CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1864.

REPORTED BY

JOHN WILLIAM WALLACE.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

SALMON PORTLAND CHASE.

ASSOCIATES.

Hon. James M. Wayne,
Hon. Samuel Nelson,
Hon. Nathan Clifford,
Hon. Samuel F. Miller,
Hon. John Catron,
Hon. Robert Cooper Grier,
Hon. Noah H. Swayne,
Hon. David Davis
Hon. Stephen J. Field.

ATTORNEY-GENERAL.

Hon. James Speed.

CLERK.

Daniel Wesley Middleton, Esquire.

CIRCUITS, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE HON. SALMON P. CHASE, Ohio.	FOURTH. MARYLAND, DELAWARE, VIRGINIA, NORTH CAROLINA, AND WEST VIRGINIA.	1864. DECEMBER 6TH.
ASSOCIATES. HON. JAMES M. WAYNE, Georgia.	FIFTH. SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI, AND FLORIDA.	1835. JANUARY 9TH.
HON. JOHN CATRON, Tennessee.	SIXTH. LOUISIANA, ARKANSAS, KENTUCKY, TENNESSEE, AND TEXAS.	1837. MARCH 8TH.
HON. SAMUEL NELSON, New York.	SECOND. NEW YORK, VERMONT, AND CONNECTICUT.	1845. FEBRUARY 14TH.
HON. ROBERT C. GRIER, Pennsylvania.	THIRD. PENNSYLVANIA AND NEW JERSEY.	1846. AUGUST 4TH.
HON. NATH. CLIFFORD, Maine.	FIRST. MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	1858. JANUARY 12TH.
HON. N. H. SWAYNE, Ohio.	SEVENTH. OHIO AND MICHIGAN.	1862. JANUARY 24TH.
HON. S. F. MILLER, Iowa.	NINTH. MISSOURI, IOWA, KANSAS, MINNESOTA, AND WISCONSIN.	1862. JULY 16TH.
HON. DAVID DAVIS, Illinois.	EIGHTH. ILLINOIS AND INDIANA.	1862. DECEMBER 8TH
HON. S. J. FIELD, California.	TENTH. CALIFORNIA AND OREGON.	1863. MARCH 10TH.

GENERAL RULES.

Law.

AMENDMENT TO RULE II.

THE last clause of the second rule of this court is amended so as to read as follows:

They shall respectively take and subscribe the following oath or affirmation: "I, —— ——, do solemnly swear that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion.

"And I do further solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counsellor of this court uprightly and according to law. SO HELP ME GOD."

ORDER OF COURT.

Ordered, That all persons who have heretofore been admitted as attorneys and counsellors of the court may take and subscribe the oath or affirmation prescribed by second rule as amended, before the clerk of this court, or of any Circuit or District Court of the United States.

AMENDMENT TO RULE IX.

The third paragraph of the ninth rule of this court is amended so as to read as follows:

In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, and Utah.

AMENDMENT TO RULE XX.

The first paragraph of the twentieth rule of this court is amended so as to read as follows:

In all cases brought here on appeal, writ of error, or otherwise, the Court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same within the first thirty days of the term; but twenty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed; ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel.

[These orders were promulgated March 10, 1865.]

AMENDMENT TO RULE XXI.

The sixth paragraph of the twenty-first rule of this court is amended so as to read as follows:

Twenty printed copies of the abstract points and authorities required by this rule shall be filed with the clerk by the plaintiff in error or appellant six days, and by the defendant in error or appellee three days before the case is called for argument.

[This order was promulgated February 9, 1865.]

MEMORANDA.

THE Honorable ROGER BROOKE TANEY, Esquire, of Maryland, Chief Justice of this Court, departed this life, in the 88th year of his age, on the evening of Wednesday, the 12th October, 1864, at his residence in the City of Washington, in vacation; having presided on this bench since the 15th March, 1836; a term of more than twenty-eight years.

On the opening of the Court at its present session, December 7, 1864, the Honorable Thomas Ewing, of Ohio, Chairman of a Committee of the Bar, and senior member attending, presented, with appropriate remarks, the proceedings of a meeting of that body, which had been held in the Capitol on the preceding day, and which, after a preamble, concluded with the following resolutions:

Resolved, That the members of this Bar and officers of this Court, deeply impressed by the great and good qualities and acquirements and illustrious life of the late Chief Justice ROGER BROOKE TANEY, deplore the decree, inevitable at his advanced age, which has removed him from his place of usefulness, dignity, and honor here.

Resolved, That they will wear the usual badge of mourning during the term.

Resolved, That the Chairman of this Committee move the Court, at its meeting to-morrow, to direct these proceedings to be entered on the minutes, and that a copy be transmitted to the family of the deceased Chief Justice, with the respectful assurance of the sincere sympathy of the Bar.

The resolutions having been read by Mr. Carlisle, of the District, mover of them in committee, the Honorable Mr. Justice WAYNE, Senior Associate of the Court, who had sat on this bench for a longer time than even the whole of the long term in which the late Chief Justice was here, and during absences of the deceased Chief Magistrate, in later times, incident to his venerable years, had presided with rare dignity and to universal acceptance, replied:

"GENTLEMEN OF THE BAR: The Court receive with sensibility your resolutions commemorative of the life, the virtues, and the judicial eminence of our deceased friend and brother: we cherish his memory with affectionate recollections and with respectful veneration.

"Your tribute will be soothing to the hearts of his family, and with other notices of his death in the circuits, will be the memorial of a character which lawyers and judges may emulate with advantage.

"His life was honorable and useful. In early manhood it gave assurances that in both respects he would become distinguished. It disclosed the qualities and acquirements which were the foundation of his distinction. They were the anticipations of it.

"In a few years after his admission to the bar he was recognized to be a sound lawyer by the distinguished advocates of that day in the courts of Maryland, whose reputations were known in every part of the United States. His general demeanor, studious habits, and pure life, gave him the good-will and confidence of the people of the town and county in which he lived, and, without having been voluntarily a candidate, they elected him, at different times, their representative in places of trust and political interest, in which the whole State was concerned. In his discharge of them, he was marked to be one who could be relied upon in those public exigencies which it requires firm character and statesmanlike ability to manage and control successfully. In such public employments, and in the practice of his profession, it was admitted by his associates, and the able men who watched his course with interest and with expectation, that he had made himself familiar with the history of the law, in all its relations, for the organization of government for the preservation of human rights, and also with those principles which had, from the instincts of men as to right and wrong, or which had been arbitrarily made in ancient and later times, to rule the rights of property and the general conduct of persons in society in connection with their obligations to authority. He had read and reflected upon all that had been written concerning society and the control of it; also as to its actual condition, as made known by sacred and profane history, and the history of modern times. That course of reading and reflection familiarized him with the consideration of human rights, and strengthened his ability and disposition to maintain them. But he was no enthusiast. He thought that men had not been solely the victims of power, but of circumstances, in all times, and in our day, before modern civilization had received the full impress of the principles and divine tendencies of Christianity, and when rulers and legislators forgot those obligations by permitting the violation of them for the advancement of State policy and trade. He thought that God had designed for men rights, whatever might be the condition of their humanity, which could not be taken from them by fraud, by violence, or by avarice, with impunity from God's chastisement. Under such convictions he gave freedom to the slaves he had inherited, aided them in their employments, and took care of them when they were in want. He often said that they had been grateful, and they had never caused him a moment's regret for what he had done.

