the same reason that Arce's testimony was withheld—the truth did not suit the purpose.

Three other grants with which Vallejo was connected are referred to as throwing light on this one: the *Petaluma Sobrante*, concerning which the evidence is found on this record; the *Lup Yumi*, (22 How., 392;) and the *Yulupi*, (22 How., 416;) which have been already investigated in this court. These three grants, together with that for *Suscol*, are all dated in 1844; all countersigned by Arce; none of them is recorded, and are all falsely certified to have been recorded. Here is a printed copy of all the grants, dated in 1844, on which claims were set up before the Land Commission, (Limantour Exhibits,) and it shows that Jimeno was at his post during the whole of that year, and attested every registered grant except one to himself. It is worthy of notice, too, that Arce was never called as a witness to prove any of the unregistered grants to which his name is appended.

The power of the political chief was limited by the colonization laws of 1824 and 1828, and they give him no power to *sell* lands; nor had he any authority either to give or sell lands which were not vacant, but occupied and used like this Rancho Nacional, by the Government, for its special and necessary purposes. The effort to change the law by proving the loose conversations of Micheltorena and Ramirez is, of course, unavailing. A book was cited by the judge below entitled *Leyes Vigentes*, published at Mexico, and page 58 is referred to. Here is *Leyes Vigentes*, and here is page 58. It contains a decree of

the Spanish Cortes made in 1813 on the subject of the crown lands, but not a word affecting this question in the remotest degree. The provisions it does contain are inconsistent with, and therefore repealed by, the law of 1824.

But, assuming that the Governor had a power not given by the colonization law, and conceding that he could sell a public ranch occupied for military purposes, does it follow that he could convey it without making his act a matter of record? On general principles this must be answered in the negative. A grant not recorded is but the private deed of the officer who makes it, says Judge *Grier* in *Luco's* case. In every well regulated Government, the deeds of its officers are enrolled, says Judge *Campbell* in *Sutter's* case. A private deed made by a public officer for a part of the public domain, upon a consideration paid to the officer himself, is not binding on the public either in law or equity.

The opinion of the judge below is based on a mistaken view of the law, and on erroneous assumptions of fact, to wit: that the title-papers were *admitted* to be genuine; that there was a money *consideration* paid for the grant, and that *possession* was taken as ordinary under Mexican law. This is wholly wrong. There was no such admission; the grant was denounced as false from first to last, and the record shows it. There is no reliable evidence that a penny was ever paid for it; and no possession was ever given or taken according to any law, custom, or usage.

Mr. Reverdy Johnson, of Maryland, and *Mr. McCalla*, of Kentucky. The genuineness of these title-papers was admitted. The statement of that fact in the written opinion of the court below is not only ample, but conclusive evidence of it. This being settled, the United States will not be permitted here in the appellate court to raise the question again. Besides, the evidence was sufficient without the admission to show that the papers were executed. The non-production of an espediente and the failure to call Arce are not, under the circumstances of this case, any grounds for rejecting the claim here. The want of a registry does not prove that the titles

were not issued. As to the certificate of approval by the Departmental Assembly, it makes no difference whether that be true or not, for an approval is not necessary to the validity of the title.

The counsel of the other side rely upon the cases in which the court has decided against claims under colonization grants. This claim is under a *sale* made by the Government to a citizen for a consideration paid, and is, therefore, not within the principle of those cases. The law of 1824 and the regulations of 1828 do not apply to it.

The power of the Governor to make such a sale is not a thing to be doubted. It existed anterior to the colonization law of 1824, and was not taken away by that law. The testimony of Marks shows that it was claimed and exercised by Micheltorena, and that it was conceded by the official authorities of the Supreme Government.

But even if the Governor had transcended the strict limits of his legal authority, yet, as it was made on a valuable consideration, it constitutes an equitable claim which ought to be confirmed. A title that would have been confirmed by the Mexican Government will be confirmed here; and this court is bound to presume that Mexico would confirm any title which in good conscience ought to be confirmed. With what regard to her faith and honor could Mexico refuse to admit the justice and honesty of a title which was paid for by the grantee, and of which she had the price in her treasury, or applied it to the public service? It would be monstrous to suppose that she could quibble with one who had paid her his money about the technical form in which his contract was made.

The letter of Micheltorena to Vallejo is admitted to be genuine. That letter, taken in connection with Cooper's evidence, shows very conclusively that an honest and fair price—the price demanded by the Government—was paid for the land in question.

General Vallejo was one of the most distir guished men of the Mexican Republic; performed for many years the most important and valuable services, and was highly appreciated by the Supreme as well as the Departmental Government. He is

now one of the most respectable citizens of California. His character makes it impossible to suppose that he would assert a claim to land which was not his own. In point of fact, no such suspicion as to this title ever entered the minds of Californians. They knew it was all right, and in that conviction large numbers of persons have bought these lands. Thousands are interested in the confirmation, and there is no opposing interest which deserves the slightest favor.

Mr. Justice NELSON. This is an appeal from a decree of the District Court of the United States for the northern district of California.

The claim of Vallejo and his assigns covers a tract of land known by the name of Suscol, in the county of Solano, California, bounded on the north by lands named Tulucay and Suisun, on the east and south by the Straits of Carquines, Ysla del a Yegua, and the Estero de Napa, without any limitation as to quantity, and embraces from ninety to one hundred thousand acres, including Mare Island, on which the United States have established their navy-yard on the Pacific, and the city of Benicia, situate on the bay of San Francisco. Two grants of the tract to Vallejo were given in evidence—one a colonization grant, dated 15th March, 1843, and the other a grant founded on a sale for the consideration of $5,000, dated 19th June, 1844. Both grants purport to be signed by Micheltorena, Governor, and Francisco Arce, Secretary *ad interim.*

From a letter of Micheltorena to Vallejo, 16th March, 1843, one day after the date of the colonization grant, in which he states that he transmits to him a title for the place named Suscol, and that he accepts the offer to pay $5,000 for the same, it is reasonable to conclude that the colonization grant was intended to be founded on the contract of sale; and doubting, perhaps, that the grant could not be maintained in this form, the second was executed without any reference to the colonization laws.

A paper purporting to be a decree for the formal approval of these two grants by the Departmental Assembly, dated 26th

September, 1845, and signed by Pio Pico, and José Ma. Covarrubias, Secretary, is in the record, but there is no evidence of its genuineness. It seems to have been given up as spurious.

The evidence of possession and cultivation is slight. Indeed, considering the magnitude of the tract granted, it is entitled to very little weight. As the grants were dated 1843 and 1844, and the country taken possession of by this Government in 1846, there could be but two or three years' possession or occupation under them at the time of our taking possession. The evidence that Vallejo occupied and cultivated the tract previous to the grants, which, of itself, is slight and unsatisfactory, is still further weakened by the fact, which is shown, that the ranch had been occupied by the claimant as a military commandant with soldiers and Government property.

The witnesses, who speak of the possession as early as 1841, might very readily have confounded this possession for the uses of the Government with a possession for Vallejo himself. We can give very little weight to a possession so limited as to duration and in extent, when offered in support of a grant of ninety or one hundred thousand acres of land. If the grant cannot be maintained by its own force and effect, this possession will scarcely uphold it. Coming then to the grants, we may as well lay aside the first one, the colonization grant, at once, as entirely defective within the law of 1824 and the regulations of 1828. The only document in evidence is the naked grant itself. It would be a waste of time, after the numerous cases in this court on these titles, to go over the objections to this source of title.

The next is the grant founded on the sale, and which is the only one entitled to consideration.

The main objection to this grant is the want of power in the Governor to make it; and this raises the question, whether or not the Governor possessed any power to make grants of the public lands independently of that conferred by the act of 1824 and the regulations of 1828.

The Mexican Congress, after the country had thrown off the government of Spain, and had erected a new and an independ-

ent government in its place, representing the sovereign power of the nation, passed the law of 1824 providing for the grant and colonization of the public lands.

The second section provides that the lands of the nation, which are not the property of any individual, corporation, or town, are the subject of this law, and may be colonized. Section third: For this purpose the Congress of the States shall, with the least delay, enact laws and regulations for colonizing within their respective boundaries, conforming in all respects to the *constitutive act*, the *general constitution*, and the *rules established in this law.*

The act then prohibits the colonization of any lands within twenty leagues bordering on any foreign nation, or within ten leagues of the sea-coast, without the consent of the supreme government; and further, that in the distribution of the lands preference is to be given to Mexican citizens; that no person shall be allowed to obtain a grant of more than eleven leagues; and that no person who may obtain a grant under the law shall retain it if he resides out of the limits of the republic.

The sixteenth section then provides, that the Executive shall proceed, in conformity with the principles established in this law, to the colonization of the Territories of the republic.

The Supreme Executive Government, acting under the above sixteenth section, on the 21st November, 1828, established regulations for the granting and colonization of the public lands in the Territories, and, among others, in California.

The first section declares, "that the political chiefs (the Governors) of the Territories are hereby authorized to grant vacant lands within their respective Territories," "to either Mexicans or foreigners who may petition for them, with the object of cultivation or settlement. Said grants shall be made according to the laws of the general Congress of 18th August, 1824, and under their qualifications."

Then follows a series of preliminary proceedings, specially enjoined for the purpose of ascertaining the fitness of the petitioner to receive a grant, and also of ascertaining if the land asked for may be granted without prejudice to the public or individuals; and it is declared, in view of these, the Governor

will grant or not the land; but if the grant is made, it must be in strict conformity with the laws upon the subject, and especially with reference to the law of 1824; and the grants made to individuals or families shall not be definitively valid without the previous consent of the Departmental Assembly.

Section eighth. The grant petitioned for having been definitively made, a patent, signed by the Governor, shall be issued, which shall serve as a title to the party, expressing therein that the grant has been made in strict accordance with the provisions of the law, by virtue of which possession shall be taken; and section nine, of all petitions and grants a record shall be made in a book kept for that purpose, with the plats of the land granted.

There are many other stringent provisions and conditions imposed which it is not important to refer to specially; it is sufficient to say, that the system thus established by the sovereign power of the nation for the grant and distribution of the public lands, exhibits a deliberation and care over the subject that is in striking contrast with the system of granting the public lands under our Government, and furnishes the highest evidence of the extreme interest the Mexican Government took in guarding against impositions and frauds, by or upon the political chiefs in the execution of the law.

Now, the above are the only laws of the Mexican Congress passed on the subject of granting the public lands, with the exception of those relating to the missions and towns, which have no bearing upon the question. No others have been produced on the argument, nor have our researches found any, nor were any others discovered by the public agents which were authorized by this Government to inquire particularly into the subject. (See Halleck's Rep., March 1, 1849, Exec. Doc., 1st Sess. 31st Cong., p. 119; Jone's Rep., April 10, 1850, Senate Doc., 2d Sess. 31st Cong., p. 18; see also Calif. 3 Rep., pp. 23, 24, 25; ib., 37, 38; 20 How., 63; 21 ib., 177; 23 ib., 315; 24 ib., 349.)

The ground taken to uphold this grant concedes that no other power has been conferred upon the Governor by any express act of the Mexican Congress; but it is insisted that the

law of 1824, and regulations of 1828, did not repeal the power, if it previously existed, to make a grant of the public lands by sale for a pecuniary consideration; and the decree of the Spanish Cortes, of January, 1813, is referred to as confirming that authority.

But any one looking into this law will see that it provides for a very different system of disposing of these lands from that found in the Mexican law of 1824, and the regulations of 1828; and unless specifically recognised or excepted, would necessarily be repealed as repugnant and inconsistent with the system adopted. After providing for the reduction of the public lands to private ownership in the way and with the qualifications stated, the act declares, that half of the vacant and crown lands of the monarchy shall be reserved as a security for the payment of the national debt, and of those to whom the nation is indebted, who are inhabitants of villages to which the lands are adjacent; and provision is made for the distribution of them to the public creditors belonging to these villages; also for distribution among the officers and soldiers of the army; and then provides, that the location of these tracts shall be made by a board of magistrates of the villages to which the lands are adjacent, and the proceedings are afterwards to be sent to the provincial deputation for approval.

The law then provides for grants of the residue of the vacant or crown lands to every inhabitant of the villages who ask for them for the purpose of cultivation, and has no land of his own. The patents are to be made by a board of magistrates free of charge, and the provincial delegation are to approve of them. The decree was to be published not only among all the people of the kingdom, but among the national armies, and in every way, so that it might come to the knowledge of all the subjects.

This law may be very properly referred to as the foundation and source of many titles to the public lands in the Mexican Government, and also of titles in the province or Territory of California, if any were derived under it during the authority of the Spanish Government. The change of Government would not affect them. But grants made after this change, and the

establishment of a new and independent Government, present a very different question. Grants under this law were to be made to the creditors, officers, and soldiers of the old Government. They were called *rewards for patriotism*, and were not to be extended to individuals other than those who may serve or who have served in the present war, (war between the Emperor Napoleon and Spain then existing,) or in quelling disturbances in some of the provinces beyond sea. Individuals, not military men, who had served in their districts, or contributed in any other way in this war, or in the disturbances in America, and who were injured or crippled, or disabled in battle, were included in the grants to be made. Serious disturbances existed in the vice-royalty of Mexico at this time, arising out of revolutionary struggles, headed by Hidalgo Morelos and Bravo. One of the objects of the law was to compensate and encourage the defenders of the mother Government against these revolutionary movements.

Without pursuing the inquiry further, we think it quite clear that this law could not have been in force after the change of Government, unless expressly recognised by the Mexican Congress; and not then, without being first essentially modified in its policy and purposes; and certainly, unless thus modified, and the power in express terms conferred on the political chiefs of the Territories to grant the public lands on sale, no such power can be derived from its provisions.

There are other serious objections to this claim. It is directed in the title-paper that a "note be made of it in the respective book;" and the Secretary *ad interim* declares at the foot of the grant, "note has been made of this title in the respective book." The grant, as we have seen, was made 19th June, 1844. The book of records of that year is in existence, and in good condition. No record was made of the title. The note of the Secretary is untrue. It was well said, in *The United States* vs. *Sutter*, (21 How., 175,) that "in every well-regulated Government the deeds of its officers, conveying parts of the public domain, are registered or enrolled, to furnish permanent evidence to its grantees of the origin of their title." An exemplification of such a record is admissible as evidence of

the same dignity as of the grant itself. (5 Peters, 233; 15 How., 1.)

This rule exists in States which have adopted the civil law. In those States the deed is preserved in the archives, and copies are given as authentic acts—that is, acts which have a certain and accredited authority and merit confidence. The acts thus preserved are public instruments, and all doubts that arise upon the copies that may be delivered are resolved by a reference to the protocol from which the copies are taken, and without which they have no authority.

We add, it is important, also, that a record should be made of these grants, so that the Government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government, where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, are not deemed grants till the proper record is made.

Without this guard, the officers making the grants, as, in the present instance, the Governor and Secretary, would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee.

Without pursuing the examination further, in every view we have been able to take of the case, we are satisfied that the grant is one that should not be confirmed, and we shall order the judgment below to be reversed, and the record remitted to the court to enter judgment for the United States.

Mr. Justice GRIER. I cannot consent, by my silence, that an inference should be drawn that I concur in the opinion just delivered. I cannot agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many

millions, on suspicions first raised *here* as to the integrity of a grant universally acknowledged to be genuine in the country where it originated. I do not intend to enter into any argument with my brethren of the majority. If they are satisfied with the conclusion, the presumption is, that the minority is mistaken. And I would not wish to weaken any arguments that may be urged to justify this wholesale confiscation. I shall merely mention a few of the facts and principles on which I have been constrained to dissent.

This Government has bound itself by a solemn treaty to respect all just claims which the citizens of California held at its date. I shall not comment upon the good faith with which this obligation has been observed, or whether it was acting in good faith to these new citizens to compel every owner of a grant or title under Mexico to enter into a long and expensive litigation, beginning at home and ending here; a litigation, too, with one who paid no costs, while it was ruinous to the claimant, who, if he retained one-half for himself, when successful, was considered fortunate. Instead of protection of their possessions, they were, in many instances, left a prey to squatters and champertons' attorneys. This was a great evil, but perhaps a necessary one. The change of sovereignty from Mexico to this Government at once gave value to lands which before had none, and which Mexico was glad to give away to colonists for nothing. There unit of measurement was a square league, and eleven of these (nearly equal to 50,000 acres) was the only maximum. The sudden affluence of those of the former settlers who had retained any considerable proportion of their square leagues, and of those who purchased their titles for a trifle, caused not only a mania for land speculation, but a system of extensive frauds, with forged grants and perjured witnesses, such as the world has seldom witnessed. If a large grant of land in California, like the one before us, were suddenly produced from the pocket of some obscure person, such as José de la Rosa or Santillan, it should excite suspicion and be scrutinized with the utmost rigor. But where a grant is public and notorious, without suspicion of fraud or forgery—where a large consideration was paid to the Mexican Govern-

ment—where possession has been taken and held for sixteen years—where numerous purchasers have made improvements worth millions, it is the duty of the court to deal with it according to the rules of equity and justice, instead of applying sharp rules of decision to inflict a forfeiture.

In a country where land had no value, where it was freely given to all who asked, without money and without price, in amounts not to exceed fifty thousand acres, it will be supposed that there are few cases to be found where the Government could raise money by the sale of it. This is, perhaps, the only case to be found where such a sale has been made. The laws of 1824 and 1828 were colonization laws; they regulated grants of land made for this purpose, and restrained the power of the local government as to the amount to be given to one person. They prescribed the proceedings and forms necessary to the validity of such grants. This sale to Vallejo was not a colonization grant, nor were the regulations of 1824 and 1828 applicable to it, nor the decisions of this court in the ratification of grants under them.

That there was a sale by the Governor to Vallejo for a consideration paid, when the Governor could find no other way to raise funds for the support of the Government, is satisfactorily proved. It was a matter of general notoriety at the time. The copy of a letter from the Governor to the grantee accompanying the title is found among the archives. The first title being defective in form, another was given confirming the sale and acknowledging a consideration paid. Possession has followed in pursuance of it. Its authenticity was admitted in the court below. But we are about to forfeit the title on the ground that the Governor, though he might give away land to any amount, had no authority to sell it for money. It is assumed, that because there was a special power given by statute to grant to colonists, therefore he had no other power. This court has frequently decided that the authority of a Governor to make such a grant will be presumed from the fact that he did make it, and that it lay upon those who deny the power to prove the want of it.

But it is assumed that the power did not exist since the reg-

ulations of 1824, because it was not exercised. It is a much better reason for the want of a precedent that land would not be sold where it had so little value that it might be had as a gift to the extent of 50,000 acres.

If this treaty is to be executed in good faith by this Government, why should we forfeit property for which a large price has been paid to the Mexican Government, on the assumption that the Mexican Government would not have confirmed it, but would have repudiated it for want of formal authority? Vallejo was an officer of the army, high in the confidence of the Government. His salary as an officer had been in arrear. In a time of difficulty he furnishes provisions and money to the Government of the Territory. How do we know that Mexico would have repudiated a sale of 80,000 acres as a robbery of its territory, when any two decent colonists, having a few horses and cows, could have 100,000 for nothing?

I believe the Mexican Government would have acted honestly and honorably with their valued servant, and that the same obligation rests on us by force of the treaty.

Now that the land under our Government has become of value these grants may appear enormous; but the court has a duty to perform under the treaty, which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of prudence or propriety.

We are not, for that reason, to be astute in searching for reasons to confiscate a man's property because he has too much. Believing, therefore, that in the case before us the claimant has presented a genuine grant for a consideration paid, which the Mexican Government would never have disturbed for any of the reasons now offered for confiscating it, I must express, most respectfully, my dissent from the opinion of the majority of the court, with the hope that Congress will not suffer the very numerous purchasers to forfeit the millions expended on the faith of treaty obligations.

Mr. Justice WAYNE. I have examined this case with much attention, and concur in the conclusions of my brother, Mr. Justice *Grier;* and will add, that as I have neither seen

nor heard anything in the case so conclusive as the judicial opinion of our brother, Judge *McAllister*, I have determined that the best course which I can take to counteract the conclusion to which this court has come in this case, will be to adopt his opinion on the law of the case as more expressive of my dissent than anything I could add. The part of it which I refer to is as follows:

"This case is to be considered as one in which the title-papers are admitted to be genuine, the payment of a money consideration paid, and the possession of the claimant, as was ordinarily taken under the laws and usages of Mexico, established. The sole grounds taken by the Government, on which the validity of this claim is resisted, are:

"1. That no witness proves that a house was built within one year from date of the grant of 1843. That a house was built upon the land prior to the date of either grant by the claimant is clearly proved. That a second house was not built, (as subsequent condition,) especially in the case of an absolute sale, could not authorize a court of equity to forfeit any interest which has become vested in the claimant.