"By temperament he was ardent. Its impulses, however, could only be

seen in his eyes and heard in fervent language, when it was excited by an occasion; but he was never impetuous or vehement. He was courteous at all times, to every one, without affectation. He was cautious and circumspect without being indecisive; and the resolves of his purposes and principles were habitually expressed in words showing the sincerity of his convictions, without offence to any who thought differently. He was generous, and the only measure of his liberalities was his inability to give more. He was the willing advocate, professionally, of any one oppressed under color of the law, or who was too poor to litigate a legal right, or to seek in court the redress of a wrong. In becoming so he encountered responsibilities by opposing preconceived public opinion, and corrected this by reconciling popular misapprehension to himself and his client. The control of himself and his temper was no doubt the result in part of a practised philosophy, but it had its foundation in a higher source. In the full maturity of his life and mind he made a profession of his Christian belief, and, with the usual constancy of his nature, he died in the faith of his ancestors, in the communion of the Roman Catholic Church.

"He lived in Frederick City for twenty-three years, and then left it to reside in Baltimore. The prospect there of a larger practice and greater professional eminence induced him to do so. Several of the distinguished lawyers of the Baltimore Bar had died within a few years, leaving it without a leader. He took that position, and maintained it with increased reputation, when he was called to Washington, having received the appointment of Attorney-General of the United States. He was at that time the Attorney-General of Maryland. He had been called to that office by the Governor and Council, though they differed from him in politics, at a time of strong excitement. He was an avowed supporter of the side in opposition to that which they took. It was a magnanimous disregard of their differences, for which the Governor and his Council were honored and are still remembered. It led to his appointment as Attorney-General of the United States, by which his State reputation became national. When the latter office became vacant, though the claims of other distinguished lawyers and politicians were discussed, yet his fitness for the discharge of the duties of the office, and for the support of the principles of the Administration of which he was to become a member, was admitted by all. He was a worthy successor of those able men who had held the office for twenty years. It would be out of place at this time to particularize the cases of his official success and ability. His arguments were listened to with the marked attention of the Court, and, whether successful or otherwise in the case, his brief comprehended all the points of it, and all the law applicable to them.

"Of the political course of Chief Justice TANEY when he was the Attorney-General and the Secretary of the Treasury, we need only say that the party contests of that day have passed away, with the admission of those who were engaged in them that his course was sincere, and sustained with ability. His virtues as a statesman and judge were worthy of all the honor bestowed upon him, and they have been illustrated by services to his country which will place him in its history among our ablest and best men.

"As his predecessor, our great MARSHALL, had been, he was made Chief Justice, having but recently held high political office. Both were leaders in support of the policy of the Administrations of which they had been Cabinet officers. Each had to meet opposition of talent and eloquence,—Marshall, from those who had the impress of services in our long revolutionary struggle with England for national independence, and for their conspicuous agency in the formation of the Constitution of the United States; his successor, the opposition of the men of talent and virtue, who had, as legislators and in arms, carried the nation through a successful war with the same Power in support of its commercial interests and its rights of navigation.

"It is a happy occurrence that two such men should have been Chief Justices in succession, and that the life of each of them should have been prolonged to their respective ages. They presided in this court for sixty-three years, and by their decisions, aided by their associates and by the learning of the District Judges of the United States, we have a body of law, constitutional and other, unsurpassed in the records of courts, for the security which it gives to political, personal, and municipal rights. It is truly a system upon which we can rely as a foundation for securing the rights and independence of the States of this Union, and our National Liberty. Gentlemen of the Bar, it is our part to maintain it, and if this shall be done by us with discretion, and with a spirit exempt from the corruptions of party, our country will again be what it was before it became distracted by rebellion and scourged by civil war.

"The Court order that your resolutions be placed on the minutes, and that they have such other direction as you may desire."

And thereupon the Court adjourned

By commission from President Lincoln, dated December 6th, 1864, the Honorable SALMON PORTLAND CHASE, Esquire, of Ohio, lately Secretary of the Treasury of the United States, and previously a Senator from Ohio, as well as at one time Governor of that State, succeeded to the vacant office. He first took his seat upon the bench December 13, 1864, having previously, on the same day, taken the oath of allegiance, in the room of the judges, and the oath of office in open court, at his place upon the bench, in the presence of a large number of ladies and gentlemen, who had assembled to witness a ceremony which, in this nation, had taken place but once in sixty-three years preceding.

Messrs. Justices CATRON and DAVIS were indisposed during the term, and did not sit.

TABLE OF CASES.

DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1864.

Dermott *v.* Jones.

1. Performance of a contract to build a house for another on the soil of such person, and that the work shall be executed, finished, and ready for use and occupation, and be delivered over so finished and ready to the owner of the soil, at a day named, is not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be partially taken down and rebuilt on artificial foundations.
2. While a special contract remains executory the plaintiff must sue upon *it*. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue either on it, or in *indebitatus assumpsit*, relying, in this last case, upon the common counts; and in either case the contract will determine the rights of the parties.
3. When he has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner nor within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*.
4. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by fault of the defendant, the cost of the work or material has been increased, in so far the jury will be warranted in departing from the contract prices. In such case the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.

Jones, *a mason and house-builder*, contracted with Miss Dermott to build a house for her, *the soil on which the house was to be built being her own*. The house was to be built

according to very detailed plans and specifications, which *the "architect" of Miss Dermott had prepared*, and which were made part of the contract. In the contract, Jones covenanted that he would procure and supply all matters requisite for the execution of the work "in all its parts and details, *and for the complete finish and fitting for use and occupation of all the houses and buildings, and the several apartments of the house and buildings, to be erected pursuant to the plan of the work described and specified in the said schedule;* and that the work, and the several parts and parcels thereof, shall be executed, finished, *and ready for use and occupation*, and be delivered over, *so finished and ready*," at a day fixed. Jones built the house according to the specifications, except in so far as Miss Dermott had compelled him,—according to his account of things,—to deviate from them. Owing, however, to a latent defect in the soil, the foundation sank, the building became badly cracked, uninhabitable, and so dangerous to passers-by, that Miss Dermott was compelled to take it down, to renew the foundation with artificial "floats," and to rebuild that part of the structure which had given way. *This she did at a large expense.* As finished on the artificial foundations the building was perfect.

Jones having sued Miss Dermott, in the Federal Court for the District of Columbia, for the price of building, her counsel asked the court to charge that she was entitled to "recoup" the amount which it was necessary for her to expend in order to render the cracked part of the house fit for use and occupation according to the plan and specifications; an instruction which the court refused to give. The court considered, apparently, that even under the covenant made by Jones, and above recited, he was not responsible for injury resulting from inherent defects in the ground, the same having been Miss Dermott's own; and judgment went accordingly. Error was taken here. Some other questions were presented in the course of the trial below, and referred to here; as, for example, How far, when a special contract has been made, a plaintiff must sue upon *it?* how far he may recover in a case where, as was said to have been the fact

Argument for the builder.

here, the plaintiff had abandoned his work, leaving it unfinished? how far "acceptance,"—when such acceptance consisted only in a party's treating as her own a house built on her ground,—waives non-fulfilment, there being no bad faith in the matter? and some questions of a kindred kind. The most important question in the case, however, was the refusal of the court to charge, as requested, in regard to the "recoupment:" and the correctness of that refusal rested upon the effect of Jones's covenant to deliver, fit for use and occupation, in connection with the latent defect of soil upon which the foundation was built.

Messrs. Carlisle and Davidge for the builder: In all cases of *locatio operis faciendi*, where a workman undertakes to incorporate his work and materials with the property of another, and loss is sustained in consequence of some inherent defect in the property, the loss falls upon the employer. The maxim of *res perit domino* applies. Pothier, according to Story,* thus declares the law of France. It is also Scotch law. By it, if the workman is employed in working the materials, or adding his labor to the property of the employer, the risk belongs to the owner of the thing with which the labor is incorporated.† The employer, by the code of France, is the guarantor of the thing upon which the work and materials of the workman are to be expended: the code of Louisiana adopts the same rule: and the common law is the same. "If the loss in bad execution," says Kent,‡ "is not properly attributable to the *fault* or *unskilfulness* of the undertaker, or those employed by him, but arises from the inherent defect of the thing itself; in such a case the loss is to be borne by the employer, unless there is some agreement by which the risk is taken by the undertaker."

Undoubtedly the plaintiff *might* have assumed the extraordinary responsibility alleged; but, unless it be clearly shown that he did so, the presumption is that he contracted

* Bailments, § 426.

† 1 Bell, 456, 5th ed.

‡ 2 Commentaries, § 40.

for no more than the sort and degree of skill and diligence belonging to his trade. His covenant is not the stipulation of an insurer of anything, but is a stipulation to give his own skill, fidelity, and diligence in the prosecution of work undertaken in pursuance of *prescribed specifications and plans.* Miss Dermott purchased, by the contract, the skill and diligence of Jones, in supplying the work and materials stipulated, and also his judgment, so far as involved in the work and materials. But she never bought his judgment, as regarded the plans and specifications. He was never consulted about them. On the contrary, they were prepared by *her* architect, and put in his hands to work by. If he deviated from them, he was guilty of a breach of contract, for which he was responsible. His business was to work by, not to override them.

It is thus apparent that the present case is not one where an architect, employed to furnish plans and specifications, is guilty of neglect, and of not exercising that degree of skill and judgment which the employer prays; but is a case where a mechanic is employed to supply work and materials according to plans and specifications which he is bound to follow. The rule of law is that a party is responsible for the ordinary degree of skill belonging to his trade or profession. But Jones was not an engineer or architect, but, as the case states, "a mason and house-builder." Nor did Miss Dermott treat with him in any other character than that of a mechanic, competent, not to plan, but to carry out her plans. She employed an architect, by whom the plans and specifications were prepared. Her remedy, then, for any defects in the plans and specifications, was by suit against the architect, not by recoupment against Jones. The architect should have ascertained, if necessary, by boring or otherwise, whether they were practicable.

Messrs. Poe and Brent contra: The counsel of the other side do not cite one adjudged case in support of their view. The speculations of Pothier, the dicta of Story, or even the ab-

stract opinions of Bell and Kent, are not "authority" anywhere, and ought not to be cited.

The theory of the other side makes the proprietor of the ground an insurer to the builder of the stability and solidity of the soil on which such builder contracts to build work. We might deny the soundness of such a doctrine in any case of a contract to build a house, where the payment of the price is to be made when the work is done; because a man cannot be said to build anything which falls down before he completes it. But, whatever may be the general rule, we rely, in the case here, upon the *contract* that this plaintiff will furnish every material and thing requisite to complete and finish these buildings fit for use and occupation. He does not merely covenant (as contended on the other side) to execute these specifications, but he superadds the contract that he will, over and above executing these, furnish everything necessary to complete it fit for use and occupation, and will *deliver* it finished and ready for occupation. The law, in cases like this, is settled and reported law from at least A.D. 1670, and from the leading case of *Paradine* v. *Jayne*, given us by the old reporter Alleyn, in 23d Charles II. The defendant there had taken a lease, covenanting to pay rent. He pleaded "that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession and him expelled, whereby he *could not* take the profits." On demurrer, the court resolved "that the matter of the plea was insufficient," and that "he ought to pay his rent." "And this difference," says Alleyn, "was taken: that where the *law* creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. . . . . But where a party by his *own contract* creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a

house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it;" and the report ends by declaring that where there is a covenant to pay, "though the land be surrounded or gained by the sea, or made barren by wild-fire, yet the lessor shall have his whole rent;" and judgment went accordingly. This case has been always followed in England. American decisions are to the same general purpose, to wit, that a man *must* fulfil covenants deliberately made. Without citing earlier ones, or quoting at large even a late one in New York,* we refer to one of the very latest, where the best cases, both English and American, are collected. We mean *School Trustees* v. *Bennett*,† in New Jersey, a case which, like our own, was the case of building a house. This case is specially in point, or at least specially strong, for the house was there *twice* destroyed by natural causes. In the first instance, when it was half way towards completion, "a violent gale of wind arose suddenly, without any of the usual premonitory signs of a storm, and prostrated the building:" afterwards, and when rebuilt, "it fell, *solely* on account of the soil having become soft and miry;" though, at the time the foundations were laid, the soil was "so hard as to be penetrated with difficulty by the pickaxe," and its defects were latent; the softness having arisen, as was suggested, by the rising of springs; at any rate from "natural causes *wholly* beyond the control of the contractors." The court, however, was resolute, and decided that "if a person contract with the owner of a lot to build and complete a building on a certain lot, and, by reason of a latent defect in the soil, the building falls down before it is completed, the loss falls upon the contractor;" and decided even, as in the case in New York, that the owner of the soil may recover back payments which he has made on account. The court reviewed the authorities from *Paradine* v. *Jayne*, in old Alleyn, down; and say, finally, "No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foun-

* Tomkins *v.* Dudley, 25 New York, 272. † 3 Dutcher, 515.

dation in good sense and inflexible honesty. He that agrees to do an act should *do it*, unless absolutely impossible. He should provide against contingencies in his contract. . . . . The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been; they all rest upon the simple principle, 'such *is* the agreement,' clear and unqualified, and it *must* be performed, no matter what the cost, if performance be not absolutely impossible."

Mr. Justice SWAYNE delivered the opinion of the court:

The defendant in error insists that all the work he was required to do is set forth in the specifications, and that, having fulfilled his contract in a workmanlike manner, he is not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing.

Without examining the soundness of this proposition, it is sufficient to say that such is not the state of the case. The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant.* That covenant it was his duty to fulfil, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.†

* See *supra*, p. 2.

† Paradine *v.* Jayne, Alleyn, 27; Beal v. Thompson, 3 Bosanquet & Puller, 420; Beebe *v.* Johnson, 19 Wendell, 500; 3 Comyn's Digest, 93.