"2. The second ground is, that the grant of 1844 is invalid, because it is without restriction, and for a consideration of $5,000 in money.

"3. Because the Governor has exceeded his power in making a grant for the excess of eleven leagues.

"The two last objections, which urge the grant to be void because it was a sale for a money consideration, and because it exceeds in quantity eleven leagues, will be considered together. These objections apply to the second grant of 1844, which purports to be on its very face an absolute sale.

"This grant cannot be deemed, in the language of the Supreme Court of the United States in the *Cambuston* case, (20 How., 64,) 'a pure donation without pecuniary consideration or meritorious services rendered to the Government.' Nor does it purport to be issued under the Mexican colonization law of 1824, or the regulations of 1828. It is treated by the Government attorney for what it really is, an unrestricted sale for a pecuniary consideration. Had it been a pure donation,

made professedly under the laws of Mexico, professing to have been issued by virtue of those laws, and in pursuance of the terms and provisions prescribed by them, proof of a compliance with the restrictions by the Governor would not have been afforded by the recitals in the grant of his having done so, especially if there had been doubt of the *bona fides* of the grant. This is the extent to which the court went in the *Cambuston* case.

"It does not apply to a *bona fides;* all made to supply the necessary wants of the Government, and applied to the removal of them. If so intended, its practical effect would be in the present and all analogous cases to nullify the applications of the 'principles of equity,' which are made one of the rules of decision by the act of Congress for this court in the exercise of the jurisdiction conferred on it. Nothing was said by the Supreme Court to justify such conclusion. In that case they use language which indicates that if the grant had not been a mere donation, had been free from suspicion, for meritorious services rendered to the Government, or a pecuniary consideration, the claimant would have stood on a different footing. They say, (20 How., 64,) 'In the examination of this case, we have found it very difficult to resist a suspicion as to the *bona fides* of the grant. It is a pure donation, without pecuniary consideration or meritorious services rendered to the Mexican Government.'

"In the case of *Fremont* vs. *United States*, Taney, C. J., says: 'And the grant was not merely to carry out the colonization policy of the Government, but in consideration of the public and patriotic services of the grantee. This inducement is carefully set out in the title-papers; and although this cannot be regarded as a money consideration, making the transaction a purchase from the Government, yet it is the acknowledgment of a just and equitable claim, and when the grant was made on that consideration the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions.'

"Now, in this case the grant was made for a money consideration by the Governor, to obtain, and who did obtain by it,

the means to maintain the starving soldiers of the country at a critical moment of its then condition. This fact is ascertained by the official communication of the Governor to the grantee, found in the Mexican archives for the year 1843, and referred to in another record for the same year. The grantee was in possession, open and notorious, for three years, undisturbed, prior to the occupation of this country by the Americans. Under such circumstances, could the Mexican Government, had it continued, have refused to have recognised the claim of the grantee with justice or equity?

"If the facts, that the Government received a pecuniary, and, for aught that appears, adequate consideration, must necessarily avoid the grants, with the other circumstance, that the quantity of land granted exceeded eleven square leagues, it must be done because these grants are within the operation of the colonization law of Mexico of 1824, in relation to the distribution of lands by donation, to carry out the colonization policy exclusively, and which restricts the quantity of lands to any one individual to eleven leagues.

"The power to give under certain restrictions, made evidently to prevent fraud in the distribution, did not, by implication, repeal the power, if it previously existed, to sell for a pecuniary consideration, if *bona fide* exercised.

"That such power did exist in the Governors, the court will now consider, and give its reasons for the conclusion to which it is arrived.

"In a work published in 1829, in the city of Mexico, among the laws supposed to be retained in Mexico is the decree of the Spanish Cortes of January 4th, 1813. This law evinced a spirit and policy evidently more liberal than had previously animated Spanish legislation, and which probably did not operate in Spain, or any of its then colonies, but, it is reasonable to believe, that in common with other decrees of the Spanish Cortes was called into active existence by the Spanish revolution of 1819, and was in force at the time of the independence of Mexico.

"Such is the view enunciated by the board of Land Commissioners in the case of the *City of San Francisco* vs. *United*

States, and the publication of the decree in Mexico, in 1829, as one of the retained laws, as of force, confirms the opinion of the board.

"The Supreme Court of this State, in the case of *Cohas* vs. *Raisin*, (3 Cal., 443,) distinctly affirm its existence, and cite the compilation in which it is given as 'Leyes Vigentes,' p. 58.

"That tribunal, in the case of *Welch* vs. *Sullivan*, (8 Cal., 168,) again affirm the existence of this decree. The say the decree of the Cortes in 1813 directs, etc.

"But there is internal evidence afforded by the Mexican legislation on the subject of colonization, that the existence of the decree of 1813 was known, and legislation was enacted in view of some of its provisions. The *diseno* making the boundaries of the land petitioned for, which is required to accompany the application to the Governor, is in conformity to the decree of 1813. Again, the conditions usually inserted in the colonization grants under the Mexican law and regulations are similar to those prescribed in the 2d section of that decree. This, in its preamble, among other things, declares its object to be 'to furnish with this class of lands (public lands) in aid of the public necessities (wants) to reward meritorious defenders of their country, and citizens who have no property.' The evident intent of this decree, declared on its face, is, that common or public lands should be converted into private property, and lands granted should be distributed in full property, and with established metes and bounds. Upon a careful revision of this decree the conclusion must be, that in the absence of other legislation the carrying out this decree must have devolved on the executive department, and the Governors of California, under the instructions of the Supreme Government, would have the power to grant common lands. Now by that decree the quantity of land granted to one individual was not limited to any given quantity; but as to persons, it was limited to citizens.

"The only instance in which quantity is limited is in certain donations to certain official persons, to whom small lots of prescribed extent were to be granted. This decree authorized grants to meritorious defenders, and a sale of land to aid the public necessities; and such sale, made in good faith, would

be the legitimate exercise of power, unless the provisions of the decree confirming the power have been repealed by subsequent legislation. Have they been repealed, expressed or by fair implication, by the colonization law of 1824 of Mexico, or by the regulations of 1828?

"Animated by a more liberal view of her interests, Mexico determined to afford inducements to emigration, and she opened her public lands to foreigners as well as citizens, and determined to make donations for colonization purposes to all who strictly complied with the terms which, in the distribution of the land, she prescribed to prevent fraud. Among these was limiting the quantity of land in any donation to a single person to eleven leagues. There are many reasons for the legislation of Mexico to surround her system of colonization with checks and limits when the Governors were to distribute the public lands, which do not apply to a *bona fide* sale for money consideration. Such is not a case which, by implication, should be brought within the colonization laws. The construction of a law, from the action of those whose duty it is to carry it out, should be considered when endeavoring to ascertain the intention of the Legislature. The fact that sales have been made by Governors of lands in quantities of more than eleven leagues, who would grant by donation to a colonist not more than eleven, is a circumstance not to be disregarded.

"By the records of the case, *United States* vs. *Rodriguez*, No. 479, among the files of the papers of the board of Land Commissioners, it is made to appear that Governor Pio Pico issued a grant for twelve leagues in consideration of the sum of $12,000, past indebtedness to the Government. The board of Land Commissioners confirmed the claim. The land in that case is situated in the southern district, and the records inaccessible to us, and it is impracticable to ascertain whether any appeal is pending, has been made, or been dismissed. The opinion of the board is, however, on file among the archives in the Surveyor General's office. In that opinion it is stated, 'that in consequence of the importance of the two questions

involved, the court took the case under advisement, and also for the reason that the determination of the case would settle the fate of a large number of cases undetermined, so far as the action of that tribunal was concerned.' The first of those questions involved the only two grounds taken in the present. It was, whether the power of the Government of California, under the Mexican authority, existed to sell or grant for a consideration of money, or with limits to exceed in amount eleven leagues. The board decided that he had such power.

"In the case of *The United States* vs. *M. G. Vallejo*, No. 321, the same tribunal affirmed the principle decided in the previous case, and confirmed the claim to fifteen leagues. In their opinion the board say, 'there appears no objection to the confirmation of this claim, except that it exceeds in amount the maximum authorized to be granted under the provision of the colonization law. The last five leagues do not appear to have been granted under those provisions, but a sale for an actual consideration received by the Government of two thousand dollars. This point was fully considered and decided by the court in case 479, and the doctrine recognised that a *bona fide* sale, made for a full consideration, by the Governor of California, under the Mexican laws, vested in the purchaser both a legal and equitable interest, of which he would not be divested by the Government by any rules of law or equity.' No power, certainly, was given by the colonization law of 1824, authorizing the Governor to grant by way of sale, under any circumstances. If, therefore, he does not possess the power independently of that law, it exists nowhere, and a money consideration need not to have been referred to the U. S. Supreme Court to illustrate the equities of parties applying for a confirmation of their grants.

"In the *Cambuston* case, (20 How., 4,) they assign as a reason for a strict interpretation of the claimant's grant, and its want of equity, that there had been no pecuniary consideration paid. In *Fremont's* case, (17 How., 558,) they refer to the fact that the grant was given for meritorious and patriotic services, and should place the claimant on a footing with one who had pur-

chased with money, and thus give a just and equitable claim against the Government, the title to which in a court of equity would be firm and valid.

"No sale, it would seem, for any amount of money, could be legal so as to pass a title, if it be conceded that no power on the part of the Governor to make a grant of the kind existed. It does appear to me, that when the Supreme Court refers to the money consideration of a grant as vesting in the holder of it a superior equity, by so doing they have at least not decided that the Governor's act was void.

"They must have acted under the impression that the power to sell in good faith was in the Governor, or that the equity of the case was such as gave 'a just and equitable claim against the Government,' the title to which in a court of equity would be 'firm and valid.' In either view, but especially on the ground of a power in the Governors of California, apart from the colonization law, to aid in good faith, by a sale of land, the public necessities, this court considers that a decree affirming that of the board of Land Commissioners in this case must be entered."

The Chief Justice, Mr. Justice *Catron*, Mr. Justice *Clifford*, and Mr. Justice *Swayne*, concurred in the opinion of Mr. Justice *Nelson*.

Decree of the District Court reversed and record remitted, with a mandate ordering that the claimant's petition be dismissed.

INBUSCH *vs.* FARWELL.

1. Partnership goods were attached on mesne process against three partners, for a partnership debt; property released on bond conditioned to pay the judgment which may be recovered against the defendants; suit discontinued against two defendants for want of jurisdiction, and prosecuted to judgment against the administrator of the other: *Held*, that the plaintiff may recover from the sureties in the bond the amount of the judgment.
2. Sureties in such a bond are sureties of the partnership, and if compelled to pay the money, they have an action for reimbursement against all who were partners at the date of the bond.
3. A judgment against one partner or his administrator (the other partners being out of the jurisdiction) binds the partnership property, and if partnership property be attached in such a case and not released, the marshal is bound to sell it and apply the proceeds to the satisfaction of the judgment.
4. A judgment for a partnership debt recovered against one of the partners is payable out of the proceeds of partnership property in preference to the individual debts of the partner sued.

Writ of error to the District Court of the United States for the district of Wisconsin.

James Buchanan, Henry Eastman, and Patten McMillan were partners trading under the firm of Buchanan, Eastman & Co. Charles B. Farwell was a creditor of the firm, and commenced an action in the District Court against all the partners by summons, with attachment. The marshal attached personal property of the partnership, and served the summons on Buchanan and McMillan. Afterwards, all three of the defendants appeared to the action. A bond was executed by James Buchanan, John G. Inbusch, and John D. Inbusch, referring to the action, reciting the attachment of the defendants' goods, and conditioned for the payment of the *amount of the judgment that might be recovered against the defendants.* On filing this bond an order was made to release the defendants' goods, which was done. Subsequently, it being made to appear that two of the defendants, Buchanan and Eastman, were citizens

of Illinois, the plaintiff discontinued his action as to them for want of jurisdiction in the court. The death of the other defendant was suggested, and his administrator was substituted. The action proceeded against the administrator of McMillan to verdict and judgment.

The present suit is against John D. Inbusch and John G. Inbusch on the bond in which they were sureties, and on which the goods of Buchanan, Eastman & Co. were released from the custody of the marshal. The defence was that the plaintiff had not recovered judgment *against the defendants*, and therefore the condition of the bond was not broken. But the judge of the District Court refused so to charge the jury, and ruled that the suit would lie on the bond to recover the amount of the judgment rendered against the administrator of McMillan, *one of the defendants.* Verdict and judgment were accordingly given for the plaintiff, and the defendants took their writ of error.

Mr. Reverdy Johnson, of Maryland, for plaintiffs in error.

Mr. Hawley, of Illinois, and *Mr. Stanbery*, of Ohio, for defendants in error.

Mr. Justice CLIFFORD. This is a writ of error to the District Court of the United States for the district of Wisconsin. As appears by the transcript, the suit was brought on the nineteenth day of October, 1859, by the present defendant, and the proceedings in the suit show that he had judgment in the court below, and that the original defendants sued out this writ of error. It was an action of debt, upon a bond signed by one James Buchanan, for and on behalf of himself, Henry Eastman, and Patten McMillan, as principal, and John G. Inbusch and John D. Inbusch, as sureties. Process issued against all three of the obligors who signed the bond, but service was not made upon the principal, for the reason that he was out of the jurisdiction of the court.

Referring to the recitals of the bond, it will be seen that it was given for the discharge of certain personal property attached

by the marshal, and held by him at the date of the bond, under a process of attachment duly issued by the District Court of the United States for the same district against said James Buchanan and the other two individuals, for and on whose behalf he professed to act in executing the instrument. They were co-partners in the lumbering business, under the firm-name and style of Buchanan, Eastman & Company, and in the course of their trade became indebted to Charles B. Farwell, the obligee of the before mentioned bond. He held against their firm two promissory notes, both dated October fifth, 1857, and made payable at the Galena Bank, with interest, at the rate of ten per cent. One was for the sum of two thousand dollars, payable in ninety days from date, and the other was for one thousand dollars, payable in four months, and both were signed in the name of the firm. Both notes being overdue and unpaid, the promisee, on the twelfth day of February, 1858, brought suit against the three partners to recover the amount. When he filed the *præcipe* he also filed a bond and affidavit for a summons with attachment, and the process duly issued in that form. Pursuant to the command of the precept, the marshal attached a large quantity of pine lumber belonging to the co-partnership, consisting of pine boards, shingles, and sawlogs.

Proceedings for the collection of debts in the District Court of the United States for that district are regulated by the laws of the State composing the district, in consequence of a rule to that effect adopted by the court. Accordingly the marshal made an inventory of the property attached, and caused the same to be appraised by two disinterested freeholders of the county. They appraised the property attached at the sum of six thousand four hundred and fifty dollars, as appears by their certificate appended to the return of the marshal. By his return, it also appears that, on the sixteenth day of the same month, he made due service of the process upon Buchanan and McMillan, two of the partners, by giving to each a certified copy of the process, and also of the inventory made by him of the property attached. All three of the defendants appeared, by attorney, on the first day of March following,

and on their motion it was ordered by the court that the property attached be released, and the attachment discharged on the defendants filing a bond, with sureties, to pay the amount as ascertained by the inventory and appraisement. Ten days afterwards the marshal was furnished with a certified copy of the order of the court, and upon the defendants in that suit filing the bond on which the present suit was brought, he released the property and discharged the attachment.

Recurring again to the bond, it will be seen that it was framed upon the condition that if the defendants in this suit, "or either of them, will, on demand, pay to the plaintiff in said action the amount of the judgment that may be recovered against the defendants in the action, not exceeding the recorded sum, then this obligation to be void; otherwise to be and remain in full force and effect."

Two pleas were filed by the defendants in this suit: First, they alleged that the writing obligatory, on which the suit was brought, was not their deed. Secondly, they alleged, in effect, that the plaintiff in the attachment suit did not recover judgment against the defendants in that suit for any sum whatever, as by the record thereof, now remaining in the court, would more fully appear, and concluded with a verification.

To the second plea the plaintiff replied, specially setting forth all the proceedings in the attachment suit as already given, and averring in addition thereto that the defendants appeared in the case on the 24th day of March, 1858, and pleaded to the jurisdiction, alleging, that at the commencement of the suit they were citizens of the State of Illinois, and not citizens of the State of Wisconsin, as alleged in the declaration. They also alleged that two of the defendants afterwards, on the seventeenth day of November, in the same year, made and filed in the cause a suggestion of the death of the other defendant; and that on the 10th day of January, 1859, he, the plaintiff, filed a replication to their plea to the jurisdiction of the court, denying the matters therein alleged, and averring that some one or more of the defendants were citizens of the State of Wisconsin, as was alleged in the declaration. That he, the plaintiff, thereafter, on the eighth day of April following, by

leave of court, entered a discontinuance as to Buchanan and Eastman, because they were out of the jurisdiction, as alleged in their plea; and, that on the twenty-first day of the same month, the administrator of the deceased defendant, McMillan, appeared as a party defendant in the suit.

These allegations were also accompanied by others, to the effect that the suit was duly revived against the administrator of the deceased partner; that the parties went to trial on the issue tendered and joined, and that the jury returned their verdict in favor of the plaintiff, and that the cause was then, for the want of a plea in bar of the action, referred to the clerk to compute the damages, and upon his report coming in, judgment was entered for the plaintiff in the sum of three thousand three hundred and seventy dollars and forty cents. Whereupon the defendants filed a rejoinder, averring that all the facts set forth in their second plea were true, and repeating the denial that the plaintiff ever recovered judgment against the defendants named in the bond. Upon these several matters they tendered an issue to the country, and on that issue the parties went to trial. To maintain the issue on his part, the plaintiff introduced the bond and a duly certified copy of the record in the attachment suit, and proved that he demanded payment of the amount before the suit was brought.

No testimony was offered by the defendants for the reason, doubtless, that their defence was, and still is, that the plaintiff failed to make out his case. They accordingly requested the court to instruct the jury that the record of the attachment suit showed that the plaintiff did not recover judgment against the defendants in that suit within the true intent and meaning of the bond, and, consequently, that there had been no breach of the condition therein set forth; but the court refused the prayer, and instructed the jury, substantially, that the suit would lie to recover the amount of the debt, interest, and costs of the judgment rendered in the attachment suit, and that the proofs introduced by the plaintiff showed a forfeiture and breach of the condition of the bond on the part of the defendants.

Exceptions were duly taken by the defendants, both to the

refusal of the court to instruct the jury as requested, and to the instructions given, as more fully set forth in the transcript.

I. It is not denied that the defendants in the attachment suit were partners, as alleged in the declaration; and it is equally clear that the suit was brought to recover a debt due the plaintiff from the partnership, and that the property attached by the marshal was partnership property.

But it is insisted by the defendants that the judgment recovered in that case was not in terms a judgment such as is described in the bond, and that they, the present defendants, being sureties, have a right to stand upon the letter of their contract. On the other hand, it is insisted by the plaintiff that the suit was well prosecuted, under the circumstances stated, against the administrator of the deceased defendant, and that the judgment, although against but one of the partners, yet being a judgment upon a partnership debt in a case where the other partners were out of the jurisdiction of the court, the effect of the judgment was to bind the property attached by the marshal, so that it would have been his duty, if no bond had been given, to have sold the same, and appropriated the proceeds to the payment of the execution issued upon such judgment.

Jurisdiction in the Federal courts is not defeated by the suggestion that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court; but it is expressly provided by the act of the 28th of February, 1839, that the judgment or decree rendered in the case shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer. 5 Stat. at Large, 32; *D. Arcy* vs. *Ketchum et al.*, (11 How., 165;) *Clearwater* vs. *Meredith et al.*, (21 How., 492.)

Under that law, therefore, without more, it is clear, that if Buchanan and Eastman had not been made parties to the suit, it might have been regularly prosecuted against the other defendant in his lifetime, and after his decease might have been revived and prosecuted against his administrator; and it is

equally clear, that by the law of the State, and the rule of the court adopting the same, it was competent for the plaintiff, under the circumstances, to discontinue as to Buchanan and Eastman, and proceed against the administrator of the other partner. Sess. Laws, 1856; see Code, Sec. 25, p. 10.

It is not questioned that the administrator voluntarily appeared in the case, and the record shows that the proceeding reviving the suit was regular and according to law. These considerations lead necessarily to the conclusion, that the judgment against the estate of the deceased partner was a valid judgment, and that the only question of any importance in the case is as to its effect upon the rights of those parties.

II. Some light will be shed upon the question by referring more definitely to the course of proceeding under which the bond was given, and the property attached released. By the law of the State, it is provided, that whenever the defendant shall have appeared in the action, he may apply to the officer or to the court for an order to discharge the attached property; but to secure that right, he must deliver to the court or officer an undertaking executed by at least two sureties, residents and freeholders in the State, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking.