The application of this principle to the class of cases to which the one under consideration belongs is equally well settled. If a tenant agree to repair, and the tenement be burned down, he is bound to rebuild.* A company agreed to build a bridge in a substantial manner, and to keep it in repair for a certain time. A flood carried it away. It was held that the company was bound to rebuild.† A person contracted to build a house upon the land of another. Before it was completed it was destroyed by fire. It was held that he was not thereby excused from the performance of his contract.‡ A party contracted to erect and complete a building on a certain lot. By reason of a latent defect in soil the building fell down before it was completed. It was held (*School Trustees* v. *Bennett*,§ a case in New Jersey, cited by counsel), that the loss must be borne by the contractor. The analogies between the case last cited and the one under consideration are very striking. There is scarcely a remark in the judgment of the court in that case that does not apply here. Under such circumstances equity cannot interpose.‖

The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

We are of opinion that the plaintiff below was entitled to recover, but that the court, in denying to the defendant the right of recoupment, committed an error which is fatal to the judgment.

* Bullock *v.* Dommett, 6 Term, 650.

† Brecknock Company *v.* Pritchard, Id. 750.

‡ Adams *v.* Nickols, 19 Pickering, 275; Bumby *v.* Smith, 3 Alabama, 123, is to the same effect.

§ 3 Dutcher, 513.

‖ Gates *v.* Green, 4 Paige, 355; Holtzaffel *v.* Baker, 18 Vesey, 115.

Opinion of the court.

We might here terminate our examination of the case; but as it will doubtless be tried again,—and the record presents several other points to which our attention has been directed,—we deem it proper to express our views upon such of them as seem to be material.

While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties.

When he has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*.

He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far, the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.

There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications.*

JUDGMENT REVERSED, and the cause remanded for further proceedings in conformity with this opinion.

* Cutter *v.* Powell, 2 Smith's Leading Cases, 1, and notes; Chitty on Contracts, 612, and notes.

HAWTHORNE *v.* CALEF.

A State statute repealing a former statute, which made the *stock* of stockholders in a chartered company liable to the *corporation's* debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void. And this is so, even though the liability of the stock is in some respects conditional only; and though the stockholder was not made, by the statute repealed, liable, in any way, in his *person* or property generally, for the corporation's debts.

THE Constitution of the United States ordains that "no State shall pass any law impairing the obligation of *contracts.*" With this provision in force, the State of Maine, on the 1st April, 1836, incorporated a railroad company; the charter providing that "the *shares* of the individual stockholders should be liable for the *debts of the corporation.*" "And in case of *deficiency of attachable corporate property or estate,*" the provision went on to say, "the *individual property, rights, and credits* of any stockholder shall be liable to the *amount of his stock*, for all *debts of the corporation* contracted prior to the transfer thereof, for the term of six months after judgment recovered against said corporation; and the same may be taken in *execution on said judgment*, in the same manner as if said judgment and execution were against him individually; OR, said creditor, after said judgment, may have his *action on the case* against said individual stockholder; but in no case shall the *property, rights*, and *credits* of said stockholder be taken in execution, or attached as aforesaid, beyond the *amount of his said stock.*" Another section provides, that if sufficient corporate property to satisfy the execution could not be found, the officer having the execution should certify the deficiency on the execution, and give notice thereof to the stockholder whose *property he was about to take;* and if such stockholder should show to the creditor or officer sufficient attachable *corporate* property to satisfy the debt, "his *individual property, rights, and credits shall thereupon be exempt* from attachment and execution."

The plaintiff, Hawthorne, who had supplied the corpora-

tion, then embarrassed and insolvent, with materials to build its road, having obtained judgment as a creditor against *it*, and being unable to get from *it* satisfaction (the company having, in fact, no property), sued the defendant, Calef, who was a stockholder, both at the time when the debt was contracted and when judgment for it was rendered; and no transfer of whose stock had been made. A few months *after* the debt was contracted, the legislature of Maine passed a statute repealing the "individual liability" clause of the charter.

On a question before the Supreme Court of Maine,—the highest court of law in that State,—whether such repeal was or was not repugnant to the clause, above cited, of the Constitution, that court held that it was not; that the original provision,—not making the stockholder *personally* liable in any way,—did not constitute a "contract" between the creditor and him, within the meaning of the Constitution; and that, while, *but* for the repealing act, the plaintiff would have been entitled to recover of the stockholder individually to the extent of his stock, this repealing act had taken away and destroyed such right.

Judgment being given accordingly, by the said court, in favor of the State statute, the correctness of such judgment was now, on error, before this court.

Mr. Curtis, for the creditor, Hawthorne: A charter is a contract between the State and the corporation; but not necessarily between them only. If it contain provisions on which third persons are invited to give credit, and which hold out assurances to them that if they will give credit a certain fund, or certain persons, will become responsible, such assurances, when accepted and acted on, become a contract, the obligation of which is protected by the Constitution. Thus in *Woodruff* v. *Trapnal*,* a charter contained the assurance that the bills of a bank would be accepted in payment of public dues. This was held to create a contract with all

* 10 Howard, 190.

persons who should receive the bills while the assurance remained unrepealed. So in *Curran* v. *The State of Arkansas*,* the charter of a bank contained an assurance that a certain fund should be responsible for the debts of the bank, and this was held to amount to a contract with creditors not to divert that fund from the payment of their debts. It has been held by the courts of New York, that such an act of incorporation as this is leaves the stockholders to stand as original contractors, and liable, as such original contractors, for the debts of the corporation; and the fact that the legislature has required the remedy against the corporation to be exhausted before proceeding against the stockholder does not vary the nature or ground of his liability. In *Corning* v. *McCullough*,† the court say:

"The original stockholders, by their acceptance of the charter, and subsequent purchasers in becoming members, assented and agreed to the terms and conditions of the act of incorporation. The defendant in this suit, in common with the other stockholders, by his acceptance of the charter, agreed to its terms, and especially to that feature of it so strongly marked, of the individual liability of the stockholders, equally with that of the corporate body, for the debts of the company. It is a liability which every stockholder must be understood to assume and take upon himself, and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust as well to the personal liability of the stockholders, as to the responsibility of the corporation, for the fulfilment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated."

In *Conant* v. *Van Schaick*,‡ the question now under consideration arose; and it was held that a law repealing the liability of stockholders was inoperative as to existing creditors, because it would impair the obligation of their contracts.

Even if it should be held that no contract existed with

* 15 Howard, 304. † 1 Comstock, 47. ‡ 24 Barbour, 87.

the plaintiff, save his contract with the corporation; still, the law in question did impair the obligation of *that* contract. When the debts were contracted the plaintiff had two remedies: one against the corporation, the other against the stockholders. The former was, and was known to be, wholly useless; the latter was sufficient and effectual; and the law in question has destroyed this sole efficient and effectual remedy, and substituted no other in its place. Such a law impairs the obligation of the contract, to enforce which the remedy was given. The principle which is decisive of this case, was laid down in *Green* v. *Biddle*.* That principle is, that a law, which so changes the nature and extent of existing remedies as materially to impair the rights of the creditor, impairs the obligation of his contract.

In *Bronson* v. *Kinzie*,† the State law restrained the creditor from cutting off the right of redemption of mortgaged property, by a sale under a power contained in the mortgage; and gave twelve months, after such sale, to redeem the property. It did not affect the plaintiff's right of action against the debtor to recover the debt. It did not release the property held as collateral security for the debt; but it encumbered the remedy of the creditor upon his collateral security, so as materially to impair it. *For this reason* the law was held invalid.

In the case at bar, while the law in question does not affect the plaintiff's right of action against an insolvent corporation which contracted the debt, it deprives him of all recourse to his remedy on the property of the stockholders, which the charter had made liable for the debt. The difference between the two cases is, that, in the case decided, the collateral remedy for the debt was only materially impaired; in the case at bar it is destroyed.

In *McCracken* v. *Hayward*,‡ it was decided that a law prohibiting property from being sold on execution for less than two-thirds of its appraised value, so impaired the remedy as to be invalid, upon the ground that, when the contract was

* 8 Wheaton, 1. † 1 Howard, 311. ‡ 2 Howard, 608.

made, the creditor had the absolute right to levy his execution and sell the property of the debtor. Now in the case at bar, the charter of the corporation and the law of the State had conferred on the creditor the right to levy his execution on the property of the stockholders, or to subject their property to the payment of the debt by an action on the case. These laws of the State had, in the language of the court, created this right, and attached it to the contract; it was part of its obligation. As was said by the court, in *Curran* v. *The State of Arkansas*, "The obligation of a contract, in the sense in which these words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed, that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.'

Mr. Shepley, contra, for the stockholder, Calef: There was no privity of contract between the creditors of the corporation and the individual members. They are, therefore, not personally liable, unless this liability is expressly imposed by statute. "Such liability," says Shaw, C. J., in *Gray* v. *Coffin*,* "is a wide departure from the established rules of law, and is, therefore, to be construed strictly, and is not to be extended beyond the limits to which it is carried by positive provisions of the statute."

Then the provisions relied on to give this personal responsibility recognize the corporation as an entity, capable of contracting debts; and these are *its* debts, and not the debts of any other party. No other *person* is made liable for them; nor is even any other thing made liable for them, originally, or absolutely, or wholly, or permanently. "The *shares* of individual stockholders shall be liable for the *debts of the corporation.*" And only in *case of deficiency* of attachable corporate property, the *individual property, rights, and credits* of any stockholder shall be liable, to the *amount of his stock.*

* 9 Cushing, 192.

This property might be taken on the execution, which had been issued on the judgment against the corporation, to which the stockholder was *no* party; OR, the creditor might have his action on the case, on the statute; manifestly to reach, by the process of foreign attachment, the "rights and credits," which could not be reached by the execution against the corporation. But in no case could property, rights, and credits of a stockholder be taken in execution or attached, beyond the amount of his stock. And the stockholder could exempt his property entirely from the execution and attachment, by disclosing and showing sufficient attachable corporate property.

In all this, there is no recognition of any contract on the part of the stockholder, or liability under contract. The remedy, to enforce whatever liability the statute creates, *excludes* the theory of contract. It is a statute remedy, to enforce a statute burden against the *property* of the stockholder.

What, then, the plaintiff had, was a remedy created by statute. And the legislature has power to take away by statute that remedy which statute alone gave. The exception is, that it may not take away vested rights. But the rights of a party, when they exist only to the extent of statute remedy, are not vested until after judgment.

It will be conceded that the legislature might take away and destroy all legal process for compelling the corporation to perform its contract, and still leave the liability of the stockholder's property, and the creditor's statute right against that, unimpaired. So it may take away and destroy all power to enforce any rights against the stockholders, or their property, and leave the obligation of the corporation's contract unimpaired.

The obligation of the maker of a promissory note is different from that of the indorser or guarantor of the same note. But the holder has two remedies,—one against the maker, the other against the indorser or guarantor. A law which should take away the remedy against the indorser or guarantor, would not impair the obligation of the maker's

contract expressed in the note,—though it would impair the obligation of the contract with the indorser or guarantor. If, now, the liability of the indorser or guarantor, instead of arising from a contract, were arbitrarily imposed by a statute, which declared, that whenever a promissory note was made for a good consideration, certain relatives of the maker, or neighbors, or religious, or literary, or political, or business associates of his, should be liable, as guarantors or indorsers of such note, who would be bold enough to contend, that the repeal of such statutory liability would impair the obligation of the contract between the maker and the payee of such note? It would add no strength to an argument in support of such a proposition, to say, that when the payee of the note parted with the consideration for it, he trusted to this liability which the statute imposed; or that the maker was insolvent, and the remedy against him was insufficient and useless, and that the repeal of the statute liability of the other persons had taken away and destroyed the only sufficient remedy which the payee had.

As respects the authorities cited by Mr. Curtis: *Woodruff* v. *Trapnal*, and *Curran* v. *The State of Arkansas*, were both decisions on the same charter, that of an Arkansas bank, and both rested upon special facts.

The legislature of Arkansas had chartered a banking corporation, of which the State was the sole owner; and in the charter had declared that the bills of this bank, which was nothing but an agent of the State itself, should be received in payment of debts due to the State. The bank, by its charter, was simply a convenient agent of the State to negotiate between the State and third parties, and its bills were substantially bills of the State of Arkansas.

Speaking in another case* of its own decision, in *Woodruff* v. *Trapnal*, this court has said:

"We held that the charter constituted a contract between the State and the holder of the bills of the bank; that the pledge of the State to receive the notes of the bank, in payment of debts,

* Paup et al. *v.* Drew, 10 Howard, 218.

was a standing guarantee, which embraced all the paper issued by the bank until the guarantee was repealed: *and that this construction was founded upon the fact, that the bank belonged exclusively to the State, was conducted by its officers, and for its benefit.* That, in this respect, the obligation of the contract applied to a State equally as to an individual; and that as to the binding force of a similar guarantee by an individual, there would seem to be no ground for doubt."

To make the case at bar analogous to this, the stockholders of *our* railroad company should be the supreme power which chartered the company; so that the *charter*, instead of being a contract between the State and the stockholders, should be a contract between the stockholders who created it, and the community who accepted and acted upon its guarantees, voluntarily inserted in it by these stockholders. The State of Arkansas had, in the cases relied on, *promised* to receive the bills of their bank, expressly, by its charter, made by the State. The stockholders of this railroad company simply submitted to "*liabilities* and *duties*," to which the legislature compelled them to be "*subject.*"

The New York decisions furnish still less support to the plaintiff's counsel. The passage from the opinion in *Corning* v. *McCullough*, in its reasoning, does, indeed, *primâ facie*, sustain this position; and if, as the counsel affirms, this reasoning were predicated upon "*such* an act of incorporation" as that which incorporated the railroad company in Maine, it would have some weight, though it would not, to this court, be an authority. But the language of the charter there was, "that the *stockholders* of the corporation shall be, *jointly and severally*, *personally* liable for the *payment of all debts and demands* contracted by the corporation." By their charter, those stockholders were liable for the payment of *all* debts and demands, not *of* the corporation, but contracted by the corporation. They were the stockholders' debts, as well as the debts of the corporation,—contracted by the corporation, as if *it* were the agent of the stockholders. The stockholders were liable; not the "property, rights, and credits" of the stockholders, nor their "*shares*,"

but the men themselves. They were liable for the *payment of all debts and demands;* not to the amount of their stock or shares which they severally owned, only. They were liable in the first instance, at the very creation of the debt or demand; not only in case of deficiency of corporate property. They were liable permanently; as long as the debt remained a debt; not for a year only after the transfer of their stock, or six months after judgment recovered against the corporation, on a suit brought within such year; but *forever*, if the debt was kept alive; without any power of exonerating themselves by showing corporate property.