Appearance was accordingly entered in the case by the attorney of the defendants in compliance with that requirement, and for the purpose of procuring the discharge of the property held by the marshal. Attachments are made for the benefit of creditors, but the provision for the discharge of the property attached is made for the benefit of debtors. They may demand as matter of right, on complying with the requirements of the law in that behalf, to have their property discharged from attachment, and that a bond with sureties be accepted in its place. Under those circumstances, it is quite obvious that the bond becomes a substitute for the property released; and where there are no special circumstances to render the case an exceptional one, it must be held that any judgment that would

have bound the property, if it had remained under attachment in the hands of the marshal, will bind the obligors of the bond in a case like the present, where the suit was commenced against the partnership upon a partnership contract, and the property attached was partnership property.

Discontinuance as to the partners, not within the jurisdiction of the court, was properly allowed under the law of the State and the practice of the court. Beyond question, therefore, it was a valid judgment upon a partnership debt; and although it was against the estate of but one of the partners, still, if the property attached had not been released, it would have been the duty of the marshal, under the law of the State and the practice of the court, to have sold the same, and appropriated the proceeds to the payment of the execution issued upon the judgment. Rev. Stat. Wis., 1849, Sec. 41, p. 539.

Although the other partners were not prosecuted to judgment, because they were out of the jurisdiction of the court, still the judgment was rendered upon a partnership debt, to which it would be the duty of the marshal to apply partnership property in preference to the debts of the individual partners. Sureties in the bond were sureties for the partnership for the purpose therein described, and if compelled to pay the amount they clearly have a right of action against all who composed the firm at the time they assumed the liability. *Gay* vs. *Johnson et al.*, (32 N. H., 167;) Story on Part., Sec. 375; Collier on Part., 3d ed., Sec. 713, p. 630; *Benedict* vs. *Stevens*, (25 Conn., 392.)

Judgment was recovered, therefore, in this case for the partnership debt, and if the property attached had not been discharged it must have been appropriated to liquidate the judgment, and we think the bond must be regarded as a substitute for the property, and consequently that the rulings and instructions of the District Court were correct.

Judgment of the District Court affirmed.

THE PROPELLER COMMERCE—*Transportation Company, Claimant; Fitzhugh et al., Libellants.*

1. To bring a case of collision within the admiralty jurisdiction of the Federal courts, it is not necessary to show that either of the vessels was engaged in foreign commerce or commerce between the States.
2. The admiralty jurisdiction is not taken away by the fact that the collision or other tort was committed within the body of a county.
3. Locality is the test of jurisdiction. If the collision occurred on those navigable waters which empty into the sea, or into the bays and gulfs which form a part of the sea, the maritime courts have jurisdiction.
4. A suit *in rem* for a marine tort may be prosecuted in any district where the offending thing is found.

Appeal from the Circuit Court of the United States for the southern district of New York.

This was a libel filed in the District Court by Henry Fitzhugh, De Witt C. Little, John Peck, and James Peck, against the steam propeller Commerce, (claimed by the Commercial Transportation Company as owners,) averring a collision on the Hudson river with the libellants' lake boat, the Isabella, by which the latter vessel was sunk, causing an injury to boat and cargo of $17,000. The cargo, it seems, did not belong to the libellants, but was in their custody as common carriers.

The allegations of the libel, the defence set up in the answer, the facts of the case as they appeared in evidence, and the points of law raised in the argument, are stated in so much fulness by Mr. Justice *Clifford*, that they need not be repeated here.

The libel was dismissed by the District Court; but on appeal to the Circuit Court, a decree was passed in favor of the libellants for $11,443 15, and thereupon the claimants appealed to this court.

Mr Benedict, of New York, for claimants.

Mr Grant, of New York, for libellants.

Mr. Justice CLIFFORD. This was a libel in admiralty in a cause of collision, civil and maritime, and the case comes before the court on appeal from the decree of the Circuit Court of the United States for the southern district of New York.

Recurring to the transcript, it will be seen that the libel was *in rem* against the steam propeller "Commerce," and that the suit was instituted by the appellees, as the owners of the lake boat Isabella; but the record shows, that after the process was issued, and the vessel was taken into custody, the appellants, on motion, had leave to appear, and having waived publication of notice and entered into stipulation, with sureties, both for costs and value, the vessel was discharged by consent, the stipulators agreeing, that in case of default or contumacy of the claimants, execution might issue for the amount of the stipulation against their goods, chattels, and lands. No change, however, was made in the form of the libel, and the whole proceedings in the suit were as *in rem* against the vessel. Reference will only be made to such portions of the pleadings as seem to be indispensable to a full understanding of the several questions presented for decision. Among other things, the libellants alleged, that the Isabella left the port of New York on the nineteenth day of August, 1852, for the port of Albany, fully laden with merchandise; that she, with certain other boats and barges, was in tow of the steam-tug Indiana during the voyage, and at the time the collision occurred; that the steam-tug was well manned, tackled, apparelled, and furnished, and in all respects competent for the business in which she was engaged; and that the craft composing the tow had on board the proper complement of officers and men for their protection and management. Two of the barges were attached to the steam-tug, one on the larboard and the other on the starboard side; and to show that there was no fault in the arrangement of the tow, they alleged that the Isabella was securely attached to the larboard side of another barge, and that both were towed astern of the steam-tug, at the usual and proper distance, by means of a hawser; and, in respect to the immediate circumstances of the colli

sion, they alleged that the Isabella, in the evening of the following day, while ascending the river, in tow of the steam-tug as aforesaid, and when about ten or eleven miles below the port of her destination, was met by the propeller, coming down the river, and bound on a voyage from the port of Albany to the port of Philadelphia; and they aver, that at the time of such meeting, the steam-tug, with all the boats and barges in tow of her, was on the eastern side of the channel, and in the usual and proper place for such craft when so ascending the river; but that the propeller, after she had passed the steam-tug in perfect safety, suddenly and improperly sheered to the eastward, and, through the negligence of those in charge of her, ran against the larboard bow of the Isabella, stove the bow from the stem, broke all the lines by which she was attached to the barge, and so damaged her that, in a few minutes, she sunk in the river, with all her cargo on board. As alleged in the libel, her cargo consisted of groceries and other merchandise, together with a steam-engine; and the libellants alleged, that the whole amount of the loss, including the damage to the cargo, was seventeen thousand dollars. When the libel was filed, the propeller was in the port of New York, and, as the libellants alleged, within the jurisdiction of the District Court. Accordingly, they prayed process, in due form of law, as in cases of admiralty and maritime jurisdiction, and it was issued and duly served upon the vessel. On the other hand, the claimants denied the allegation that the steam-tug was well manned and equipped, or that the boats and barges in tow of her had a full complement of officers and men for their protection and management, or that the tow was properly made up, and especially that the Isabella was at no greater distance astern of the steam-tug than was usual and proper. They admitted, however, that the propeller passed the steam-tug in safety, and met the Isabella at the time alleged, but denied that the steam-tug, or the boats and barges in tow of her, were on the eastern side of the channel, or in a proper place for such craft when ascending the river.

Their theory was, that the lower barge, with the boat of the libellants attached, was on the western side of the channel,

and they accordingly alleged that the tow was out of the usual and proper place; and they expressly denied that the propeller, after passing the steam-tug, sheered at all, or so moved towards the eastern side of the channel as to cause the collision. Witnesses were examined on both sides in the District Court, and, after a full hearing, a decree was entered dismissing the libel, and the libellants appealed to the Circuit Court. Additional testimony was taken on the appeal, and the Circuit Court reversed the decree of the District Court, and entered a decree in favor of the libellants. Whereupon the claimants appealed to this court, and now seek to reverse the last named decree.

It appears from the evidence that the steam-tug, when she started from New York, had seven boats and barges in tow, but the number, although she left one at Kingston, was increased to ten in the early part of the trip. On arriving at Athens, the master, as he had been accustomed to do, rearranged the tow, in order to make it narrower for the residue of the voyage. Briefly stated, the arrangement was as follows: Two of the craft were lashed, as before, to the sides of the steam-tug; but they had two others at their stern, which were connected with them by lines put out from the stem of the boat in the rear, and attached to the stern of the boat ahead. Four of the residue, arranged abreast and lashed together, were connected with the steam-tug by a hawser about two hundred feet long, and the barge to which the boat of the libellants was attached was some three or four hundred feet astern of the whole, and was also connected with the steam-tug by a hawser. With the tow arranged in the manner described, the steam-tug proceeded slowly up the river, and passed Mull island in perfect safety. Shortly after passing the island, the master of the steam-tug, who was standing in the wheel-house, discovered two steamers coming down the river, and as they were not far distant, he went aft to see to the tow. They proved to be the propeller and the steamer Oregon, and the former, in a few minutes, passed the steam-tug some fifty or a hundred feet to the westward—so far to the west, that a schooner under mainsail and foresail, and with her main

boom out, was between the propeller and the steam-tug at the time the former passed the latter. Seeing the schooner coming up, the Oregon stopped until the schooner passed out of the way, but the propeller proceeded on her course, without any abatement of her speed, and after passing the steam-tug, and the four boats arranged abreast, sheered to the eastward, and struck the stem of the libellants' boat, and, as the witnesses state, drove it into the cabin, and parted all the lines which attached the boat to the barge. Some conflict exists in the testimony as to the precise locality where the collision occurred; but the clear inference from the whole evidence is, that it took place just after the barge, with the boat of the libellants attached, passed the point of Mull island, and it is conceded that the island is within the northern district of New York, and within the body of one of the counties of that State. Want of jurisdiction was not suggested, either in the District or Circuit Courts; but it is now insisted that the case was not cognizable in the District Court, for three reasons: First, because it did not appear that the propeller or the boat of the libellants was engaged in foreign commerce, or in commerce between the States, and, therefore, was not a case cognizable in the admiralty; second, because the collision occurred within the body of a county, and, therefore, was exclusively cognizable at common law; thirdly, because, assuming it to be a case of admiralty and maritime jurisdiction, still it was properly cognizable in the northern district of New York, and not in the southern, where the decree was rendered.

1. But the first objection could not be sustained, even if it were admitted, on the theory of fact assumed, that it was correct, for the plain reason that it is alleged in the libel, and not denied in the answer, that the propeller was bound on a voyage from the port of Albany to the port of Philadelphia, and one of the witnesses of the claimants testified that she was employed in her second trip, and that, notwithstanding the collision, she completed her voyage.

Admiralty jurisdiction, however, was conferred upon the Government of the United States by the Constitution, and in cases of tort it is wholly unaffected by the considerations sug-

gested in the proposition. Such certainly were the views expressed by this court in the case of the Genesee Chief, 12 How., 452, where the court say: "Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants." When the District Courts were organized, they were authorized by Congress to exercise exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas. That provision of the judiciary act remains in full force and unrestricted as applied to the navigable waters of the Hudson and all the other navigable waters of the Atlantic coast which empty into the sea, or into the bays and gulfs that form a part of the sea. All such waters are, in truth, but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself. It is not denied that the admiralty has jurisdiction of torts committed on such navigable waters, nor is it denied that the waters of the Hudson, where the collision in this case occurred, are within the admiralty and maritime jurisdiction of the United States; but it is insisted that something more is wanting in order to bring the case within the cognizance of the admiralty. Our reply to that suggestion is, that locality, by all the authorities, is the test, in cases of tort, by which to determine the question whether the wrongful act is one of admiralty cognizance; and if it appears, as in cases of collision, depredations upon property, illegal disposition of ships, or seizures for breaches of revenue laws, that it was committed on navigable waters, within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty. 1 Cur. Com., p. 33, Sec. 37.

2. It is assumed, in the second place, that the jurisdiction must be denied, because it appears that the collision occurred

on the Hudson river within the body of a county; but the objection presents a question that has long since been settled by this court. It was first presented in the case of *Waring et al.* vs. *Clark*, (5 How., 452,) where this court held that the question of jurisdiction was unaffected by the fact that the locality of the collision was *infra corpus comitatus*, provided it occurred in waters where the tide ebbed and flowed, which is a rule sufficiently comprehensive to control this case. That decision, however, preceded the case of the Genesee Chief, 12 How., 443, where the same rule was declared to be applicable to the lakes and the navigable waters connecting the same, although not affected by the ebb and flow of the tide. Similar views were also expressed by this court in the case of *The Magnolia*, (20 How., 298;) and in the case of *The Philadelphia, Wilmington and Baltimore Co.* vs. *The Philadelphia and Havre de Grace Co.*, (23 How., 215,) it was emphatically said, that since the case of *Waring et al.* vs. *Clark*, (5 How., 464,) the exception of *infra corpus comitatus* is not allowed to prevail. Taken together, these three decisions, we think, ought to be regarded as decisive of the point under consideration, and may well excuse us from any extended argument upon the subject.

3. But it is insisted that the case was not cognizable in the District Court for the southern district of New York. Judging from the course of the argument, it would seem that the error on this point arises from a misapplication of the established rule, that jurisdiction in the admiralty, in cases of tort, depends upon locality. Whether a wrongful act, committed upon the person or property of another, was of a character to be denominated a marine tort, and, consequently, to be regarded as the proper foundation of a suit cognizable in the admiralty, undoubtedly depends upon the locality where the wrongful act was committed, as already explained. But marine torts are in the nature of trespasses upon the person or upon personal property, and they may be prosecuted *in personam* in any district where the offending party resides, or *in rem* wherever the offending thing is found to be within the jurisdiction of the court issuing the process.

Process *in rem* is founded on a right in the thing, and the

object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it. Consequently, the court, through its process, arrests the thing, and holds possession of it by its officers, as the means of affording such satisfaction, and in contemplation of law it is in the possession of the court itself. Bened't's Adm., p. 241, Sec. 439. Unless, therefore, the suit *in rem* can be prosecuted in the district where the property is found, it cannot be prosecuted at all, which would defeat the right of the injured party to a very beneficial remedy. Libels *in rem, in instance causes*, civil or maritime, says Mr. Greenleaf, shall state the nature of the cause, as, for example, that it is a cause civil and maritime, of contract, of tort or damage, of salvage, or possession, or otherwise, as the case may be; and if the libel is *in rem*, that the property is *within the district*, and if *in personam*, the names and place of residence of the parties. 3 Greenl. Ev., 401. It is plain that the suit *in rem* cannot be maintained without service of process upon the property, and we hold it may be prosecuted in any district where the property is found; and such undoubtedly must have been the opinion of this court in *Nelson et al.* vs. *Leland et al.*, (22 How., 48,) which, indeed, is decisive of the point under consideration. See also *Monro* vs. *Almeida*, (10 Wheat., 473.)

It is clear, therefore, on authority, that the third objection to the jurisdiction cannot be sustained; and, after a careful consideration of the evidence, we think the decision of the Circuit Court was correct upon the merits. Considerable conflict exists in the evidence on the point, whether the lower barge, with the boat of the libellants attached, was or was not on the eastern side of the channel when the collision occurred; but we think the weight of the evidence shows that the tow, as well as the steam-tug, was east of the centre of the channel. Full proof was exhibited that the steam-tug was as near the eastern side as it was safe for her to go, and the proof of that fact goes very far to sustain the entire theory of the libellants, especially as all or nearly all the witnesses who were on the several craft composing the tow concur in the statement that

the propeller made a sheer to the eastward after she passed the steam-tug, and the four boats arranged abreast.

Objections were also made to the computation of the damages, but none of them can be sustained.

One of the objections was, that the court erred in allowing damages for the injury to the cargo as well as to the boat; but the point has been so often ruled that the carrier, who is responsible for the safe custody and due transportation of the goods, may recover in cases of this description, that we do not think it necessary to do more than to express our concurrence in the rule adopted by the Circuit Court.

The decree of the Circuit Court is therefore affirmed, with costs.

SILLIMAN *vs.* HUDSON RIVER BRIDGE COMPANY.—COLEMAN *vs.* SAME.

1. In a case where the judges of the Circuit Court have divided in opinion upon several questions, one of them being whether the court has jurisdiction, the question of jurisdiction must be determined before any opinion can be expressed on the others.
2. If the judges of this court, as well as the court below, are equally divided on the question of jurisdiction, the case will be remitted for such further action as may be required by law and the rules of court.
3. Where the record (of an equity case) goes down in this condition, it is the established rule to dismiss the bill and leave the plaintiff to his remedy by appeal.
4. Whether the evidence is sufficient to prove an averment in the pleadings, is a question of fact, and cannot, therefore, be brought into this court upon a certificate of division.

Both these cases came up on certificates of the judges of the Circuit Court that they were divided in opinion on certain points raised at the trial.

The questions on which the judges divided in the court below are mentioned in the opinion of Mr. Justice *Nelson*. The arguments of counsel here were mainly on the merits of the

cause; but this court being also divided, nothing was determined except the points of practice noted at the head of this report.

Mr. Beach, of New York, and *Mr. Reverdy Johnson*, of Maryland, for complainants.

Mr. Pruyn, of New York, for defendants.

Mr. Justice NELSON. These were suits in equity, in which the bills were filed in October, 1856, to obtain a decree for an injunction perpetually restraining the defendant from erecting a bridge across the Hudson river, at Albany, authorized by an act of the Legislature of the State of New York, passed on the 9th day of April, 1856. The defendant answered both bills, to which general replications were filed and proofs taken, and the causes brought on for hearing, and heard together, upon pleadings and proofs.

And upon the hearing of each of the said causes, the following questions occurred, to wit:

First. Whether or not the court, under the Constitution and laws of the United States, has the power perpetually to restrain the erection of the bridge across the Hudson river, at Albany, proposed to be erected by the defendants in the manner provided for or authorized by the acts of the Legislature of the State of New York, mentioned in the pleadings and proofs herein, in case the plaintiff, being the owner of vessels holding coasting licenses, shows, to the satisfaction of the court, that such bridge, if erected, will materially obstruct, delay, or hinder such vessels in the navigation of said river, while engaged in commerce between said State of New York and other States.

Second. Whether or not the evidence in this case shows that the bridge in controversy will, if erected, constitute a material obstruction and impediment to the navigation of the Hudson river for the vessels of the plaintiff, mentioned in the pleadings and proofs.

Third. Whether or not the defendant is entitled to a decree dismissing the bill, on the ground that the complainant has an

adequate remedy at law for all injury he may sustain by reason of the erection of the said bridge, should the same be erected as proposed.

On which several questions the opinions of the judges were opposed.

Whereupon, on motion of the defendants, by their counsel, that the points on which the disagreements hath happened may, during the said term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court of the United States, to be finally decided—

It is ordered that the said points of disagreement, together with the pleadings and proofs herein, be, and they hereby are, certified, according to the request of the defendants, as aforesaid, and of the act of Congress in that case made and provided.

This court, after hearing the arguments of counsel for the respective parties, and upon consideration of the first question, are equally divided in opinion, and, consequently, no instructions can be given to the court below concerning it. And, being thus divided on the first question, which involved the jurisdiction of the court below over the subject-matter of the suits, no opinion can be properly expressed upon the two remaining questions. These two questions can become material only, or be inquired into, after jurisdiction has been entertained in the cases, and the court bound to proceed to a final disposition of them.

We may add, also, that the second question is one which, according to a decision of this court, is not properly certified here, the question being one of fact. 8 How., 258.

This being the condition and posture of the cases, it becomes proper and necessary to remit them to the court below, for the purpose of enabling that court to take action upon them, and such further proceedings as the rules of the court or principles of law may require. The rights and interests of both parties call for such a disposition of the cases here; for, as the judges of the court below were divided in opinion upon the question of jurisdiction, when the cases go down, as they must, for final disposition in that court, the bills in the two cases, according

to the established rule of proceeding, under the circumstances stated, are to be dismissed, and a decree to that effect entered, so that the parties aggrieved may, if they think proper, bring up the questions on appeal for review from the final decree.

PINDELL *vs.* MULLIKIN ET AL.

A bill claiming title to, and praying for possession of, lands will be dismissed, if the complainant and those through whom he claims have taken no steps to assert their right for twenty years; the land being, all that time, in the adverse possession of the defendants and their ancestor.

Appeal from the Circuit Court of the United States for the district of Missouri.

This was a bill in equity brought in the Circuit Court of the United States for the district Missouri, by Richard Pindell, of Kentucky, against Napoleon B. Mullikin, Jerome B. Mullikin, Charles B. Wiggins, and Virginia, his wife, John R. Shepley, William H. McPherson, P. Dexter Tiffany, Samuel Willi, James Clements, jr., and David H. Armstrong, citizens of the State of Missouri.

The complainant prayed to have decreed to him fifty arpents of land in the neighborhood of St. Louis, and deduced his title from John R. Sloan, the sole heir and legal representative of one John Sloan, to whom the land claimed was alleged to have been conveyed by David Musick. The defendants had been in possession of it for more than twenty years before the filing of the bill.