When *Conant* v. *Van Schaick*—the other New York case relied on—was decided, a general statute of the State had created certain corporations, by language precisely identical with that in the charter considered in *Corning* v. *McCullough;* and the liability of stockholders of one of these corporations was, on the authority of *Corning* v. *McCullough*, held to rest on a contract, at common law, and, *therefore*, a statute repealing such liability was held to impair the obligation of a contract.

Reply: The only question is, whether, when the repealing law destroyed the existing right of action by the plaintiff against the defendant to recover from him the amount of the debt due to him from the corporation, it impaired the obligation of a contract? One argument of the other side is, that the right of the plaintiff was *created by statute;* that the legislature have power to take away by statute what was given by statute, except vested rights; and that the right of a party when it exists *only* by statute, does not become vested till after judgment. But this is erroneous doctrine when applied to this case.

1. The *right* of the plaintiff was not *created* by statute, and did not exist "only by statute." It is true there was a statute in existence which enacted that if the plaintiff should sell merchandise to a corporation which should fail to pay for it, he should have a right of action against any one of its stockholders to recover its price, to the amount of his stock.

Reply for the creditor.

But this law did not *create* the plaintiff's *right*. This plaintiff parted with his merchandise to an insolvent corporation *on the faith of this liability which the defendant, by taking stock, had assented to be subject to*. The only effect of the law was to apprise the parties that if such a sale should be made, the defendant would come under a legal obligation to the plaintiff to pay the debt, and to create that legal obligation upon the sale; just as the law apprises the vendee of goods, that he will come under a legal obligation to the vendor for the price, and creates that legal obligation on the sale. The right in neither case is created by the law alone; but in both cases the law does create the legal obligation; and in one case just as entirely as in the other. It may be true that a statute may take away what a statute has given, except vested rights. But the question still remains whether this plaintiff had not a vested right to the obligation of the defendant, and to some adequate remedy to enforce that obligation. In *McCracken* v. *Hayward* the right of the plaintiff to sell the defendant's property on execution was given by a State law. Yet it could not be taken away or impaired by a State law, because the creditor had a vested right to some adequate remedy, such as existed when his contract was made. This plaintiff sold his property to an insolvent corporation on the faith of the obligation of the defendant to pay for it, and of the remedy the law then allowed him to enforce the obligation of the defendant to perform the contract.

If A. is under a complete legal obligation to B. to perform the contract of C., which B. can enforce by an action against A., and which contract B. made on the faith of A.'s obligation to perform it, has not B. a vested right to have A. perform the contract? and can A.'s obligation be released by law without impairing the obligation of a contract, within the meaning of the Constitution? It is A.'s duty to perform the contract. *That duty is recognized and enforced by the law.* The law is so changed that this duty can no longer be enforced. The obligation of the contract which A. was under is released. Is it any answer that C., an insolvent debtor, is yet

under the obligation of the contract? The contract created two perfect and complete and several obligations,—one of A., the other of C. One is as much the obligation of the contract as the other.

It is an unfounded assumption that the *obligation* of a contract can be incumbent only on *the party that makes the promise.*

The obligation of a contract is a duty of performing it recognized and enforced by the laws. An executor or administrator, though he has made no promise, is under a legal duty to perform the contracts of the deceased; *the obligation of the contract is incumbent on him;* and a State law releasing him would as clearly impair the obligation of the contracts of the deceased as a law releasing the living debtor. So a husband is bound to perform the contracts of his wife before marriage. Without making any promise, he takes on himself the legal duty of performing these contracts of hers, by voluntarily entering into the marital relation at a time when and place where the law made this duty incumbent on him. Could he be released without impairing the obligation of such contracts? For still stronger reasons was the obligation of this contract incumbent on the defendant. He voluntarily entered into such relations with this corporation as created a perfect legal obligation to pay this debt when it was contracted, and the plaintiff parted with his property to an insolvent corporation on the faith of this legal obligation incumbent on the defendant.

The defendant's counsel has pointed out a supposed distinction between the cases cited from the New York reports and this case. It is that, in those cases, the charters made the stockholders jointly and severally *liable* for all the debts and demands *contracted by the corporation. But the defendants were not contractors.* The contracts were made by a third person, viz., the corporation. The relation of the stockholders to the contracts *was not created by the contracts themselves, but by the law*, as in this case; and the obligation of this defendant to perform this contract is as complete and perfect,

and arises from the same causes as the obligations of the defendants in the cases in New York.

In those cases, as in this case, there was a liability created by law, and made incumbent on one person to perform the contracts of another person. If that liability could not be discharged without impairing the obligation of a contract, how can this liability be discharged without a similar violation of the Constitution?

Mr. Justice NELSON delivered the opinion of the court.

The question upon the provisions of the charter of the railroad company—in connection with the sale of the property by the plaintiff to the corporation, out of which this debt accrued—is, whether a contract, express or implied, existed between him and the stockholder?

It is asserted, in behalf of the latter, that a contract existed only between the creditors and the corporation; and that the obligation of the stockholder rests entirely upon a statutory liability, destitute of any of the elements of a contract.

Without stopping to discuss the question upon the clause of the statute, we think that the case falls within the principle of *Woodruff* v. *Trapnal*,* and *Curran* v. *State of Arkansas*,† heretofore decided in this court.

In the first of these cases, the charter of the bank provided that the bills and notes of the institution should be received in all payment of debts due to the State. The bank was chartered 2d November, 1836. On the 10th January, 1845, this provision was repealed, and the question was, whether or not, after this repeal, the bills and notes of the bank, outstanding at the time, were receivable for debts due to the State. The court held, after a very full examination, that the clause in the charter constituted a contract with the holders of the bills and notes on the part of the State, and that the repealing act was void as impairing the obligation of the contract.

* 10 Howard, 190. † 15 Id., 304.

In the second case, the charter of the bank contained a pledge or assurance that certain funds deposited therein should be devoted to the payment of its debts. It was held by the court, that this constituted a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

Now, it is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability.

This question has been repeatedly before the courts of the State of New York, and they place the obligation of the stockholders upon two grounds. The *first* is that of contract. In *Corning* v. *McCullough*,* Chancellor Jones, then in the Court of Appeals, observes that the liability of the defendant, upon which the action is grounded, is for the payment of a debt of the company incurred by the purchase of merchandise of the plaintiffs, for the use and benefit of the company, and wherein the defendant, as one of the members, was interested, and for which he thereby, and under the provisions of the charter, became and was, concurrently with the company, from the inception of the debt, personally liable. It is, he says, virtually and in effect, a liability upon a contract and the mutual agreement of the parties; not, indeed, in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties. The *second* ground is upon the view that the legislature, by subjecting the stockholders to personal liability for the debts of the company, thereby removed the corporate protection

* 1 Comstock, 47, 49.

Opinion of the court.

from them as corporators, and left them liable as partners and associates as at common law.*

There is another view of the case, involving a violation of the principal contract between the creditors and the corporation, which we think equally conclusive against the judgment of the court below. This view rests upon a principle decided in *Bronson* v. *Kinzie*,† and the several subsequent cases of this class. There Kinzie executed a bond mortgage to Bronson, conditioned to pay $4000 on the 1st of July, 1842, and covenanted, that in case of default, the mortgagee should sell the premises at public auction, and convey them to the purchaser. Subsequently to the execution on the mortgage, the legislature passed a law that mortgagors on a sale of the premises, under a decree of foreclosure in chancery, should have a right to redeem them at any time within twelve months from the day of sale. By another law it was provided, that when the premises were offered for sale, they should not be struck off unless at two-thirds of a previous valuation. The court held that these acts so seriously affected the remedy of the mortgagee as to impair the obligation of the mortgage contract within the meaning of the Constitution, and declared them void. Now, applying the principle of this class of cases to the present one, by the clause in the charter subjecting the property of the stockholder, he becomes liable to the creditor, in case of the inability or insolvency of the company for its debts, to the extent of his stock. The creditor had this security when the debt was contracted with the company over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company.

We are of opinion, upon both of the grounds above recited, that the court below erred.

JUDGMENT REVERSED.

* Conant *v.* Van Schaick, 24 Barbour, 87. † 1 Howard, 311.

Statement of the case.

DRURY *v.* FOSTER.

A paper, executed, under seal, for the husband's benefit, by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and the sum borrowed, and to be filled up by the husband, is no deed as respects the wife, when afterwards filled up by the husband and given to a lender of money, though one *bonâ fide* and without knowledge of the mode of execution. The mortgagee, on cross-bill to a bill of foreclosure, was directed to cancel *her* name.

FOSTER, of Minnesota, being about to engage in some enterprise, and wanting money, asked his wife, who owned, in her separate right, a valuable tract of land in that State, to mortgage it for his benefit. What exactly was said or promised did not appear. However, Foster afterwards went to a notary, who exercised, as it seemed, the business of a scrivener also, and directed him to draw a mortgage of the property, with himself and wife as mortgagors, but leaving *the name of the mortgagee, and the sum for which the land was mortgaged, in blank.* This the magistrate did. Foster acknowledged the deed, at the magistrate's office, *in this shape*, and the magistrate then took the instrument to Mrs. Foster, at her husband's house, that she might sign and acknowledge it in the same shape. When the magistrate took the mortgage to her thus to execute, Mrs. Foster said, "she was fearful that the speculation which her husband was going into would not come out right; *that she did not like to mortgage that place*, but that he wanted to raise a few hundred dollars, or several hundred dollars, or something to that effect,"—the magistrate, who was the witness that gave the testimony, did not recollect the exact expression which she used,—"and that she did not like to refuse him, and that so she consented to sign the mortgage." Mrs. Foster, having signed the instrument in *this blank shape*, the notary, under his hand and seal, certified, in form, that the husband and wife, "the signers and sealers of the *foregoing deed*," had personally appeared before him, "and acknowledged the signing and sealing *thereof* to be their voluntary act and *deed*, for the uses

and purposes expressed;" and that the wife, "being examined separate and apart from her said husband, and the contents of the foregoing deed made known to her by me, she then acknowledged that she executed the same freely, and without fear or compulsion from any one." Such form of separate acknowledgment, it may be well to say, is required by statute, in Minnesota, to give any effect to a *feme covert's* deed. After taking the wife's acknowledgment, the notary gave the instrument to her husband. He, finding the complainant, Drury, willing to lend as much as $12,800 upon the property, himself filled up the blanks with the name of Drury, as mortgagee, and with the sum just mentioned as the amount for which the estate was mortgaged. In this form the instrument was delivered to Drury, who, knowing nothing of the facts, advanced the money in good faith, and put his mortgage on record. There was no evidence that the wife derived any benefit from the money advanced, or that she ever knew that such a large sum was advanced.

On a bill of foreclosure brought four years afterwards by Drury against Foster and wife, in the Federal Court for Minnesota, the defence was, that the mortgage was not the wife's deed; a defence which the court below thought good as to her. It accordingly dismissed the bill as regarded her, giving a decree, however, against the husband. The correctness of its action as regarded the wife was the question, on appeal, here.

Mr. Peckham for Drury, the mortgagee: All will admit that it is not easy to conceive of a case addressing itself more to a sense of equity. Drury, without a circumstance to excite suspicion, and relying upon a mortgage regular upon its face, advanced a large sum in perfect good faith. He supposed, too, as was natural, that the mortgagors were acting in equal good faith. Mrs. Foster deliberately, and with understanding, put it into the power of her husband to obtain the loan. Will she be permitted, at this late day, in conjunction with her husband, to disavow her acts, and thus, in effect, defraud an innocent third party whom she has been

chiefly instrumental in bringing into his present position? Even if Mrs. Foster were entirely innocent in the premises, and was the victim of the fraud of her husband, yet either she or the plaintiff must suffer loss in the present case; and no principle is better settled than that where loss must fall upon one of two innocent parties, it must be borne by that one who is most in fault. There is no reason for exempting the wife from the operation of this rule. On the contrary, in transactions between the husband and wife and third parties, there is the strongest reason for applying the principle. It would be against public policy, and expose transactions relative to real estate to hazard, to allow a married woman to screen herself from the consequences of her own acts under the circumstances of the present case. Such a doctrine would subordinate all other interests to those of married women.

Viewed on legal principles, the conclusion is to the same effect. It is of no pertinence to cite, in this day and this country, "technical dogmas," as Grier, J., calls them,* out of Shepherd's Touchstone, or Perkins. These old books may, indeed, declare, "that if a man seal and deliver an empty piece of paper or parchment, albeit he do therein withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed."† But such doctrines have been exploded, even in England, these two hundred years. Certainly the contrary, as respected a bond, was adjudged in *Zouch* v. *Claye*, 23 and 24 Charles II, in the days of Norman French and of black-letter law. Levinz thus reports the case:‡

"Det sur obligation. Le case fuit tiel. A. and B. seal and deliver le bond a C., et puis per le consent de touts les parties le nom et addition de D. fuit interline, et il auxy seal l'obligation et ceo deliver. Et si l'obligation per cest alteration fuit faet void vers A. and B. fuit le question. Et per Hale et totam curiam adjudge que nemy."

* Mercer Co. *v.* Hacket, 1 Wallace, 85.

† Shepherd's Touchstone, 54; Perkins, § 111; Co. Lit. 171.

‡ 2 Levinz, 35.

Argument for the mortgagee.

"Debt on bond. The case was this. A. and B. seal and deliver a bond to C.; and then, with the consent of all parties, the name and addition of D. was interlined; and *he* also sealed the bond and delivered it. The question was whether, owing to this alteration, the bond was void as respected A. and B. And by Hale, and the whole court adjudged that it was not."