John Sloan, the father of the plaintiff's grantor, died in 1818, without having recorded any deed from the previous owner to himself. It was supposed to have been lost as early as the death of Sloan. No steps were taken for forty years to assert any claim under it. According to the allegations of the bill, the representatives of Sloan knew all the time of his title to the land, yet *they* commenced no suit at all, and their assignee only after a lapse of forty years. J. R. Sloan, the son under

whom appellant claimed title, came of age in 1834, and knew as early as 1838 that Mullikin claimed portions of the tract in controversy. It was alleged that he took professional advice on the subject in 1838, but it was not until twenty years after that time, and twenty-four years after he came of age, that any suit was instituted.

No counsel appeared for appellant.

Mr. Shepley, of Missouri, for appellees. Laches, much less flagrant than this, will prevent a court of equity from granting relief even in a clear case. 2 Story Eq. Juris., (7th ed.,) Sec. 1520, p. 889, note 4, and cases there cited; *Holt* vs. *Rogers*, (8 Peters, 420 et al.;) *Patte* vs. *Carroll*, (8 Cranch, 471;) *Moore* vs. *Blake*, (1 Ball & P., 69;) *Boone* vs. *Missouri Iron Co.*, (17 How., 340.)

Mr. Justice CATRON. Pindell filed his bill against the respondents and others, to have decreed to him, as assignee of John R. Sloan, fifty acres of land adjoining the city of St. Louis. The respondents rely on the act of limitations as a defence, (among others,) alleging that they have been in adverse possession of the land for which they are sued for more than twenty years before the suit was brought.

John R. Sloan became of age in 1834; the bill so alleges. The land was confirmed to the father of the respondents, under whom they claim as heirs, by the act of Congress of July 4th, 1836, and the bill was filed in January, 1857, more than twenty years after the legal title was vested by the confirmation.

The bill admits that Mullikin's heirs hold the legal title, and they prove that a division of the land confirmed took place among various owners, and that about ten arpents of it were allotted to Mullikin, the ancestor. This occurred in 1836; that immediately after the partition, Mullikin took possession of the land allotted to him, and he and his heirs have held it in possession ever since.

The claim set up by the bill is barred by twenty years' adverse possession. If, however, this defence was not conclusive

of the controversy, our opinion is, that no sufficient evidence that the contract alleged to have once existed is proved; and that the decree below dismissing the bill was also proper for want of proof to sustain its allegations.

Decree of the Circuit Court affirmed.

SHERMAN *vs.* SMITH.

The State of New York established a general banking law, containing a provision that members of an association, organized under it, should not be individually liable for its debts unless by their own agreement, but reserving to the State the right to repeal or change the law. Afterwards an amendment to the State constitution and an act of the Legislature declared that the shareholders of all banks which should continue to issue notes after a certain time must be individually responsible. *Held:*

1. That the stockholders of a bank, organized under the general banking law before the amendment of the constitution, are liable for the debts of the association in their individual capacity.
2. That the articles of association, made by the stockholders at the time they organized themselves as a bank, were not a contract with the State.
3. That the change made by the constitution and subsequent act of the Legislature were not the less constitutional and valid, as against this bank, because the stockholders, in their articles of association, had declared that they would not be individually bound for the debts of the concern.

Writ of error to the Supreme Court of New York.

Oliver Lee & Company's Bank, at Buffalo, was organized in January, 1844, under the act of the Legislature to authorize banking, passed 18th April, 1838. Watts Sherman was one of the shareholders. In the articles of association it was agreed that the shareholders should not be liable, individually, for the debts of the bank, and this was in accordance with the act of 1838, under which the association was organized, and which declared that no shareholder should be liable unless the articles

of association signed by himself made him so. But this act contained a provision that the Legislature might at any time alter or repeal it. In 1846 a change was made in the constitution of the State which imposed individual liability on the stockholders of banks, and in 1849 the statute was passed under which this proceeding was commenced and carried on to enforce that responsibility.

In 1857 Henry B. Gibson, one of the stockholders, presented his petition, agreeably to the act of 1849, to a judge of the Supreme Court of the State, setting forth that this bank was insolvent, and praying that it might be declared so and a receiver appointed, and such other relief given as might be required. The proceeding thus begun ended in a judgment of the Supreme Court, affirmed by the Court of Appeals, making Watts and the other stockholders liable in their individual capacity for an amount of the debts equal to their stock. James M. Smith, the defendant in error, was appointed receiver.

The question argued here was, whether the constitution of 1846 and the statute of 1849 were or were not in conflict with that provision in the Federal Constitution which forbids the States to make any law impairing the obligation of contracts. The point was raised below, but was decided against the stockholders in every court to which the cause was carried, including the highest.

Mr. Peck, of New York, (with whom was *Mr. Porter* and *Mr. John Van Buren*,) for the plaintiff in error, cited: 1 Parsons on Contracts, 399; *Miller* vs. *N. Y. & Erie R. R. Co.*, (21 Barbour, 513, 519;) *Ham* vs. *McClairs*, (1 Bay., 93;) *Calder and Wife* vs. *Bull and Wife*, (2 Dall., 398;) *Bennett* vs. *Boggs*, (1 Bald., 74;) *Schuyler et al.* vs. *McCrea*, (1 Har. & J., 249;) *Commonwealth* vs. *McCloskey et al.*, (2 Rawle, 374;) *Allen* vs. *McKean*, (1 Sumner, 302, 303;) *State Bank of Ohio* vs. *Knoop*, (16 How., 385;) *The L. & C. Co.* vs. *Town*, (1 N. H., 44;) *Winter* vs. *Muscogee R. & Co.*, (11 Georgia, 438;) *Kean* vs. *Johnson et al.*, (1 Stockton, 401;) *Ex parte Johnson*, (31 Eng. L. & Eq.;) 21 Barbour, 519, *supra; Livingston* vs. *Lynch et al.*, (4 Johnson Chy., 573, 582, 595–598;) 1 Sumner, 314; Laws of 1849, 340, Sec. 3; *Hart-*

ford R. R. Co. vs. *Crosswell*, (5 Hill, 383, 386;) *Green* vs. *Biddle*, (8 Wheaton, 2, 92;) *Dodge* vs. *Woolsey*, (18 Howard, 331, 359;) *Piqua Bank* vs. *Knoop*, (16 Howard, 369;) *Allen* vs. *McKean*, (1 Sumner, 278, 313, 314;) *Livingston* vs. *Lynch et al.*, (4 Johnson Chy., 573, 582, 595–598;) *R.* vs. *M. & I. R. R. Co. and P. & I. R. R. Co.*, (21 Howard, 442;) *Mason* vs. *Finch*, (2 Scam., 223;) *McFarland* vs. *State Bank*, (1 Pike, 410;) *State* vs. *Williams*, (2 Strobh., 474;) *Town Ottawa* vs. *County La Salle*, (12 Ill., 339;) 2 Roll. Abr., 409; *Taylor* vs. *Homersham*, (4 M. & S., 426;) 2 Parsons on Contracts, p. 13, N. r, and cases there cited; *Lyman* vs. *Clark*, (9 Mass., 235;) *Jackson ex dem. Stevens* vs. *Stevens*, (16 Johnson, 110;) *Covington* vs. *McNickle*, (18 B. Monroe, 262;) *Jackson* vs. *Stackhouse*, (1 Cowan, 122;) *Torrence* vs. *McDougald*, (18 Georgia, 526;) 7 Bar. and Cross., 643, Bu. and Brandling; *Townley* vs. *Gibson*, (2 Tenn., 701;) 1 Coke, 68, Alton Woods; Plowden, 365, Duke of Norfolk's case; 5 Greenleaf's Crim., 19, Sec. 44; 5 Greenleaf's Crim., Tit. Private Acts and King's Grants, pp. 1–53; 4 Greenleaf's Crim., 174, Sec. 26—300, Sec. 8—303, Sec. 15—345, Sec. 62, note 1; *Mitchell* vs. *Doggett*, (1 Branch, 356;) *Henry* vs. *Tilson*, (17 Verm., 479;) *City of St. Louis* vs. *Russel*, (9 Miss., 507;) *Fletcher* vs. *Peck*, (6 Cran., 87;) *Dash* vs. *Van Kleek*, (7 Johnson, 417;) *People* vs. *Clark*, (3 Selden, 385;) *Gilmore* vs. *Shuter*, (2 Mod.;) *Couch* vs. *Jeffries*, (4 Burr., 2460;) *Sayer and Wife* vs. *Wisner*, (8 Wendel, 661;) 1 Harr., 285, *supra;* 1 Branch, 356, *supra; Hooker* vs. *Hooker*, (10 S. & M., 599;) *Bruce* vs. *Schuyler*, (4 Gilm., 221;) *Morlot* vs. *Lawrence*, (1 Blatch. Ct. Ct., 608;) *United States* vs. *Cases Cloths*, (Crabbe, 356;) 4 Pike, 410, *supra; Town Ottawa* vs. *County La Salle*, (12 Ill., 339;) *Brown* vs. *County Comm's*, (21 Penn.;) *Sackett* vs. *Andross*, (5 Hill, 527,) elaborate opinion of Brown, J.; *Quackenbush* vs. *Danks*, (1 Denin, 128;) *Dewart* vs. *Purdy*, (29 Penn., 113;) *U. S.* vs. *Stone*, (1 Hemp., 469;) *Aurora and L. T. Co.* vs. *Holdhow*, (7 Ind., 50;) *Brown* vs. *Fifield*, (4 Mich., 322;) *People* vs. *C. Comm's*, (3 Scam., 153;) *Barnes* vs. *Mayor Mobile*, (19 Ala., 707;) *Bruce* vs. *Schuyler*, (4 Gilm., 221;) *Brown et al.* vs. *Lever, Sheriff, &c.*, (5 Hill, 221.)

Mr. Ganson, of New York, contra, cited 21 N. Y. Rep., 9; 22 N. Y. Rep., 9; 1 Rev. St., 600; *Pl. R. Co.* vs. *Thatcher*, (1 Kernan, 102;) *R. R. Co.* vs. *Dudley*, (4 Kernan, 336;) *Northern R. R. Co.* vs. *Miller*, (10 Bach., 260;) *White* vs. *R. R. Co.*, (14 Bach., 559;) *Stanley* vs. *Stanley*, (26 Maine R., 191;) *Charles River Bridge* vs. *Warren Bridge*, (11 Pet., 549;) *Ohio Ins. & Tr. Co.* vs. *Debolt*, (16 How., 416;) *Bank of Columbia* vs. *Attorney General*, (3 Wend., 588.)

Mr. Justice NELSON. This is a writ of error to the Supreme Court of the State of New York.

The proceeding was instituted under an act of the Legislature of the State of New York, to enforce the responsibility of stockholders in certain banking corporations or associations.

The judge before whom the proceedings were instituted declared the bank insolvent, and appointed Smith, the defendant in error, the receiver to take charge of its assets, and to perform such other duties as the law imposed.

The case was afterwards referred to Judge Hall, as a referee, to apportion the debts and liabilities of the bank which had been contracted after the first day of January, 1850, and remained unsatisfied among the stockholders, ratably in proportion to their stock, according to the principles declared by an act passed April 5, 1849, and report to the court. Judge Hall reported that the capital of the bank was $170,000, and its indebtedness $502,944 22; and further, that the assets in the hands of the receiver, and an assessment upon the stockholders of an amount equal to the capital of the bank, would be insufficient to discharge its debts and liabilities, and hence apportioned upon each of the stockholders an amount equal to the amount of stock held by them respectively in the bank. The sum of $7,000 was assessed upon the plaintiff in error.

The referee further reported, that this bank was an association formed 23d April, 1844, under the general banking law of the State, passed 18th April, 1838; and inserted in his report a copy of the articles of association, among which is one that declares: "The shareholders of this association shall not

be liable in their individual capacity for any contract, debt, or engagement of the association."

The counsel for the plaintiff in error appeared before the referee and objected to the assessment, on the ground, among others, that the clause in the articles of association above referred to, and which were authorized by the general banking act of 1838, constituted a contract; that the stockholders were not to be made individually liable for the debts of the association, which was protected by the Constitution of the United States; and that the provision of the constitution of the State of New York, of 1846, imposing upon them individual liability, and the act of the Legislature of 1849 carrying it into effect, were inoperative and void. The counsel further objected, that a reservation by the State, in express terms, of a power to impair by subsequent laws the obligation of contracts between individual citizens, lawful at the time it was made, would be in conflict with the Federal Constitution.

Numerous other objections were taken to the assessment before the referee, but the above are the only ones material to notice in this court.

The referee overruled these objections, and the report was afterwards confirmed by the judge.

This judgment, confirming the report, was appealed from to the Supreme Court of the State, which affirmed it. An appeal was afterwards taken to the Court of Appeals, the highest court in the State of New York, in which the judgment in the Supreme Court was affirmed, and the record remitted to that court to have the judgment carried into execution.

As this case comes before us under the 25th section of the judiciary act, the only question involved is, whether or not the court below erred in denying a right set up by the plaintiff in error under the Constitution of the United States; in other words, whether the constitution of the State of New York of 1846, or the act of the Legislature of 1849, or both, which subjected the stockholders of the bank to personal liability for its debts accruing after the first day of January, 1850, impaired the obligation of any contract with the stockholders in its charter?

The general banking law of 1838, under which this bank was organized, provided in the 23d section, that "no shareholder of any such association shall be liable in his individual capacity for any contract, debt, or engagement of such association, *unless the articles of association by him signed shall have declared that the shareholder shall be liable.*"

The 15th section provided, that "any number of persons may associate to establish offices of discount, deposit, and circulation, upon the terms and conditions, and subject to the liabilities, prescribed in this act."

One of the articles of association, as we have already seen, provided, that the shareholders should not be liable in their individual capacities for any contract, debt, &c.

The 32d section of the general banking act provided, that "the Legislature may at any time alter or repeal this act."

The argument on the part of the plaintiff is, that this stipulation of the stockholders in the articles of association from exemption from all personal liability for the debts of the institution, constitutes a contract within the authority of the act under which it was organized, that cannot be legally impaired by the provision in the constitution of New York, or by the act of 1849, which seeks to change the obligation, and impose upon them personal liability; that, in respect to this bank, the provision in the constitution and the law are void as against the Constitution of the United States.

Now, in the first place, it is to be observed, that the article of association relied on is but an affirmation of the principle contained in the 23d section of the act of 1838, and can be entitled to no greater effect or operation than the law itself, unless, indeed, by incorporating it into the articles, it can be made permanent or perpetual. The section expressly exempts the individual liability of the stockholder, but confers the privilege upon the association to subject him to personal liability if they think fit. It was competent for the stockholders to avail themselves of this privilege in their articles of association, and thus, perhaps, increase public confidence in the credit of the institution. But we can discover no authority in the section or any necessity or propriety on the part of

the association, for incorporating the law itself into their articles. Certainly, in so doing they cannot change it, or make it more or less effectual.

In the second place, we remark, that this article of association is not within any authority conferred on the stockholders by any provision of the general banking law.

By the 15th section, any number of persons may associate to establish offices, &c., upon the terms and conditions, and subject to the liabilities, prescribed by the act. These terms and conditions, as it respects the personal liability of the stockholders, are found in the 23d section, which exempts them, unless they see fit to impose it upon themselves. It is not in their power to change the rule of liability except as specified in the section, and that they have not attempted.

This article of association, therefore, being a mere attempt to re-enact a provision of the law, and this even without any authority in the general charter, cannot be regarded as a contract in any legal sense of the term, and, of course, not within the protection of the provision of the Constitution of the United States.

Another view of this question, even assuming that the stipulation of the stockholders in the article of association amounted to a contract, is equally conclusive against the stockholder.

According to the 15th section, the association was authorized to establish a bank of discount, deposit, and circulation, "upon the terms and conditions, and subject to the liabilities, prescribed in this act." It was not competent for the association to organize their bank upon any other terms or conditions, or subject to any other liabilities, than those prescribed in the general charter. Now, the 32d section, which reserved to the Legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any one of these terms and conditions, or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system.

The saving clause in the constitution of the State of New York has been referred to, which provided, that "nothing contained in this constitution shall affect *any grants or charters to bodies politic or corporate made by this State, or by persons acting under its authority.* This provision saved the charter of the bank in this case and all others organized under the general banking law, as well as all those created by special charters, but it saved each of them as a whole, as an entirety; the charters remained after the adoption of the constitution the same as before, with all their privileges and disabilities intact. We do not perceive that this provision has any bearing upon the question in the case.

It is unimportant to inquire into the effect of this provision of the constitution of the State of New York, or of the act of 1849, when applied to the personal liability of the stockholder for debts of the bank existing at the adoption of the one or the passage of the other, as no such question is presented in the case. The constitution imposed the liability only in respect to all debts contracted after the first day of January, 1850, and the act of 1849 simply carries the provision into execution. Neither do we inquire whether or not this constitutional provision applied to existing banks, as that question has been determined by the State court, to which it belonged. Our inquiry has been, assuming this to be the true construction, whether or not any contract in the charter of the bank with the State has been impaired within the meaning of the Constitution of the United States, and we are perfectly satisfied that the answer must be in the negative.

*Judgment of the State court affirmed.**

* Mr. Justice *Nelson* also, and at the same time, delivered the judgment of the court in the case of *Watts and Sherman* vs. *Smith*, in which the same question of law was presented, and decided in the same way.

GLASGOW ET AL. *vs.* HORTIZ ET AL.

1. The act of Congress, passed June 13, 1812, confirming to the inhabitants of St. Louis and other villages the lots, out-lots, common-fields, &c., occupied and cultivated by them before 1803, is a present operative grant of all the interest which the United States had in the land mentioned in the act.
2. As no act of the Surveyor General was necessary to make the grant valid, so nothing that he did could defeat it.
3. A map, made by the Surveyor General in 1840, exhibiting the out-boundary lines of St. Louis common, is not binding on one who claims under a villager.
4. A title confirmed by the act of 1812 is a good title, though the land be not within the out-boundaries laid down in the Surveyor General's map.

Writ of error to the Supreme Court of Missouri.

This action was commenced in the St. Louis Land Court, by William Milburn, William Glasgow, jr., and William C. Taylor, against Jean Baptiste Hortiz. The petition of the plaintiff set forth that they are commissioners appointed under a law of the State, and as such entitled to the possession of the land described as section sixteen, township forty-five north, range seven east, and the defendants have taken and unlawfully hold about ten acres thereof, for which suit is brought. The defendant answered, admitting his possession of a tract containing 4 22-100 arpents, and denied the plaintiff's right of possession.

On the trial the plaintiffs showed their appointment as commissioners, and their right under the law of Missouri to possession of the sixteenth section. The defendant admitted that the land he was on was part of the sixteenth section, but showed that he held it by a title from François Bequette, who had occupied and cultivated it, claiming it to be his own prior to December 20, 1803; and that it is situated in the vicinity of the ancient village of St. Louis, of which Bequette was an inhabitant.

The defendant asserted that those facts, coupled with the act of Congress passed in 1812, confirming to the inhabitants of St. Louis and other villages such out-lots, common-field lots, and commons, as were inhabited, cultivated, or possessed by them previous to December 20, 1803, gave him a legal title to the land in dispute. To this the plaintiffs replied that a survey of the St. Louis commons, out-lots, &c., was made by the Surveyor General in 1840. He exhibited the map of that survey, and showed that the land occupied by the defendant was not within the out-boundaries there laid down.

The court refused to instruct the jury that the survey was binding upon all parties claiming under the confirmation of 1812, but charged, that if the land in dispute was one of a series of lots lying together in the vicinity of St. Louis village, and used by the inhabitants as a common-field prior to December, 1803—if the land sued for was cultivated by Bequette before that time—if Bequette was an inhabitant of the village—and if his title was vested in the defendant—then the verdict ought to be for the defendant.

The verdict and judgment were in favor of the defendant. The judgment was affirmed in the Supreme Court of the State The plaintiff took this writ of error.

Mr. Bates, Attorney General, for plaintiffs in error. It appears that the land in question lies outside of the out-boundary as surveyed under the act of 1812, and outside of the limits of the corporation, as designated in 1809; yet the defendant, while this is obvious to the eye upon the map, and admitted upon the record, still insists that the land he claims, though clearly not *within nor adjoining* the town, did, nevertheless, *belong* to the town. If that were so, it was for him to show it. The jury, even, did not find it as a fact. Indeed they could not so find it; for the phrase "*belonging to the town*," as used in the act of 1812, does not imply *ownership or proprietary right*, but *jurisdiction and governmental control.* Neither did the court find it as matter of law. There is no such finding by court or jury in the case.

This question of out-boundary has never been passed upon

by this court, and never by the Supreme Court of Missouri, except in this very case, as reported in 23 Mo., 532. And so, the supposition of adverse counsel, that this case is covered and controlled by the case of *Guitard* vs. *Stoddard*, (16 How., 507,) is a clear mistake. That case did not touch this question. In that case the question was not of locality—whether within or without the boundary—but a question of the time and manner of proving up the claim. The Circuit Court held that it could not be proven then, at the trial, but that the claimant ought to have made his proof before the recorder, under the act of May 26, 1824. And that was the point upon which this court reversed the judgment of the court below.

As the claimant, to make himself a beneficiary of the act, must needs show himself within the scope of the general grant, which does not name him, nor specify his land, let us consider the necessity of a survey of his private claim.

It is said that the claimants, in these cases of confirmation by the act of 1812, stand in no need of a survey to perfect their title by identifying their lands. I answer, if that be so, it is not because the law does not require in that case, as in all others, special locality and exact boundary, but because there are other easy and convenient means of precise description.

The act grants only *lots*, not large tracts of land—lots in, adjoining, and belonging to towns, not lands in the wilderness—lots to which the persons had a right, title, or claim in Spanish times—lots which were actually inhabited, cultivated, or possessed as long ago as 1803—lots, therefore, capable of definite proof. And if no other law required that proof, the act of May 26, 1824, (4 Stat., 65, Ch. 184,) makes it the duty of every claimant, who seeks to get the recorder's certificate of confirmation, to make proof "of the fact of inhabitation, cultivation, or possession, together with the boundaries and extent" of his claim—(not of his *right, title, or claim*, for that was supposed to be already in the recorder's office, as was the fact in very many cases, proved by the reports of the recorder, which were confirmed by the act of April 29, 1816, Ch. 159.)

Besides, the act of April 29, 1816, Ch. 151, (3 Stat., 325,) after directing the survey of the *public* lands, proceeds to say:

"And also, *it shall be the duty of the surveyor* to cause to be surveyed the lands in the said Territories, the claims to which *have been*, or hereafter *may be*, confirmed by *any act of Congress*, which have not already been surveyed *according to law*."

From the general tenor of our land laws, it is manifest that the Government intended that all private claims should be surveyed; and this particular act enjoins upon the surveyor to survey *all lands* confirmed, or to be confirmed, *by any act of Congress*. But how can he perform that duty in regard to confirmations of claims which exist only in the secret memories of the claimants and their witnesses—claims which have no record or other written basis, nothing in the public offices to which he can resort for information, and nothing upon the land itself to intimate a confirmation, or even a claim?

The possession of Hortiz of his little scrap—4.22 arpents—is only coeval with this action, (September 15, 1853,) so far as appears in this record, and yet he claims a confirmation *then* more than forty years old!

The surveyor, as in duty bound, went on, under the said act of 1816, to survey the public lands and such private confirmations as were made known to him. But the claim of Bequette (or Hortiz) was not made known to him, neither by record evidence, nor even oral pretension. He could not, therefore, survey it, for he could not know of its existence. And hence, when, in 1818, (two years after the passage of the act,) he was surveying township forty-five, both public and private lands, he could do no otherwise than treat section sixteen as public land, and survey it accordingly. And it *was* public land—so treated by both the nation and the State; and, therefore, if Bequette ever had any inchoate right to the land, he justly lost it by his laches.

Mr. Hill and *Mr. Polk*, of Missouri, for defendants. The survey was not a condition of the grant made by the act of 1812. The confirmation contained in the first section gave a free title, *proprio vigore*, to the inhabitants of the villages. *Vasseur* vs. *Benton*, (1 Mo., 296;) *Janis* vs. *Gonno*, (6 Mo., 380;) *Page* vs. *Scheivel*, (11 Mo., 167;) *Carondelet* vs. *St. Louis*, (25 Mo.,

460;) *Harrison* vs. *Page*, (16 Mo., 182;) *Kissel* vs. *Schools*, (16 Mo., 553;) *Gamache* vs. *Piquinot*, (17 Mo., 310;) *Soulard* vs. *Clark*, (19 Mo., 583;) *City of St. Louis* vs. *Tony*, (21 Mo., 243;) *Carondelet* vs. *St. Louis*, (24 Mo., 31;) *Guitard* vs. *Stoddard*, (16 How., 494;) *Gamache* vs. *Piquinot*, (16 How., 451;) *Savignac* vs. *Garrison*, (18 How., 136.)

Mr. Justice GRIER. This case depends upon the solution of a single question, touching the construction of the act of Congress of 13th June, 1812, entitled "An act making further provision for settling the claims to land in the Territory of Missouri."

This act declares "that the rights, titles, and claims to town or village lots, out-lots, common-field lots and commons, in, adjoining, and belonging to the several towns and villages, (named in the act, and including St. Louis,) which lots have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be, and they *are hereby, confirmed* to the inhabitants of the respective towns and villages aforesaid, according to their several right or rights in common thereto."

It provides, also, for a survey of the out-boundary lines of the villages, so as to include the common lots and commons thereto respectfully belonging, and donates to the town, for the use of schools, all unappropriated pieces of land within such out-boundary.

Surveys were made of the common-fields called the Barrier de Noyer, the St. Louis common, and a portion of the Cul de Sac field, which were claimed by the village or town of St. Louis as early as 1820, when a township plat was returned. But no map had been constructed, which purported to be a compliance with the duty imposed on the Surveyor General by act, till the year 1840, when the Surveyor General constructed a map, (known in the courts as map X,) exhibiting the out-boundary lines; but for some reason, or by mistake perhaps, the common-fields just mentioned were omitted.

The lots claimed by the several defendants are parts of these excluded common-fields.

The jury have found, in each case, that the lot in question

was a common-field lot of the village of St. Louis; that it was inhabited, cultivated, or possessed prior to the 20th of December, 1803, by the persons under whom the several defendants claim.

Does the admitted fact, that these same commons are not included within the out-boundary map X, affect the titles claimed under the act?

The term common-field is of American invention, and adopted by Congress to designate small tracts of ground of a peculiar shape, usually from one to three arpents in front by forty in depth, used by the occupants of the French villages for the purposes of cultivation, and protected from the inroads of cattle by a common fence. The peculiar shape of the lot, its contiguity to others of similar shape, and the purposes to which it was applied, constituted it a common-field lot. It could not be confounded with lots or tracts of land of any other character. Under the Spanish and French authorities, that species of trespassers designated by the American term "*squatter*" was wholly unknown. Villagers did not venture to take possession of lots, either for cultivation or inhabitation, without a formal license from the lieutenant governor.

When Congress, in fulfilment of our treaty obligations, came to legislate on the subject of these claims and possessions, they chose to except them from the provisions made by previous enactments,(of 1806 and 1807,) requiring proof of some concession, requéte, or survey, under the former Government, to be submitted to commissioners to have surveys made, and a favorable report by them, before the claims were confirmed. The claims of these old villages to their common-field lots, and the peculiar customs regarding them, were well known. Congress, therefore, did not require that any documentary evidence should be filed, nor a report of commissioners thereon. A survey was considered unnecessary, because the several boundaries of each claimant of a lot, and the extent of his possession, was already marked by boundaries, well known among themselves. They required no record in the land office, to give validity to the title. The act is certainly not drawn with

much regard to technical accuracy. It is without that certainty, as to parties and description of the property granted, which is required in formal conveyances. But a title by statute cannot be thus criticised. It sufficiently describes the lands intended to be granted, and the class of persons to whom it is granted. Besides, it is not a donation, or mere gift, requiring a survey to sever it from other lands of the donor; but, rather, a deed of confirmation to those who are admitted to have just claims. It passes a present title, *proprio vigore*, of the property described to the persons designated; a patent to another afterwards, for any of these lands, would be void, because the Government had already released all title and claim thereto. If Congress could not grant them to another, much less could the arbitrary edict, or imperfect performance of a neglected duty by a ministerial officer, operate to divest a clear title by statute.

The construction of this act of 1812 has been so often before the courts of Missouri and this court, that it would be tedious to refer to the cases. The case of *Guitard* vs. *Stoddard* (16 How., 508) need only be cited, as it contains a review of previous decisions.

We there decide, "That the act of 1812 is a present operative grant of all the interest of the United States in the property described in the act; and that the right of the grantee was not dependent on the *factum* of a survey under the Spanish Government. That the act makes no requisition for a concession, survey or permission to settle, cultivate, or possess, or for any location by public authority, as the basis of the right, title, or claim upon which its confirmatory provisions operate. No board was appointed to receive evidence, or authenticate titles, or adjust contradictory pretensions. All these questions were left to be decided by the judicial tribunals."

We have decided, also, that notwithstanding the act of 1824 makes it the duty of claimants to proceed within eighteen months to designate their lots, by proving the fact of inhabitation, and their boundaries and extent, &c., so as to enable the Surveyor General to distinguish the private from the vacant

lots, yet that this act imposes no forfeiture for non-compliance. The confirmee, by a compliance, obtained a recognition of his boundaries; but the Government did not, by that act, impair the effect of the act of 1812.

Now, it is true that this court have not decided directly as to the effect of this map X upon the title to lots excluded by the out-boundaries there traced; but it was only because the question was not involved in the cases decided, and not from any peculiar difficulty in the question itself; for its decision is but a corollary from the principles already established by this court. If our decision be correct, that no act of the Surveyor General was necessary to give validity to the titles confirmed by this act, *a multo fortiori*, it could not operate to defeat them.

The evident purpose and object of this survey of the out-boundary, required by the act, was to distinguish the private from vacant lots, so that the donation of the remnants to the public schools might be ascertained. This duty was neglected by the Government officers for twelve years, when the act of 1824 was passed. At this time, the fences which surrounded these common-fields, and designated their boundaries, had rotted down, and the boundaries were difficult to ascertain. The act of 1824 was an attempt to remedy this long neglected duty of the Surveyor General. But it was found ineffectual; and after sixteen years more have elapsed, and the lots, whose titles were confirmed by the act of 1812, may have descended to the second or third generations, the Surveyor General seems to have waked up to the performance of his duty. It was purely a ministerial function. His neglect could not suspend the vesting of the titles granted, much less his blunders forfeit them. If these verdicts be true, (and we must assume they are,) the Surveyor General has never yet performed the task imposed upon him, of making a survey and map of the out-boundary, including out-lots, common-field lots, &c., belonging to the village, now city, of St. Louis.

The map X may be conclusive, as between the Government and the schools; but as it was not necessary, even if correct,

to confirm the titles under which the defendants claim, its want of correctness cannot now be a reason for their forfeiture.

*Judgment of the Supreme Court of Missouri affirmed.**

CONWAY ET AL. *vs.* TAYLOR'S EXECUTOR.

1. A ferry franchise on the Ohio is grantable, under the laws of Kentucky, to a citizen of that State who is a riparian owner on the Kentucky side; and it is not necessary to the validity of the grant that the grantee should have a right of landing on the other side or beyond the jurisdiction of the State.
2. The concurrent action of two States is not necessary to the grant of a ferry franchise on a river that divides them. A ferry is in respect to the landing, not to the water; the water may be to one, and the ferry to another.
3. After a citizen of Kentucky has become the grantee of a ferry franchise, and his riparian rights have been repeatedly held sufficient to sustain the grant by the highest legal tribunal of the State, the same question is not open here; the adjudications of the State courts are a rule of property and a rule of decision which this court is bound to recognise.
4. A license to establish a ferry which does not extend across the river may be less valuable for that reason, but not less valid as far as it goes.
5. The laws of Kentucky relating to ferries on the Ohio and Mississippi are like the laws of most, if not all, the other States bordering on those rivers: they do not leave the rights of the public unprotected, and are not unconstitutional. The franchises which the State grants are confined to the transit from her own shores, and she leaves other States to regulate the same rights on their side.
6. A ferry franchise is property, and as sacred as other property.
7. An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or

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* Five other cases or writs of error to the Supreme Court of Missouri, all depending on the legal principle solved by this opinion of Mr. Justice *Grier*, were determined at the same time.

goods in the ordinary prosecution of commerce without the regularity or purpose of ferry trips; that remedy applies only to one which is run openly and avowedly as a ferry-boat.

8. The authority to establish and regulate ferries is not included in the power of the Federal Government to "regulate commerce with foreign nations and among the several States and with the Indian tribes."

9. The authority to regulate ferries has never been claimed by the General Government, has always been exercised by the States, never by Congress, and is undoubtedly a part of the immense mass of undelegated powers reserved to the States respectively.

Appeal from the Court of Appeals for the State of Kentucky.

James Taylor, executor of James Taylor, deceased, and Robert Air, filed their bill in equity in the Circuit Court of Campbell county, Kentucky, against Peter Conway, John J. Simmons, John Sebree, Ernest Klinschmidt, Bernard Delmar, John Schenburg, Thomas Dodsworth, Daniel Wolff, and the Common Council of the city of Newport. The prayer of the bill was, that defendants might be enjoined from invading certain ferry rights claimed by plaintiffs as set forth in their bill. An account was also prayed for, and a decree against the defendants, in respect of the moneys received by them in violation of the rights of complainants. The defendants filed answers to the bill, and after the taking of much testimony and hearing of the cause, a decree was passed for plaintiffs in accordance with the prayer of their bill. From this decree defendants appealed to the Court of Appeals of the State of Kentucky, where an order was entered modifying the decree of the court below, but still adverse to defendants. The cause was then removed to the Supreme Court of the United States upon a writ of error under the 25th section of the judiciary act.

All the leading facts of the case are stated in the opinion of Mr. Justice *Swayne.*

Mr. Stanbery, of Ohio, for appellants. In considering the nature and extent of the title set up by the plaintiffs below we have only to look to their ferry license from Kentucky, and

their coasting license from the United States. And as their case is founded on an exclusive privilege to which the United States license does not extend, they must be confined wholly to their ferry license. This, by their own showing, is a ferry license from the Kentucky side to the Ohio side, not from the Ohio side also to the Kentucky side; and although they ask an injunction against running our boat "between Cincinnati and Newport," yet the decree below only finds the ferry right to extend *from* Kentucky *to* Ohio, and not *from* and *to* both sides of the river; and the injunction is accordingly limited against transportation by our boat *from* the Kentucky shore. The decree of the Court of Appeals finds that the place of landing of the Commodore, our boat, on the Kentucky side, is at a public landing; that the right of wharfage at that place belongs to the city of Newport; and that the owners of the Commodore had a right, under the city of Newport, to land their boat at that place.

Here, then, we have as established facts, a navigable river dividing two States, a public wharf, and a vessel navigating the river under a license from the United States, and a decree, notwithstanding the license, which forbids that vessel to transport persons or property from that landing across the river to the opposite shore.

Whilst this injunction remains, a single voyage or trip by our boat, carrying persons or property, from our wharf in Kentucky to the Ohio side, is forbidden; our license affords no protection to us for any sort of transportation from that landing across the river. If, after this decree, the Commodore should be engaged in commerce between Pittsburg and Cincinnati and intermediate ports, and should touch at Newport, she might land passengers and freight, but could not receive passengers or freight to be transported to Cincinnati; so that, by this decree, her right under the license of the United States is to that extent annulled. The decree, therefore, is erroneous in the extent to which it goes, and on that ground it should be reversed.

But the license of the Commodore should have protected her in making regular trips as a ferry boat between Cincinnati and

Newport. The only ground upon which she is prohibited from doing so is that such transportation is in violation of a ferry franchise granted to appellees by the State of Kentucky. No such ferry franchise exists. It cannot be denied that the license of the Commodore gives her the right to the free navigation of the river to and from all the ports upon it, at least until some paramount and exclusive right is shown on the other side. The appellees accordingly set up an exclusive and paramount right in virtue of a ferry franchise. They deduce this franchise from the State of Kentucky alone, and under that grant they claim in their bill an exclusive right to carry on all the transportation across the river from and to both sides. The Circuit Court of Campbell county sustained their franchise to the full extent; but in the Court of Appeals the franchise was limited to a ferry franchise *from* Kentucky *to* Ohio, and denied as to a ferry franchise *from* Ohio *to* Kentucky.

Kentucky possesses no *exclusive* jurisdiction even to the middle of the river, and has no power to grant an exclusive right over any part of it; the *compact* makes all jurisdiction over the river *concurrent*, and this compact, by adoption, has become a part of the law of the United States. *Wheeling Bridge* case, (13 How., 518.)

It is said that "a corporation can have no legal existence out of the sovereignty by which it is created." Ang. and Ames on Corps., Sec. 161. And this is equally true of all other franchises.

Take the case of a franchise for a toll-bridge across the Ohio, only authorized by a grant from Kentucky, and to make the supposed case parallel with the case at bar, let the Kentucky franchise only authorize the bridge and transportation over it *from* Kentucky *to* Ohio; could such a franchise be sustained or pleaded in restriction of any common right, lawfully exercisable, if no valid franchise existed?

The boat was engaged, under the authority of the United States, in carrying on lawful commerce, over a navigable river, between Ohio and Kentucky. In opposition to this *prima facie* right, the appellees set up an exclusive and paramount right to carry on all the commerce across the river from Kentucky to

Ohio, at the same place, and so far to forbid and restrict our right. Admitting, for the purpose of the argument on this point, that a ferry franchise would have such effect, we say no such franchise can exist by authority from Kentucky alone, and none other is set up by the appellees. Nor can it be said, that aside from a ferry franchise, Kentucky can, under her sovereign power, lay an embargo upon this commerce along the shore of the river within her jurisdiction. That power was surrendered to the United States.

But if the appellees had shown a valid ferry franchise over the Ohio river, the running of defendants' boat, even if engaged in the business of ferriage, could not be enjoined by the appellees. She was engaged in commerce between the two States, over a navigable river, for transportation of persons and things across such a river is commerce, under whatever name it may be carried on.

Now if we admit that the business of ferriage, when applied to such commerce, is subject to police regulations by one or both the States, there was no valid ground upon the footing of their franchise upon which the appellees were entitled to enjoin this boat.

The statutes of Kentucky recognise what is called a ferry right on the Ohio river as a riparian right of the owner of the coast bordering on the river, and the franchise to exercise this right is grantable to such riparian proprietor exclusively. None but a resident of Kentucky can have a ferry grant; the riparian proprietor has an exclusive right to the grant; no new ferry can be established within one mile and a half of an established ferry, except where an impassable stream intervenes, or in front of a town, and then not within four hundred yards of the established ferry.

Under the influence of this exclusive grant the commerce across this great river has been embarrassed for more than a quarter of a century; not merely in so far as the citizens of Ohio are concerned, but also to the detriment of the citizens of Kentucky. As early as the year 1830 attempts were made, on the Kentucky side of the river, towards relief; in that year the trustees of Newport applied for the grant of another ferry

The case is reported in 6 J. J. Marshall, 134. The application was refused on the ground that Taylor owned the entire river front at Newport, and, as such riparian proprietor, was exclusively entitled to all ferry rights belonging to it. The court say: "It does not certainly appear, whether or not the public interest requires the establishment of another ferry; but as the parties have waived that question, we will consider it on the ground on which they have placed it. That ground was, the ownership of the river bank in front of Newport, and it was held to be in Taylor; so that application failed.

In the year 1850 the Common Council of Newport made another application for a ferry. This application, after being granted by the County Court, was resisted by Taylor, and taken to the Court of Appeals. It is reported in 11 B. Monroe, 361.

The application failed. This case settled the question as to any second ferry from Newport; and it is a conclusive construction of the Kentucky statutes as to ferries across the Ohio, that, no matter what may be the demands of public convenience, no new ferry can ever be established there without the consent of Taylor or his heirs. It surely does not require argument to show that such an interdict upon commercial intercourse over the Ohio river, under whatever name it may be established, is an unlawful regulation.

This interdict, as we have seen, was established upon the footing of an exclusive ferry license, and an exclusive riparian ferry right. But what foundation supports these ferry privileges; what gives them birth and calls them into exercise? Simply the public convenience—nothing else. The proprietary ferry right which Kentucky undertakes to confer upon her citizens who own land on the Ohio river, cannot be exercised without a license from the State. It is a right in which the public are concerned, and no license is given to the riparian proprietor until the public convenience requires a ferry.

The foundation of the grant, therefore, is the public convenience. This is universal law, as well as Kentucky law, for ferries are *publici juris*. When, then, public convenience, in aid of which one ferry is established, in the progress of time

requires a second ferry within a mile of the first, how can it be said that this public convenience shall be baffled and frustrated by the prior grant? It may be that a second ferry is more imperatively necessary, within that distance, than was the first; and yet the very grant, made solely to subserve the public convenience—not for private profit, but for public profit—becomes the instrument to oppose and to frustrate the very end for which it was established.

It is true, the court in the case quoted indicate one remedy, and that is, an application to the Legislature of Kentucky for another ferry. We do not know what might be the result of such an application, nor is it at all material to inquire or speculate about. We are just now only concerned as to the ferry regulations which the Legislature has made, and not as to those which may be made. If we show a State regulation which is repugnant to a Federal right, our relief is not to be sought from the grace and favor of the State, but by an appeal to the Federal authority.

This case was brought to test the validity of these commercial restrictions. The Commodore, with a license from the United States, and with a lease from the city of Newport to use the public wharf at the foot of Monmouth street as a place of landing, embarked in the business of transportation across the river. No proceedings were instituted against her by the State of Kentucky, or under public authority; but she has been enjoined at the instance of private persons upon the ground of certain ferry regulations, which in effect give them a monopoly of all the navigation and commerce from the entire river front of the city of Newport. The Court of Appeals says that our voyage from Ohio to the public landing is lawful. No ferry franchise or riparian right is allowed to prevent that sort of transportation, because Kentucky has chosen to that extent to admit the public right of navigation. But as to the return voyage our boat must go empty; not a person or thing can be taken back. What is called by the Court of Appeals *an interdict* forbids it. "To this extent," says the court, "the State claims jurisdiction for the protection and preservation of her own established ferries, and by virtue of

her sovereignty over her own territory, on which, in the cases prohibited, persons and property must be landed from or received for transportation across the river." From this language one would infer that the court had reference to a subject-matter purely of State cognizance and regulation—a subject-matter over which, in virtue of her sovereignty, the State possessed absolute control and power to establish regulations looking exclusively to her own grants and the privileges and franchises created by herself.

We see, however, that this State sovereignty is not claimed by the court to extend beyond the Kentucky shore, but is confined to her "own territory, on which, in the cases prohibited, persons and property must be landed." But are we to infer from this that Kentucky, in virtue of her sovereignty over the Kentucky coast on the Ohio river, can make any sort of regulation, however much it may interfere with navigation and commerce? or that she can establish, according to her own supreme discretion, exclusive grants and privileges which shall interdict all other commerce from her shores? What would the navigation of the Ohio be worth if such embargoes could be laid along the coast? and especially on what a tenure should we hold the public right of commerce and intercourse between the States? These great public rights do not come under State sovereignty even when their exercise requires the use of her soil. This court has said in *Turner* vs. *Boston*, (7 How., 283,) that commerce does not stop at the boundary line of a State, nor is it confined to acts done on the water. It extends to such acts done on the land as interfere with, obstruct, or prevent its due exercise.

It is further said by the Court of Appeals, that "The right thus claimed by the State over its own territory on the river, and for the protection and benefit of its own grantees of the ferry privilege, it has not at any time denied to the States on the other side." In other words, as Kentucky requires a landing on the Ohio side to make her own ferries available, she therefore concedes to the Ohio ferry a similar privilege of landing on the Kentucky shore; but beyond this privilege of transportation from Ohio and disembarkation on Kentucky

soil, no further privilege is given to the Ohio ferryman. Here Kentucky does not regulate, but forbids. She does not say to the Ohio ferryman, you shall provide a safe boat; keep your landings in repair; run at convenient intervals; and make reasonable charges: all these would be regulations; but she absolutely forbids. If Ohio, under the useful power of regulation, had pursued a similar policy, what intolerable annoyance would have followed. Then, on both sides of the river, exclusive ferry franchises and exclusive riparian rights would bring all the commerce and intercourse across the river to this singular condition—that each ferry could transport only in one direction; and that as half the trips of each ferry would be without freight or passengers, and therefore without compensation, the charge for the transportation one way must be so increased as to cover the expense of the return trip. Such a regulation just doubles the charge upon the public. By means of these regulations, Kentucky has in fact monopolized all the commerce between Cincinnati and Newport, for no ferry can ever be run from the Ohio shore while this interdict upon the return voyage remains.

The Court of Appeals of Kentucky has not always been so clear upon the point of Kentucky sovereignty in the matter of these exclusive ferry regulations. Vide *Arnold* vs. *Shields*, (5 Dana, 18.)

Now, aside of the compact between Virginia and Kentucky, which recognises a concurrence of jurisdiction over the Ohio river in the States which lie upon its border, the same result would follow if the exclusive jurisdiction of Kentucky extended, as has been sometimes argued, to low-water mark on the Ohio shore. Such exclusive jurisdiction is subordinate to the intercourse and commerce across this river between the two States, and this common right is secured not only by the compact, which has become by adoption a statute of the United States, but by the Federal Constitution.

We maintain, therefore, that the statute of Kentucky securing to the appellees an exclusive right, not merely to transport persons and things at their ferry, but to prevent all ferriage or transportation along the river shore, for a prescribed distance

above and below, under any circumstances and without any regard to the public necessity or convenience, is unconstitutional; and that there was error in the decree of the Court of Appeals, in holding this enactment as paramount to the right of the Commodore under her license from the United States. *Gibbons* vs. *Ogden*, (9 Wheaton, 1.)

The *Wheeling Bridge* case (12 How., 630) settles principles which must control the case at bar.

1. The bridge belonged to the class of subjects which appertain to State regulation, for it was entirely within the State of Virginia, both abutments being on the soil of that State.

2. In authorizing the bridge the State of Virginia had made such regulations concerning the structure as were deemed in her discretion no obstruction to navigation.

3. Navigation in respect to all vessels was unimpeded, except that, as to six or seven large steamers, the height of the bridge was an obstruction in certain stages of water.

Notwithstanding all this, the bridge, so erected under State regulation, was declared by this court to conflict with the commerce and navigation of the river.

Furthermore, the assertion of this right was not founded upon any special authority from the United States, in the form of a coasting license, but upon the common right to the free navigation of the river; and, consequently, the right of the owners of the Commodore to free navigation, uninterrupted by obstructions, embargoes, or exclusions, under State authority, would have been perfect even without the coasting license, and its denial by the State judiciary would authorize the intervention of this court.

Mr. Stevenson, of Kentucky, for appellees. We shall maintain for the appellees, that the statutes of Kentucky establishing and regulating ferries over the Ohio and Mississippi rivers, within the Commonwealth of Kentucky, constitute a legitimate exercise of State sovereignty, are clearly within the reserved powers of the State, and are not inconsistent with, or antagonistic to, the Constitution of the United States, or any statute passed by Congress in pursuance thereof; and that if the es-

tablishment and regulation of ferries over the Ohio and Mississippi rivers were conceded to be commercial regulations, within the scope of Federal authority, the State statutes would still be valid, until Congress had exercised its power of regulating ferries over these rivers by direct legislation, which has not been done.

It may be safely affirmed, that there is scarcely a State in the Confederacy, lying upon a river, which has not, from the adoption of the Constitution, and before that period to the present time, claimed and exercised, without question, the exclusive right of establishing and regulating ferries over the rivers thus constituting their boundary.

So long an exercise of sovereign power by States, without dispute, during the entire period of a generation or more, of those who framed the Constitution, and were most active and distinguished in the leading cases in which its construction was to receive a permanent impress, is a fact which, while of itself it cannot enlarge the reserved rights of the States, affords the most persuasive proof of the popular acquiescence in the justice of the claim, and the propriety of its exercise by the respective States, rather than by the Federal Government.

This long and hitherto unquestioned right of the State governments to establish and regulate ferries has not been confined to rivers like the Ohio, Mississippi, Cumberland, Tennessee, Susquehannah, Potomac, and the Delaware, but anterior to the adoption of the Federal Constitution, and continuously since the States have exercised the exclusive jurisdiction of establishing ferries over our largest lakes separating States; and New York established, at an early day, a ferry over Niagara river, the boundary line between the United States and Canada, and its judicial action in this particular was upheld by an eminent judge now upon this bench. *People* vs. *Babcock*, (11 Wendell, 587;) *Gibbons* vs. *Ogden*, (9 Wheat., 1.)

When the Revolution took place the people of each State became sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, for their own *common use*, subject only to the rights since surrendered by the States to the General Government. *Martin* vs. *Waddell*, (16 Peters, 410.)

The Government of the United States is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. *New Orleans* vs. *The United States*, (11 Peters, 735;) *Pollard's Lessee* vs. *Hagan and others*, (3 How., 223.)

That the Ohio river was wholly within the limits of Virginia up to 1st March, 1784, cannot be doubted. Upon that day she granted to the United States "all the right, title, and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, or being to the northwest of the river Ohio," &c.

This language, not less by its terms than by the judicial construction uniformly given to it in Federal and State courts, made the northwestern margin of the Ohio river the southern boundary of the territory described in this deed of cession to the United States.

Virginia retained in full and absolute ownership all which was not disposed of, and the entire river Ohio, and every portion of it, remained her property, and subject to her jurisdiction, and so continues, except so far as this right has been alienated and parted with. The title of Virginia was admitted by Congress to the territory ceded by its resolution of 6th September, 1780, asking for its cession to aid in the accomplishment of the Revolution, by the act of 13th September, 1783, declaring the terms on which the cession would be accepted, by resolution of 1st March, 1784, announcing the acceptance of the deed of cession, by the resolution of July 7, 1786, requesting Virginia to revise and so to alter such deed of cession as *to empower the United States* to make a division of the territory granted unto the proposed new States, and especially by the ordinance of July 13, 1787, in which it is declared that "there shall be formed in the said territory not less than three, nor more than five States, and the boundaries of the States, as soon as Virginia shall alter her deed of cession, and consent to the same, shall become fixed," &c.

These various acts would seem to constitute an estoppel on the United States, and upon Ohio claiming under that title. So, too, this court held on this question. "But when, as in

this case, one State is the original proprietor, and grants the territory on the one side only, it retains the river within its dominion, and the new created State extends only to the river. The river, however, is its boundary." *Handly* vs. *Anthony et al.*, (5 Wheaton, 379.) It is equally unquestionable that, under the various acts of the Legislature of Virginia and of Congress, Kentucky, for the whole extent that her soil touches the Ohio river, has succeeded to the territorial rights and sovereignty of Virginia, subject only to the restrictions and conditions embraced in these statutes, none of which interfere with the question now in issue. The extent of Kentucky upon the Ohio river is as clearly the same, and her jurisdiction and her water-line the same, as had been that of Virginia prior to the deed of cession of Virginia to the United States in 1784.

The boundary between Virginia and Kentucky is an interior line, except where they cross the Ohio river.

Congress, by an act approved 4th February, 1791, (1st Statutes at Large, 189,) consented that the said district of Kentucky, within the jurisdiction of the Commonwealth of Virginia, and according to its actual boundary on the 18th December, 1789, should, upon the 1st day of June, 1792, be formed into a new State, and as such be received and admitted on that day into the Union.

This act of 18th December, 1789, is what is known as the compact with Virginia. There was no State formed out of the territory ceded by Virginia to the United States at the passage by Congress, on 4th February, 1791, of the act admitting Kentucky. The United States was the sole proprietor and coterminous owner of the territory north of the Ohio river, and is bound by the consent of Congress that Kentucky should be formed into a State, according to its actual boundaries on 18th December, 1789.

The solemnity of a compact by Congress is thus given to this boundary line, as it existed in December, 1789, as that which separated Kentucky from the Northwestern Territory.

The subsequent admission of Ohio, Indiana, and Illinois into the Union, could not abridge or modify the terms of this

compact by varying the boundary line without the consent of Kentucky.

Kentucky has always claimed that the counties within her territory, calling for the river Ohio as a boundary line, extended to the low-water mark on the northwestern side of the Ohio river. *Church* vs. *Chambers*, (3 Dana, 278;) *McFall* vs. *Commonwealth*, (2 Metcalfe, Ky. R., 394;) Stanton's Ky. Revised Statutes, 211; 4 J. J. Marshall, 158; *McFarland* vs. *McKnight*, (6 Ben. Mon., 510.)

And that claim seems to have been fully sustained by this court, in the case of *Handly* vs. *Anthony et al.*, already cited.

The sovereignty of Kentucky is, therefore, vested to low-water mark on the northern bank of the Ohio river.

To this extent its jurisdiction is as unbounded as over any other portion of its territory; subject, however, to any limitation or restriction of the Constitution of the United States, or the laws of Congress passed in pursuance thereof.

We concede, that, in the compact between Virginia and Kentucky, the free navigation of the Ohio river is guarantied.

The ferry statutes of Kentucky are, it is submitted, in no way inconsistent with the free use and navigation of the Ohio river as a national highway.

The control by States of ferries and ferry landings are clearly police regulations.

It is claimed by the other side that the powers delegated to Congress "to regulate commerce among the States," is an implied restriction upon the jurisdiction of the States over the Ohio and similar rivers, and all State laws granting exclusive ferry privileges, upon such streams, are upon this ground null and void.

To test the truth of this assumption, let the consequences which must follow its adoption be exhibited.

The right to a ferry does not at all depend upon the right to, or property in, the waters over which it passes. The right of ferry is a franchise, consisting in the right to transport persons, carriages, vehicles, &c., for hire, and therefore the property of waters may be in one, and the right of ferry in another. 15 Pickering's Rep., 253; 2 Hilliard on Real Prop-

erty, 51. Ferrymen have the same common right to navigate these waters with their boats, as fishermen, coasters, or ship-masters, with their boats and vessels, and the United States with her navies. The franchise of a ferry does not confer or enlarge, take away or impair the right of navigation. 15 Pickering, 253. A ferry must include the right to land. Tomlin's Law Dictionary, "Ferry;" 7 Grattan's Va. Rep., 212; *Peter* vs. *Kendall*, (6 Barn. & Cress, 301.) It is not necessary for the grantee of a ferry to own the land on both sides of the water. *People* vs. *Babcock*, (11 Wend., 587;) 15 Pickering, 254; 7th Grattan, 212; 6th Barn. & Cress., 302. So far from it, ferries between New York and New Jersey, and between New Jersey and Pennsylvania, have existed from a remote period. Indiana, Ohio, Kentucky, Illinois, Missouri, and Iowa have established ferries over the Ohio and Mississippi rivers from their respective shores, without question of right, and for a long period. *Chosen Freeholders of Hudson Co.* vs. *State*, (4 Zabriskie, 723;) 10th Barbour, 237–8; *Bowman's Devisees & Burnley* vs. *Wathen et al.*, (2 McLean, 377;) *Cincinnati* vs. *White's Lessee*, (6 Peters, 431;) *Walker* vs. *Taylor*, (5 How., 64;) *Miles* vs. *St. Clair Co.*, (8 How., 569;) *Fanning* vs. *Gregoire*, (16 How., 524;) *Phelps* vs. *Bloomington*, (1st Iowa (Green) R., 498.)

Where a State grants lands, it may impose restrictions, which shall be deemed proper, on the grantee; but where the grant is without restrictions the grantee holds the land and all the appurtenances which belong to it.

Some of the rights which appertain to the soil are of a public nature, and the uses of them are, consequently, subjects of legal control. Ferriage and wharfage belong to this class.

That these and kindred subjects of purely internal police were not, and could not have been, by the Constitution of the United States, committed to the exclusive jurisdiction of Congress, seems evident from the impossibility which would attend the regulation of such subjects by the Federal Government.

There are twenty-seven counties on the Ohio and Mississippi rivers in Kentucky, containing, perhaps, 300 ferries. They are judicial and legislative grants, within prescribed distances, to

the grantees of the soil. The statutes regulating them impose certain conditions, and exact of the grantees proper accommodations, skilful ferrymen, and safe boats and good landings. Bond and security are required of the grantees for a compliance with all the requisitions of the statute. And for this the State grants exclusive licenses, and regulates the rates of ferriage.

It is essential to the public accommodation of the citizens of Kentucky that these ferries and their landings should be constantly kept up. It is essential to the intercourse between the States. How could the Federal Government establish or undertake any system for the establishment or regulation of these ferries and landings? How could Congress know anything of the wants of a ferry in the various counties in Kentucky, bordering on the two rivers, for a distance of eight hundred miles? How can the Federal Government exercise jurisdiction over the landings without acquiring title to the soil?

If, however, these ferries, thus granted upon Kentucky soil, by the sovereign power of the Commonwealth, are regulations of commerce, and, as such, wholly within the power of Congress, the jurisdiction of the General Government must be extended and become equally exclusive over all the landings and wharves within the States from which these ferries are established.

All State laws establishing and regulating ferries, wharves, and public landings, within their own territorial limits, become direct usurpations upon the exclusive power of Congress to regulate commerce, and it follows that the admitted, constantly exercised, exclusive power of the States to develop their internal resources, control their roads and public rivers, protect their fisheries, establish health and inspection laws, in a word, to guard and protect the rights, property, and happiness of its people, perish under the construction which erects this colossus of consolidation upon the reserved rights of the States.

This argument, that would include ferries within the exclusive jurisdiction of Congress rather than within the police powers of the States, rests on the fallacy that all navigation is commerce.

Commerce may, and does under certain circumstances, include navigation, and navigation is certainly one of the means by which commerce is carried on.

It may be conceded, too, that the power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it as well as to the instruments used. 12 Howard, 315–16.

It was the traffic and intercourse with foreign nations among the States and with the Indian tribes which was comprehended by the word commerce as used in the Constitution. This construction is supported because it is essential to reconcile and maintain harmony in leading and well established decisions of this court. *City of New York* vs. *Miln*, (11 Peters, 131;) *Gibbons* vs. *Ogden*, (9 Wheat., 1;) *Brown* vs. *State of Maryland*, (12 Wheat., 419;) *License Cases*, (5 How., 589; *ib.*, 627–8;) *Holmes* vs. *Jennison*, (14 Peters, 614.)

The Federal Government could exercise no jurisdiction over ferries, because "the power to regulate commerce," if exclusive, confers upon Congress no power to regulate the "wharf or common" at Newport from which this ferry is granted. *New Orleans* vs. *U. S.*, (10 Peters, 736;) *Corfield* vs. *Coryell*, (4 Wash. C. R., 379.) It has been expressly decided that whatever soil below low-water mark is the subject of exclusive ownership belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the Declaration of Independence. *Den* vs. *Jersey Co.*, (15 How., 212;) *Martin* vs. *Waddell*, (16 Pet., 367;) *Pollard's Lessees* vs. *Hagan*, (3 How., 212.)

And this doctrine applies with greater force to the Ohio river, which was owned entirely by Virginia, and is still held by Virginia and Kentucky within their territorial limits, subject to the limitation before referred to.

But it is held by the State not only in subordination to, but in trust for, the enjoyment of certain public rights, among which the right of taking fish and of establishing ferries, building wharves, &c. The Commonwealth holds the property

of this soil for the conservation of these public rights of ferriage, fishery, &c., and, under its reserved rights, may regulate the same. From the ownership and legislative power of the State over it, not less than from its duty to preserve unimpaired the public uses and private rights in which it is held, it may legally do any act or forbid any act which would render the right less valuable, tend to its destruction, or prevent its enjoyment. Vattel, Book I, Ch. 20, § 246; *Corfield* vs. *Coryell*, (4 Wash. C. R., 376;) *Smith* vs. *State of Maryland*, (18 Howard, S. C. R., 75.)

The *jus publicum* of navigation and free intercourse cannot limit the *jus privatum* which a State has in the soil covered by its waters, including fish of all descriptions, and its right to its shores. *Smith* vs. *State of Maryland*, (18 Howard, 74;) *Corfield* vs. *Coryell*, (4 Wash. C. R., 379–80.)

It has been expressly held that the reserved right of the States to establish and regulate ferries upon the waters separating them from other States is not inconsistent with the power on the part of Congress to regulate commerce. *Babcock* vs. *State*, (11 Wend., 590;) *Fanning* vs. *Gregoire*, (16 How., 534.)

If the establishment and regulation of ferries upon the Ohio and Mississippi rivers be not within the reserved rights of the States, still, as such statutes are clearly essential to preserve the peace and protect the public and private interests within the limits of such States, this court would uphold and maintain these laws as the exercise of a concurrent power on the part of the State, till the General Government found it expedient to legislate, or until it became apparent that such State action was in direct conflict with the acts of Congress upon the same subject-matter. *Sturges* vs. *Crowningshield*, (4 Wheat., 196;) *Wilson* vs. *The Black Bird Creek Marsh Co.*, (2 Peters, 245;) *Prigg* vs. *Pennsylvania*, (16 Peters, 539;) *New York* vs. *Milne*, (11 Peters, 103;) *Holmes* vs. *Jennison*, (14 Peters, 540;) 15 Peters, 589.

It is now well settled that steam ferry-boats are not within the provision of the acts of 1793 for the enrolment and licensing of vessels, or of the act of 1838. *The United States* vs. *Steam Ferry Boat "Wm. Pope,"* (Newberry's Admiralty Rep.,

256;) *The Steamboat James Morrison*, (ib., 241;) "*Ottawa*," (1 Newberry, 536.)

If the act of 18th February, 1793, for enrolling and licensing vessels, or the two acts amendatory thereto, passed 7th July, 1838, (5 Stat. at Large, 304,) and 30th August, 1852, do not include ferries and steam ferry-boats, then, whatever the extent of Federal power, as there has been no legislation by Congress upon the subject, it follows, no conflict arises between Federal and State jurisdiction, and the ferry statute of Kentucky will be upheld.

Many of the State laws regulating vessels in ports and harbors, appointing harbor-masters, erecting wharves, regulating cargoes and ballast, places of anchorage, prescribing rules for the navigation of our largest rivers and lakes, are strong illustrations of the concurrent power of the States with the General Government, even in matters of commerce, until there is a direct antagonism. *Cooley* vs. *The Board of Wardens of Philadelphia*, (12 Howard, 311;) *The "John Gray"* vs. *The "James Frazer,"* (21 Howard, 184;) *Fitch* vs. *Livingston*, (4 Sandford, 493;) 1 Parker, C. C. R., 659; *Groves* vs. *Slaughter*, (15 Peters, 509–574;) *Corfield* vs. *Coryell*, (4 Wash. C. C. R., 371;) *Holmes* vs. *Jennison*, (14 Peters, 594;) 18 Connecticut Rep., 500.

State laws have always been upheld by this court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the act of Congress. *Sennot et al.* vs. *Davenport*, (22 How., 244;) 2 Woodberry's Writings, 221; Woodberry & Minot, R., 401–451; 12 Wheaton, 441; 3 Howard, 230; *Milnor* vs. *Railroad Company*, (6 Am. L. R., 9.)

James Taylor, as the owner and patentee in 1787 of the land on which the town of Newport was located, became vested with all the riparian rights of fishery, of ferry, &c. The State could not directly or indirectly divest him of any one of these rights, except by a constitutional exercise of the power of eminent domain. *Bowman & Burnley* vs. *Walker*, (2 McLean, 382;) *Thurman* vs. *Morrison*, (14 Ben. Mon., 367.) Being thus seized of the land and all its riparian rights, he entered into a contract with the State, by which he surrendered one hundred and eighty acres of this ground for the town, and the Legislature

ratified his reservation of all other rights, especially an exclusive right of ferry from the entire space in front of Newport. 6 J. J. Marshall, 134.

After this contract was ratified, it was beyond the control of the State or Federal Government. *Walker* vs. *Taylor*, (5 How., 64;) 10 Peters, 662; 2 McLean, 382; 6 Wheaton, 579.

This franchise of a ferry extended to the entire esplanade in front of said town, and has been run by Taylor, as grantee of the patentee and proprietor, since 1799, subject to the conditions which the ferry laws impose. He may be required to run one or more boats, but his right to the entire franchise extends to every part of this wharf or esplanade. 6 J. J. Marshall, 134; 11 Ben. Monroe, 361; 16 Ben. Monroe, 699.

All the right of wharfage has been decided to be in the city of Newport; it is held in express servitude to his superior and exclusive right of ferry.

The city of Newport can grant no greater title than it possesses; consequently, can neither lease nor convey any part of this public esplanade for the purpose of injuring or lessening the superior claim of Taylor to the exclusive ferry franchise, from every part of the public esplanade.

This right is upheld and preserved by the Federal and State constitutions. It has been sanctioned by the Legislature and the courts of Kentucky, as vested and exclusive.

This court will follow the decision of the court below, if the franchise of ferry, and laws regulating and establishing it, are not, as we have attempted to show, in no manner inconsistent with the Constitution or laws of the United States.

Mr. Justice SWAYNE. The appellees filed their bill in equity in the Circuit Court of Campbell county, Kentucky, seeking thereby to enjoin the appellants from invading the ferry rights claimed by them as set forth in their bill, and also praying for an account and a decree against the appellants in respect of the moneys received by them in violation of the alleged rights of the complainants. The appellants answered, proofs were taken, and the case brought to hearing.

The Circuit Court of Campbell county entered a decree

against the appellants. They removed the cause to the Court of Appeals of Kentucky. That court modified the decree of the court below, but also decreed against them. They thereupon brought the cause to this court by a writ of error under the 25th section of the judiciary act of 1789. It is now presented here for adjudication.

The case made by the pleadings and proofs is substantially as follows:

On the 29th of April, 1787, James Taylor, of Virginia, received from that State a patent for 1,500 acres of land lying upon the Ohio and Licking rivers, at the confluence of those streams, and above the mouth of the latter.

In 1792, James Taylor, the patentee, by his agent, Hubbard Taylor, laid out the town of Newport, at the confluence of the two rivers, upon a part of the tract of fifteen hundred acres.

According to the map of the town as surveyed and thus laid out, the lots and streets did not extend to either of the rivers. A strip of land extending to the water-line was left between the street, running parallel with and nearest to each river.

In July, 1793, John Bartle applied to the Mason county court for the grant of a ferry from his lot in Newport, on Front street, across the Ohio to Cincinnati. An order was made accordingly, but the appellate court of Kentucky reversed and revoked it on the 15th of May, 1798, upon the ground that it did not appear that his lot extended to the Ohio river.

On the 29th of January, 1794, a ferry was granted to James Taylor, of Virginia, by the Mason county court, from his landing in front of Newport, across the Ohio river, with authority to receive the same fares which were allowed upon transportation from the *opposite shore.* A ferry across the Licking was also granted to him.

On the 20th August, 1795, a re-survey and plat of the town of Newport was made, by which the eastern limits of the town were extended to "Eastern Row," and the strip of ground between the Ohio river and the northern boundary of the town, and between Licking river and the western boundary of the town, were endorsed, "Common or *esplanade*, to remain common forever." This plat was made by Roberts.

On the 14th December, 1795, an act was passed by the Legislature of Kentucky incorporating the town of Newport, in conformity with the re-survey and plat of Roberts.

The preamble, and so much of the act as is deemed material in this case, are as follows: "Whereas it is represented to the present General Assembly, that one hundred and eighty acres of land, the property of James Taylor, in the county of Campbell, have been laid off into convenient lots and streets, by the said James Taylor, for the purpose of a town, and distinguished by the name of Newport, and it is judged expedient to vest the said land in trustees and establish the town:

"§ 1. *Be it therefore enacted by the General Assembly*, That the *land comprehending the said town*, agreeably to a plat made by John Roberts, be vested in Thomas Kennedy and others, 'who are hereby appointed trustees for the same, except such parts as are hereafter excepted.'

"§ 7. *Be it further enacted*, That such part of said town as lies between the lots and rivers Ohio and Licking, as will appear by a reference to the said plat, shall forever remain for the use and benefit of said town for a common, *reserving to the said James Taylor, and his heirs and assigns, every advantage and privilege which he has not disposed of, or which he would by law be entitled to.*"

The streets and lots exhibited by the Roberts's plat of 1795, as by that of 1792, did not extend to either the Ohio or Licking river.

The disputed ground between the northern boundary of Front street and the Ohio river varies in width according to the inflexions in the line bounding the margin of the river at high-water mark, from five to ten poles; and the distance from high to low-water mark varies from seventeen to two hundred yards, and was not included in the 180 acres laid out for the town. This area is denominated "the esplanade."

In 1799, James Taylor, of Virginia, the patentee, conveyed to his son, James Taylor, of Kentucky, this strip of ground, between Front street and the Ohio river, together with the other land adjacent to the 180 acres laid out in the plat of the town in 1795, and also the ferry franchise.

James Taylor, of Kentucky, from the time of the conveyance by his father to him, in 1799, continued to run the ferry from the ground in front of Newport, on which it was originally established.

In consequence of the passage of the act of 1806, by the Legislature of Kentucky, concerning ferries, James Taylor, of Kentucky, applied to the Campbell county court in 1807 for the establishment of the ferry granted to his father; and the ferry was re-established in his name, and he executed a bond, and continued to run the ferry from almost every part of the ground or esplanade, in front of the town of Newport, from that period to the time of the filing of the bill in this case.

In 1830 the town of Newport applied to the Campbell county court for the grant to said town of a ferry, from the esplanade across the Ohio river to Cincinnati, which application was refused. An appeal was taken to the Court of Appeals, and at the June term, 1831, the order of the Campbell county court was affirmed.

This case is reported in 6 J. J. Marshall, 134.

James Taylor, of Virginia, and his grantee and son, James Taylor, of Kentucky, continued, therefore, uninterruptedly to run this ferry from 1794 until the commencement of this suit. The proof shows, also, that he constantly exercised acts of ownership over the whole common in front of Newport, and did not permit even the quarrying of stone without his consent; that he was in the habit of landing his ferry-boats at various points on this common or esplanade from time to time, and that he acquiesced in its free use as a common for egress and ingress by the people of the town, but always claimed and exercised the exclusive ferry privilege.

"After the incorporation of the town of Newport as a city, the city of Newport applied, in 1850, at the February term of the Campbell county court, for the grant of a ferry across the Ohio river, to the president and Common Council of the city of Newport. No notice was given of the application, and the ferry was granted."

At the time of this application, James Taylor, of Kentucky,

had departed this life, leaving a will, and appointing his son, James Taylor, his executor, and making a particular devise of this ferry, and requiring his executor to rent it until the taking effect of the devise, as provided in the will.

As soon as the action of the Campbell county court granting a ferry to the city of Newport was known, a writ of error was sued out from the *Circuit Court* by the executor and devisees of James Taylor, of Kentucky, to reverse the order of the *county court*, whereby the ferry was granted. The order was reversed. The city of Newport took the case to the Court of Appeals of Kentucky. That court, in March, 1850, affirmed the judgment of the Circuit Court. This case is reported in 11 Ben. Monroe, 361.

It appears in the proofs, that the ferry boats used by the appellees were duly enrolled, inspected, and licensed under the laws of the United States.

No claim is set up in the bill as to any ferry license from Ohio, or to any right of landing on the Ohio side.

In 1853 the appellants built the steamer Commodore, and constituted themselves "The Cincinnati and Newport Packet Company," for the purpose of running that steamer as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati. They rented, for five years, a portion of the esplanade in front of Monmouth street, *in the city of Newport*, from the Common Council of that city.

The Commodore was a vessel of 128 tons burden, and in all respects well appointed and equipped.

The appellants caused her to be enrolled on the 4th of January, 1854, at the custom-house at Cincinnati, under the act of Congress for enrolling and licensing vessels to be employed in the coasting trade and fisheries, with Peter Conway as master, and obtained on the same day, from the surveyor of customs at the port of Cincinnati, a license for the employment and carrying of the coasting trade.

They commenced running her as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati, on the 5th of January, 1854.

Her landings were at the wharves on each side of the river, opposite to each other, the landing in Newport being at the foot of Monmouth street.

The right of the Commodore to land there, for all lawful purposes, was not contested in the Court of Appeals, and was not questioned in the argument here.

In January, 1854, the appellees exhibited their bill in equity against the appellants.

In the same month a preliminary injunction was granted, restraining the appellants from running the Commodore as a ferry-boat between the cities of Cincinnati and Newport.

In the progress of the cause, proceedings were instituted against the appellants for contempt of the court in violating this injunction. It was then made to appear that the appellants had, on the 6th of March, 1854, obtained a ferry license under the laws of Ohio. This fact appears in the record, and is adverted to in the judgment of the Court of Appeals.

Upon the final hearing, the Campbell Circuit Court decreed, that an account should be taken of the ferriages received by the appellants on account of the Commodore, and that they "be and they are, each and all of them, perpetually enjoined from landing the boat called in the pleadings and proof the 'Commodore,' or any other boat or vessel, upon that part of the Kentucky shore of the Ohio river lying between the lots of the city of Newport and the Ohio river, designated upon the plat of the town of Newport as the 'esplanade,' and including the whole open space so designated, for the purpose of receiving or landing either persons or property *ferried from, or to be ferried to, the opposite shore of the Ohio river.*

"It being hereby adjudged against all the defendants to this action, that the entire privilege and franchise of ferrying persons and property to and from said part of the Kentucky shore of the Ohio river is in the plaintiffs alone; and it is hereby adjudged, that the receiving of persons, animals, carriages, wagons, carts, drays, or any other kind of vehicle, either loaded or empty, upon said boat or any other vessel at said part of the Kentucky shore, for the purpose of being transported and landed upon the opposite shore of the Ohio river, and

the landing of persons, animals, and the kind of property above described, which had been received upon said boat or other vessel at or from the opposite shore of the Ohio river, and transported across said river, upon said part of the Kentucky shore, is an infringement of the ferry franchise of the plaintiffs, and is hereby perpetually enjoined; and this injunction shall extend to and embrace all persons claiming under the defendants to this action."

In reviewing this adjudication, the Court of Appeals held: "The judgment is erroneous in the extent to which it perpetuates the injunction, and to which it restrains the Commodore and the defendants in landing upon the slip in question, persons and property transported from the Ohio shore, and in adjudging, as it seems to do, the exclusive right of ferrying from both sides of the river to be in plaintiffs alone. *The transportation as carried on* was illegal and properly enjoined, and the injunction should have been perpetuated against future *transportation of a like kind*, either under color of any license obtained, or to be obtained, from the authorities of the United States under the existing laws, or without such license, unless authorized to transport from the Ohio shore, from a ferry established on that side under the laws of that State; and they might have been restrained or prohibited, under all or any circumstances, from transporting persons or property from this to the other side, (within the interdicted distance above or below an established ferry on this side,) unless authorized under the laws of this State to do so; and the exclusive right of ferrying from the Kentucky side should have been declared to be in the plaintiffs.

"Wherefore the judgment perpetuating said injunction, and adjudging the exclusive right of ferrying from both sides of the river to be in the plaintiffs, is reversed, and the cause as to that is remanded, with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right as above directed.

"And afterwards, to wit, on the 9th day of February, 1860, the following order was entered on the records of this court:

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"It is ordered that the mandate be amended as follows: That the judgment perpetuating the said injunction is *reversed*, and the cause as to that is remanded, with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right, as above directed."

It is objected by the appellants, that no such ferry franchise exists as was sought to be protected by this decree, because it was granted under the laws of Kentucky, and did not embrace a landing on the Ohio shore. It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both States is necessary to give it validity.

Under the laws of Kentucky a ferry franchise is grantable only to riparian owners. The franchise in this instance was granted in pursuance of those laws. Any riparian ownership, or right of landing, or legal sanction of any kind beyond the jurisdiction of that State, is not required by her laws.

The riparian rights of James Taylor, deceased, and of his executor and devisees, in respect of the Kentucky shore, have been held sufficient to sustain a ferry license by the highest legal tribunal of that State, whenever the subject has been presented. The question came under consideration, and was discussed and decided in the year 1831 in 6 J. J. Marshall, 134, *Trustees of Newport* vs. *James Taylor;* in 1850 in Ben. Monroe, 361, *City of Newport* vs. *Taylor's heirs;* in 1855 in this case, 16 Ben. Monroe, 784; and, finally, in 1858, in the *City of Newport* vs. *Air & Wallace.* (Pamphlet copy of Record.)

These adjudications constitute a rule of property, and a rule of decision which this court is bound to recognise. Were the question an open one, and now presented for the first time for determination, we should have no hesitation in coming to the same conclusion. We do not see how it could have been decided otherwise. This point was not pressed by the counsel for the appellants. The judgments referred to exhaust the subject. We deem it unnecessary to go again over the same ground.

The concurrent action of the two States was not necessary. "A ferry is in respect of the landing place, and not of the

water. The water may be to one, and the ferry to another." 13 Viner's Ab., 208, A.

In 11 Wend., 590, *The People* vs. *Babcock*, this same objection was urged, in respect of a license under the laws of New York, for a ferry across the Niagara river. The court said: "The privilege of the license may not be as valuable to the grantee, by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place."

The point has been ruled in the same way in a large number of other cases:

2 McLean, 377, *Bowman's Devisees and others* vs. *Burnley and others;* 3 Yerger, 390, *Memphis* vs. *Overton*; 1 Green's Iowa Rep., 498, *Phelps* vs. *Bloomington;* 4 Zabriskie, 723, *Freeholders* vs. *The State;* 8 How., 569, *Wills et al.* vs. *St. Clair County et al.;* 16 How., 564, *Fanning* vs. *Gregoire.*

In the case last cited, (*Fanning* vs. *Gregoire*, 16 How., 564,) the arguments on file show that this objection was pressed with learning and ability. In the opinion delivered, the court seems to have assumed the validity of such a license, without in terms adverting to the question. Another question was fully discussed and expressly decided. This point does not appear in the report of the case.

Our attention has been earnestly invited to the following provisions of the ferry laws of Kentucky, under which the license of the appellees was granted:

"None but a resident of Kentucky can hold the grant of a ferry. Sec. 5, Stanton's Revised Statutes, p. 540.

"Any sale or leasing of a ferry right, or contract not to use it, made with the owner of a ferry established on the other side of the Ohio or Mississippi, shall be deemed an abandonment, for which the right shall be revoked. Sec. 12.

"Any one who shall, for reward, transport any person or thing across a water-course from or to any point within one mile of an established ferry, unless it be the owner of an established ferry on the other side of the Ohio and Mississippi

rivers so transporting to such point on this side, and any owner or lessee, or servant, of the owner of a ferry on the other side of either of those rivers, who shall so transport from this side, without reward, shall forfeit and pay to the owner of the nearest ferry the sum of sixteen dollars for every such offence, recoverable before a justice of the peace. Sec. 14.

"No ferry shall be established on the Ohio river within less than a mile and a half, nor upon any other stream within less than a mile of the place in a straight line, where any existing ferry was pre-established, unless it be a town or city, or where an impassable stream intervenes.

"No new ferry shall be so granted within a city or town, unless those established therein cannot properly do all the business, or unless public convenience greatly requires a new ferry at a site not within four hundred yards of that of any other." Sec. 15.

We have considered these in connection with the other provisions of those laws. Whether they are wise and liberal, or the opposite, are inquiries that lie beyond the sphere of our powers and duties.

Considered all together, they have not seemed to us to deserve the character which has been ascribed to them. While they fence about with stringent safeguards the rights of the holder of the ferry franchise, they do not leave unprotected the rights of the public. If they give the franchise only to the riparian owner and citizen of the State, they surround him with sanctions designed to secure the fulfilment of his obligations.

The franchise is confined to the transit from the shore of the State. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the States lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those States. It was shown in the argument at bar that similar laws exist in most, if not all, the States bordering upon those streams. They exist in other States of the Union bounded by navigable waters.

Very few adjudged cases have been brought to our notice in which the ferry rights they authorize to be granted have been challenged; none in which they have been held to be invalid.

A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property.

"An estate in such a franchise and an estate in land rest upon the same principle." 3 Kent's Com., 459.

Lastly, it is urged that the Commodore, having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrolment and license gave to the appellants in respect of that trade by obstructing the free navigation of the Ohio.

Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below.

The counsel for the appellants insists that, "as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth street, that vessel is enjoined, under '*all or any circumstances, from transporting persons or property*' to the opposite shore, unless under the authority of the State of Kentucky."

We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt, in our minds, that the court intended only to enjoin the Commodore, under "all or any circumstances, from transporting persons or property" from the Kentucky shore *in violation of the ferry rights of the appellees*, which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport "persons and property" from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees.

Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the Court of Appeals, in the language referred to, intended to lay down the converse of these propositions, would do that distinguished tribunal gross injustice.

The Commodore was run openly and avowedly as a ferry-boat; that was her business. The injunction as to her and her business was correct.

The language of the court must be considered as limited to that subject. The zeal with which this point was pressed by the counsel for the appellants has led us thus fully to consider it.

The enrolment of the Commodore ascertained her ownership, and gave her a national character.

The license gave her authority to carry on the coasting trade. Together they put the appellants in a position to make the question here to be considered.

The language of the Constitution to which this objection refers is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. 1, § 8, clause 4.

The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the States touching the same subject, came under discussion in this court, for the first time, in *Gibbons* vs. *Ogden*, (9 Wheat., 1.) It was argued on both sides with exhaustive learning and ability. The judgment of the court was delivered by Chief Justice Marshall. The court said: "They" (State inspection laws) "form a portion of the immense mass of legislation which embraces everything within the territory of a State *not surrendered to the General Government;* all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and

those which respect turnpike roads, *ferries*, &c., are parts of this mass."

The proposition thus laid down has not since been questioned in any adjudicated case.

The same principle has been repeatedly affirmed in other cases, both in this and the State courts.

In *Fanning* vs. *Gregoire*, (9 How., 534,) before referred to, this court held:

"The argument that the free navigation of the Mississippi, guarantied by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with *the police powers of a State* in granting ferry licenses. When navigable rivers within the commercial powers of the Union may be obstructed, one or both of these powers may be invoked."

Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist.

We have shown that it is property, and, as such, rests upon the same principle which lies at the foundation of all other property.

Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How., 519, *Wheeling Bridge* case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the State.

The authorities referred to must be considered as putting the question at rest. The ordinance of 1787 was not particu-

larly brought to our attention in the discussion at bar. Any argument drawn from that source is sufficiently met by what has been already said.

The counsel for the appellees has invoked the authority of *Cooley* vs. *The Board of Wardens of Philadelphia*, (12 How., 299,) in which a majority of this court held that, upon certain subjects affecting commerce as placed under the guardianship of the Constitution of the United States, the States may pass laws which will be operative till Congress shall see fit to annul them.

In the view we have taken of this case, we have found it unnecessary to consider that subject.

There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power.

That the authority lies within the scope of "that immense mass" of undelegated powers which "are reserved to the States respectively," we think too clear to admit of doubt.

We place our judgment wholly upon that ground.

There is no error in the decree of the Court of Appeals. It is therefore affirmed, with costs.

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In a suit for land covered with water, this court will decide nothing until the plaintiff proves his title to the land before it was swept away. *Ib.*

The plaintiff must recover, if at all, upon the title he had when the suit commenced. *Pindell* v. *Mullikin*, 585.

In Missouri, prior equitable title bars a suit at law on a patent. *O'Brien* v. *Perry*, 132.

ERROR.

It is error to submit a hypothetical case to the jury. *Bryan* v. *United States*, 140.

ERROR, (*Continued.*)

The discretion of the judge who presides at the trial must regulate and limit the cross-examination of witnesses. *Johnston* v. *Jones*, 209.

So, also, as to the time and order of introducing evidence. *Ib.*

Where a plaintiff suing for accretions does not show that he is entitled to them, this court will not notice an error concerning the mode of dividing them. *Ib.*

A writ of error does not lie in a criminal case from this court to a Circuit Court. *Ex Parte Gordon*, 503.

Judge of the Circuit may disregard written points if his charge be full and accurate. *Law* v. *Cross*, 533.

ESTOPPEL.

A ship receiving and carrying a cargo, and claiming freight, cannot deny her liability to deliver in good order. *The Water Witch*, 494.

A contract to enter lands on false proofs is illegal and void, and will not operate between the parties by way of estoppel. *Harkness* v. *Underhill*, 316.

Where a bankrupt contested with his assignee the right to a fund and it was decided in favor of the assignee, it cannot afterwards be litigated. *Clark* v. *Hackett*, 77.

A party sued for repairs to a vessel cannot deny that he is owner if the vessel has been sold and he took the price of her. *Flanigan* v. *Turner*, 491.

The city of Carondelet is estopped to claim lands, as confirmed to her by the act of 1812, outside of an American survey under which she has previously claimed. *Carondelet* v. *St. Louis*, 179.

But a St. Louis villager is not bound by the survey and map of the Surveyor General which was made in 1840, and which excluded his land. *Glasgow* v. *Hortiz*, 595.

EVIDENCE.

Maps, surveys, and plats, must be authenticated before they are received. *Johnston* v. *Jones*, 209.

A deed dated after suit brought cannot be given in evidence to show that a plaintiff suing for accretions had a water front. *Ib.*

A witness's calculation, founded on a map not authenticated, is inadmissible. *Ib.*

Federal courts are governed by the rules of evidence of the State where they sit. *Vance* v. *Campbell*, 427; *Haussknecht* v. *Claypool*, 432.

In what circumstances the letter of a third party may be given in evidence as *res gestæ*. *Law* v. *Cross*, 538.

In a suit for the infringement of a patent right evidence of the pre-existence of the improvement claimed by the plaintiff may be given by defendant without notice. *Vance* v. *Campbell*, 427.

The discretion of the judge who presides at the trial must regulate and limit the cross-examination of witnesses. *Johnston* v. *Jones*, 209.

So, also, as to the time and order of introducing evidence. *Ib.*

In admiralty, objection to a witness must be made at hearing. *Nelson* v *Woodruff*, 156.

What objections cannot be made to a deposition where the opposing proctor knew it was taken. *Ib.*

EXCEPTION.

What is necessary to make a good exception to a master's report and what it brings up. *Goddard* v. *Foster*, 506.

FERRIES.

The law of ferries on the Ohio river between the States of Kentucky and Ohio. *Conway* v. *Taylor's Executor*, 603.

FINAL DECREE.

After a cause has been decided here a motion to change the decree will not be heard. *United States* v. *Knight's Administrator*, 488.

New evidence offered here will not in any case influence the judgment of the court. *Ib.*

The court may open a judgment during the term for reasons arising out of the record. *Ib.*

What is a final decree of the Circuit Court from which an appeal lies. *Wabash and Erie Canal* v. *Beers*, 54.

FREIGHT AND CARGO.

Vessel with a perishable cargo not liable for the consequences of unavoidable delay. *The Collenberg*, 170.

Unless master or crew have misbehaved. *Ib.*

What is blameless conduct in the master. *Ib.*

The ship-owner's claim for freight on so much of a perishable cargo as was delivered cannot be defeated by showing that another part had perished, and was necessarily left behind. *Ib.*

FRENCH AND SPANISH CLAIMS.

See *Land Law.*

INDIAN TREATY.

Reservation in a treaty of land to an individual gives the reservee a transferable interest. *Crews* v. *Burcham*, 352.

And this before the land reserved is selected or patented. *Ib.*

If the reservee sells and dies before patent, the patent afterwards issued will enure to the benefit of his grantee. *Ib.*

The grantee of his heir under a deed dated after the patent takes nothing. *Ib.*

See *Jurisdiction.*

JURISDICTION.

This court cannot review a case from a State court merely because one of the parties is a State corporation. *Attorney General* v. *Meeting-House*, 262.

It must appear that the validity of the charter was drawn in question. *Ib.*

The validity of the charter is not drawn in question by the assertion of the defendants that they claimed the property before the charter, and since. *Ib.*

Where the charter is a mere enabling act for parties in possession, and others claim to be the true owners, the issue is on the original rights of the parties. *Ib.*

This court has no jurisdiction to review a State court which decided that an Indian's title under a treaty was good, when neither the Indian himself, nor any person claiming under him, was party to the suit. *Verden* v. *Coleman*, 472.

JURISDICTION, (*Continued.*)

Where a decision made by the Secretary of the Interior is sustained by a State court, writ of error lies from this court. *Maqwire* v. *Tyler*, 195.

So where the State court decided that a survey in pursuance of a Federal statute estopped one of the parties. *Carondelet* v. *St. Louis*, 179.

A question of jurisdiction sent here on certificate of division must be determined before any other point. *Silliman* v. *Hudson River Bridge Company*, 582.

The judgment of a State court cannot be reviewed here unless upon a point distinctly taken in the State court. *Hoyt* v. *Shelden*, 518; *Farney* v. *Towle*, 350.

LAND LAW (*of United States.*)

Fraudulent entry may be set aside by Commissioner of General Land Office. *Harkness* v. *Underhill*, 316.

A contract to enter lands on false proofs of occupancy is illegal and void, and will not operate between the parties by way of estoppel. *Ib.*

LAND LAW, (*California Claims.*)

The Sutter general title is void and illegal. *United States* v. *Hensley*, 35.

A naked grant is invalid. *United States* v. *Neleigh*, 298.

Proof that archives are destroyed will not avail unless it be specific that claimant's papers were lost. *Ib.*

Mexican officers will not be heard to contradict or supply records. *Ib.*

The theory that records were lost to such an extent as to excuse the want of record proof is altogether fabulous. *Ib.*

A grant not recorded, without an espediente, and not among the forty-five confirmed in June, 1846, is not genuine, though a secretary swears to it. *Ib.*

A grant dated 10th of July, 1846, being after the conquest, is invalid. *United States* v. *Wilson*, 267.

A claim derived from an Indian, to whom a lot was assigned near a mission, is good, if it be shown that the grantee lived on it a long time. *Ib.*

The decree of the Spanish Cortes for the disposition of Crown lands not in force after the independence of Mexico. *United States* v. *Vallejo*, 541.

The law of 1824 and regulations of 1828 repealed the previous system. *Ib.*

These latter laws were the only system of colonization in force after their date. *Ib.*

A grant not registered is contrary to the practice of every well-regulated Government. *Ib.*

A false note of the attesting Secretary that it was registered is against the authenticity of the grant. *Ib.*

A confirmation is binding on the United States and on the assignees of the original grantee. *United States* v. *Covilland*, 339.

When the survey is executed the assignee may intervene. *Ib.*

When patent is issued, the assignee may assert his right in the ordinary tribunals. *Ib.*

But not by a proceeding under the act of 1851. *Ib.*

A Mexican grant confirmed is a legal title, and cannot be opposed by another Mexican title unconfirmed. *Singleton* v. *Touchard*, 342.

LAND LAW, *California Claims*, (*Continued.*)
A good title confirmed though the claim be prosecuted in the name of one who has a deed older than the grant. *United States* v. *Vallejo*, 283.
What is a complete espediente under Mexican law. *United States* v. *Knight's Administrator*, 227.
An order of reference and informé will not be presumed unless it appears on the record. *Ib.*
If there was an informé in another petition for same land, the recital in the grant will be referred to that. *Ib.*
If the informé was altered, the inference is that the grant was made after the alteration. *Ib.*
Hartnell's Index of 1847 and '48 not a record. *Ib.*
Loose papers found in Surveyor General's office, not numbered, indexed, or filed by Mexican authority, are no evidence that grant was recorded. *Ib.*
Without record evidence claim cannot be confirmed. *Ib.*
If it could, claimant would still be obliged to produce grant, and would not be permitted to prove it by parol without showing its existence and loss. *Ib.*
Secondary evidence is worthless, unless it shows that the grant was legally made and recorded. *Ib.*
Proof that a book is lost will not avail a claimant without evidence that his grant was on the lost record. *Ib.*
See *Mandamus*.
LAND LAW, (*French and Spanish claims under Louisiana treaty.*)
A patent of a quarter section subject to French claims is not good as against a French claimant whose survey and patent were in time. *Gregg* v. *Tesson*, 150.
But if the patentee of the quarter section was in possession of part, and claimed the whole for seven years, and the French claimant was not in possession at all, the statute of limitations is a protection. *Ib.*
What is a housekeeper under the law of 1832 giving pre-emption to claimants from France and Spain. *O'Brien* v. *Perry*, 132.
In an undetermined claim housekeeping was unnecessary. *Ib.*
If entry legally made by French claimant, cancellation of it is void. *Ib.*
The act of 1812 confirmed certain lands to certain villages, but reserved to the United States the right to define the boundary by a survey. *Carondelet* v. *St. Louis*, 179.
A Spanish survey marking only one line amounts to nothing. *Ib.*
A subsequent survey under American authority was binding, though it did not follow the line made by the Spanish officer. *Ib.*
If the grantees accept the latter survey and hold under it, they are estopped to claim beyond it. *Ib.*
Power of Commissioner of General Land Office over surveys of Spanish titles in Upper Louisiana. *Maguire* v. *Tyler*, 195.
Power of Secretary of Interior. *Ib.*
Secretary may lawfully set aside such survey. *Ib.*
The act of 1812 was a present operative grant to the villagers of St. Louis and others. *Glasgow* v. *Hortiz*, 595.
The map of 1840, by the Surveyor General, is not binding on them. *Ib.*

LAW AND FACT.

The *locus in quo* of a criminal offence is matter of fact for the jury. *United States* v. *Jackalow*, 484; *Franklin Branch Bank* v. *Ohio*, 474.

A special verdict set aside for not finding the *locus*. *Ib.*

The customary meaning of a word is matter of fact for the jury. *Law* v. *Cross*, 533.

Whether the evidence in an equity suit is sufficient to sustain an averment in the pleadings is a question not of law but of fact, and cannot therefore be brought up on certificate of division. *Silliman* v. *Hudson River Bridge Company*, 582.

LEGISLATIVE GRANT.

When it may be repealed and when not. *Rice* v. *Railroad Company*, 358.

What words vest title *in presenti*. *Ib.*

Common law rules of interpretation to be applied to Federal or State statutes. *Ib.*

Legislative grants not warranties. *Ib.*

Grants of privileges to a corporation must be construed strictly against the grantee. *Ib.*

LIMITATIONS, (STATUTE.)

If descent be cast on a married woman, limitation runs against the husband immediately, and the grantee of husband and wife cannot recover after it expires. *Gregg* v. *Tesson*, 150.

MANDAMUS.

Will not be awarded for the intervention of one Mexican claimant in the proceeding of another. *White's Administrator* v. *United States*, 501.

MARITIME LIEN.

The right of a shipowner to freight and his lien for it on the cargo depends on the bill of lading. *Bags of Linseed*, 108.

Lien for freight is lost by delivery of the goods. *Ib.*

Unless there be an understanding that the lien is to continue. *Ib.*

But the fact of such understanding must appear, or be plainly inferable from the custom of the port. *Ib.*

Lien for supplies not waived by the acceptance of the owner's note, if it was agreed that lien should continue. *Steamer St. Lawrence*, 522.

MASTER'S REPORT.

What is necessary to make a good exception, and what it brings up. *Goddard* v. *Foster*, 506.

NOTICE.

A purchaser has notice of an adverse title if it be recorded, and the person claiming under it is in possession. *Crews* v. *Burcham*, 352.

PARTNERSHIP.

An association to buy and sell lands is a partnership. *Clagett* v. *Kilbourne*, 346.

What rights a separate creditor of one member of such an association has against the common property. *Ib.*

A bond given for the release of partnership goods attached on mesne process must be paid by the sureties, though judgment be recovered against only one of the partners. *Inbusch* v. *Farwell*, 566.

PARTNERSHIP, (*Continued.*)

The sureties have recourse for indemnity against all the partners. *Ib.*

A judgment for a partnership debt against only one partner is payable out of the partnership effects before an individual debt. *Ib.*

What expenses are to be deducted from the common funds. *Goddard* v. *Foster*, 506.

Where one of several partners is employed as agent the others are not partners in the business of the agency, and need not join in a suit against the principal. *Law* v. *Cross*, 533.

PATENT RIGHT.

The surrender of a patent extinguishes it. *Moffitt* v. *Garr*, 273.

Suits brought for the infringement fall with the surrender. *Ib.*

But moneys paid cannot be recovered back. *Ib.*

A combination of elements must be proved as an entirety. *Vance* v. *Campbell*, 427.

Construction of the 9th section of the act of 1837, and where it applies. *Ib.*

Evidence of the pre-existence of the invention may be given without notice. *Ib*

PLEADING.

On a joint bond all the obligees must sue, if alive. *Farni* v. *Tesson*, 309.

But suit may be brought by survivors, if the death of one or more be suggested. *Ib.*

Where the condition of a joint bond be not for the joint benefit of all, still all the legal obligees must sue. *Ib.*

The non-joinder of a joint obligee is not cured by averring that it is done to give the Federal court jurisdiction. *Farni* v. *Tesson*, 309.

Objection may be made to non-joinder of plaintiff by demurrer on general issue, or on motion in arrest of judgment. *Ib.*

Property a good plea in replevin. *Dermott* v. *Wallach*, 96.

A plea merely denying the property of the plaintiff is good in substance. *Ib.*

The omission of a similiter is not fatal. *Ib.*

If the plea of property be in, but not tried, judgment will be reversed. *Ib.*

An omission to join issue upon an avowry for rent is cured by verdict. *Ib.*

Objection to form of action or pleadings not available here if plaintiff has no case in any form. *Washington* v. *Ogden*, 450.

PRACTICE.

The court may award a *certiorari* at the third term, but will not postpone the cause. *Clark* v. *Hackett*, 77.

Writ of error will be dismissed if no citation served. *Bacon et al.* v. *Hart*, 31.

Service of citation on defendant's counsel good. *Ib.*

But not on his executrix or his partner. *Ib.*

Where one party in a pending appeal buys out the other, the appeal will be dismissed. *Cleveland* v. *Chamberlain*, 419.

If this be done to affect persons, not parties, it is punishable as a contempt. *Ib*

The third parties sought to be injured will be heard to show it. *Ib.*

Where the judges of this court and the Circuit Court are both equally divided, the bill is to be sent down and dismissed. *Silliman* v. *Hudson River Bridge Company*, 582.

PRACTICE, (*Continued.*)

The judges of the Circuit Court cannot certify a division on the question whether evidence is sufficient to prove the averments. *Ib.*

A bill of exceptions to the rejection of a witness need not state that the witness was material. *Haussknecht* v. *Claypool*, 431; *Vance* v. *Campbell*, 427.

Power of the court to make rules of practice. *Steamer St. Lawrence*, 522.

The court cannot thereby enlarge or diminish its jurisdiction. *Ib.*

Rules are prospective in their operation. *Ib.*

On appeal, the Circuit Court may modify other decrees of the District Court not appealed from between the same parties and relating to the same matter. *The Water Witch*, 494.

A party benefited by such change cannot complain of it. *Ib.*

The court will not dismiss a writ of error to the Circuit Court on the ground that no error appears on the record. *Hecker* v. *Fowler*, 95.

A bill of exceptions should contain only what is necessary to raise the legal question. *Johnston* v. *Jones*, 209.

If it excepts generally to a series of propositions laid down by the court, any one of which is true, the bill is overruled. *Ib.*

The discretion of the judge who presides at the trial must regulate and limit the cross-examination of witnesses. *Johnston* v. *Jones*, 209.

So, also, as to the time and order of introducing evidence. *Ib.*

In admiralty, objection to a witness must be made at hearing. *Nelson* v. *Woodruff*, 156.

What objections cannot be made to a deposition where the opposing proctor knew it was taken. *Ib.*

This court will not reverse a decree in admiralty for a supposed mistake of fact, unless the mistake be clear. *Ship Marcellus*, 414; *The Water Witch*, 494.

The judge may disregard written points, if he charges rightly. *Law* v. *Cross*, 538.

RAILROAD COMPANY.

Where a county through which a railroad may pass is authorized to subscribe stock, this includes any county lying between the termini. *Woods* v. *Lawrence County*, 386.

What irregularities will not be a defence for a county against bonds given by commissioners. *Ib.*

RIPARIAN RIGHTS.

The right of a riparian owner to accretions depends on the condition of the land at the date of his deed, and not at the date of a title bond under which he procured it. *Johnston* v. *Jones*, 209.

Riparian owners have a right to build piers, &c. *Dutton* v. *Strong*, 23.

Extent of the right. *Ib.*

Presumption is that they are not a nuisance. *Ib.*

Distinction between public and private piers. *Ib.*

Where a pier is private, a vessel cannot be moored to it without the owner's consent. *Ib.*

A vessel wrongfully attached to a private pier may be cut loose. *Ib.*

SALARY.
A register (of Land Office) can retain as compensation only $3,000. *United States* v. *Babbit*, 55.
All over that sum must be paid into the Treasury. *Ib.*
SALVAGE.
Parties who take in a derelict vessel are entitled to all the salvage. *Island City*, 121.
But a vessel is not derelict unless wholly abandoned. *Ib.*
Where several vessels at different times render separate and meritorious service the salvage is to be divided among them. *Ib.*
Salvage is forfeited if the salvors be guilty of embezzlement or other acts of bad faith. *Ib.*
STATUTE.
A State or Federal statute is to be construed according to the rules of the common law. *Rice* v. *Railroad Company*, 358.
One statute does not repeal another unless it be impossible to reconcile them. *McCool* v. *Smith*, 459.
In American statutes generally, terms well known in the English law must be interpreted according to that law. *Ib.*
SURETIES OF PUBLIC OFFICERS.
Are chargeable only with moneys received by their principal while in office, and must be credited with all he has paid. *Bryan* v. *United States*, 140.
Not chargeable with a draft which was not paid until the principal went out *Ib.*
Transfer by the Government to an agent of the officer will not affect his sureties. *Ib.*
SURRENDER.
What is surrender and cancellation of an agreement to sell lands. *Washington* v. *Ogden*, 450.
SURVEY.
See *Ejectment, Estoppel, Land Law.*
TIME.
Where a party has had possession of land for fourteen years under a legal title, equity will not turn him out. *Harkness* v. *Underhill*, 316.
The heirs of a person who died in possession cannot be turned out after several years, and a rise in the value of the property, by one claiming the title of a sheriff's vendee, who consented that the heirs should redeem. *Laflin* v. *Herrington*, 326.
Claim for money lent, thirty-three years after the loan, rejected. *Rogers* v. *Law*, 253.
A bill in equity will not lie after twenty years of negligence. *Pindell* v. *Mullikin*, 585.
USURY.
What it is, and what it is not. *Hogg* v. *Ruffner*, 115.
WILL.
Construction of a will which forbade legatees to claim anything under certain deeds on penalty of forfeiting their legacies. *Rogers* v. *Law*, 250.
Legatees must accept testator's bounty *cum onere*. *Ib.*

WRIT OF ERROR.

Writ of error under Sec. 22 of the judiciary act will not lie unless the matter in dispute exceed $2,000 in value. *Pratt* v. *Fitzhugh*, 271.

This means a property value. *Ib.*

Therefore it will not lie to an order on a *habeas corpus* discharging a party from arrest. *Ib.*

WRIT OF PROHIBITION.

Does not lie in a criminal case from this court to a Circuit Court. ***Ex Parte Gordon*, 503.**