Texira v. *Evans*, cited in *Master* v. *Miller*, and reported by Anstruther,* A. D. 1793 (Lord Mansfield's time), did but affirm this old adjudication. There, Evans wanted to borrow £400, or so much of it as his credit should be able to raise. For this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond. Texira lent £200 on it, and the agent accordingly filled up the blanks with the sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed.

The principle was early enunciated in America. Chief Justice Parsons, in delivering the judgment in *Smith* v. *Crooker*,† where a bond had been executed by a surety before his name had been inserted in the body of the instrument, and his name being afterwards inserted therein in his absence, holding the instrument valid, remarks: "The party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond." *Ex parte Kerwin*‡ is a later case, one in New York. It was there held, that an appeal bond drawn in blank as to the recital of the judgment, and executed by the appellant and his surety, the former giving parol authority to his surety to ascertain from the justice the amount of the judgment, and fill up the blank accordingly, and deliver the bond for both, and which was done, was a good bond. This is similar to the case at bar, in the respect that the agent for the insertion of the blanks and delivery of the instrument was one of the co-obligors.

* Vol. 1, p. 228. † 5 Massachusetts, 539. ‡ 8 Cowen, 118.

Many other American cases are to the same point.* This relaxation of ancient technicality is universal in our new Western States. There people deal with lands as they do with oxen; and pass a fee simple to a hundred acres with as much facility as they do the title to a plough or a cart.†

We assert, and the cases just cited prove, that a paper under seal, executed with blanks, becomes, when those blanks are filled up, and the instrument is afterwards delivered, the party's deed. And it is difficult to see why a contrary view should be entertained. Parol authority is confessedly sufficient for the mere delivery of a deed. But delivery is the act of acts. It is the act by which each and all of the other acts necessary to the execution of the deed become operative and effectual. By it the signing, the sealing, and the acknowledgment take effect. If, therefore, delivery can be made under parol authority, why may not blanks be filled in, and alterations and interlineations made in deeds before their delivery by like authority? Neither of these things constitute the execution of a deed, but are merely acts necessary to be performed in the execution thereof; acts consummating and giving effect to the execution.

The fact that the party making this deed was a *feme covert* is unimportant. What an ordinary person may do without examination, a *feme covert* may do when separately examined. If an ordinary person, without examination, may execute a deed with blanks, a *feme covert* may execute a similar deed, provided she be separately examined, know fully what she does, and it be plain that it was such a deed she wished and meant to execute. Why not? Certainly she could convey her whole estate, if it were conveyed by deed, whose blanks were filled. Why may she not convey a portion whose extent remains undefined, if she has wished and meant so to do? Her real wishes, her perfect knowledge of what she is

* Sigfried *v.* Levan, 6 Sergeant & Rawle, 308; Wiley *v.* Moore, 17 id. 439; *Ex parte* Decker, 6 Cowen, 59; Anderson *v.* Lewis, 1 Freeman's (Mississippi) Chancery, 178.

† See what is said by Miller, J., *post*, Miles *v.* Caldwell.

doing, her entire freedom from the husband's coercion and compulsion, these are the points to which the law looks; and these being settled, her capacity is as great as if *dis-covert.* In this case, when separate and apart from her husband, Mrs. Foster gave her voluntary consent to a sealed instrument, with blanks; in that same manner, she authorized these blanks to be filled at the discretion of her husband, to whom she knew it would be handed over.

But even if not her deed, Mrs. Foster is *estopped* from asserting that she did not execute the mortgage. The mortgage in question was duly signed, sealed, acknowledged, and certified to, with the name of the grantee and the amount of the mortgage debt in blank, and was, when so signed, sealed, and acknowledged, well known to both grantors to contain these blanks. The conclusion, therefore, is, that the blanks were designedly left by both grantors to facilitate the negotiation of the loan, which was the avowed object of the execution of the mortgage, well known to and understood by Mrs. Foster, as appears by her own declarations made to the notary public at the time, and because the amount and terms of the loan which her husband might succeed in effecting, and the party of whom he might make it, were at the time unknown to either grantor. The mortgage having been thus deliberately, and with understanding, executed in such form and for such purposes by both parties, was, with the full knowledge and deliberate consideration of Mrs. Foster, delivered by her to the notary, to be by him delivered to the other grantor, her husband, which was accordingly done; and this mortgage, with all the blanks filled in, and in all respects perfect, was delivered by Foster to Drury, the complainant. The doctrine of estoppel *in pais*, thus laid down by Lord Denman,* applies to such a case: "The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the

* Packard *v.* Sears, 6 Adolphus & Ellis, 469.

former is concluded from averring against the latter a different state of things as existing at the same time."

There is yet another ground why this decree, as respects the wife, should be reversed. Evidence was introduced by Mrs. Foster, for the purpose of showing that, at the time of the signing, sealing, and acknowledgment of the mortgage, there were blanks in it; and this evidence was introduced upon the theory that, there being such blanks at such time in the mortgage, this deed was *no deed*, at least so far as defendant, Mrs. Foster, was concerned. This evidence tended to contradict, and was introduced for the purpose of contradicting, the certificate of acknowledgment, and showing the same to be false; whereas, on the highest ground of public policy, such certificates are held to be *conclusive* evidence of the matters they contain, and they can neither be *aided* nor *disproved* by parol testimony, except, perhaps, in cases of fraud or imposition. In *Jordan* v. *Jordan*,* Tilghman, C. J., recognizing this principle, said: "There would be no certainty to titles if that kind of evidence were permitted. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else." The case of *Jamison* v. *Jamison*,† subsequently decided by the same court, is nearly parallel to the one at bar. It was the case of a mortgage executed by husband and wife, of the separate estate of the wife to secure the debt of the husband; and in which there was an offer to prove, by the testimony of the justice of the peace before whom the acknowledgment was taken, that his certificate thereof was false. The court held that the certificate of the judge or justice to the acknowledgment of a deed by a married woman, is to be judged of solely by what appears on the face of the certificate itself; and that parol evidence of what passed at the time of the acknowledgment is not admissible for the purpose of contradicting the certificate.

Mr. Carlisle, contra: Whatever interest the husband had, passed, we concede, by the decree. What we assert is, that

* 9 Sergeant & Rawle, 268. † 3 Wharton, 468.

Mrs. Foster's estate in the land was never conveyed. She never executed any *deed* in the premises. She signed, sealed, and acknowledged, but never delivered, a blank form of a deed of mortgage, containing no name of the grantee, or mortgagee, no statement or recital of the sum of money to be secured, or the time of payment; or, in short, of any of the matters indispensable to make the deed operative, except the names of the grantors and the description of the property. It was an instrument which conveyed nothing, because there was no grantee. It was an unfinished mortgage in form; but it was no mortgage at all, because there was no mortgagee and no debt, recited, described, or in any manner indicated. It consists, in natural reason, as well with Mrs. Foster's declaration at the time she signed it, that it was intended to be a security for "a few hundred dollars," as with the complainant's claim for $12,785; and it might as well have turned out a mortgage for a million of dollars. And because it was thus absolutely wanting in certainty, and might be anything, or nothing, when it was signed and acknowledged by Mrs. Foster, it was not, and could not become, her deed in law.

To say that Mrs. Foster is estopped from denying that she executed the mortgage, because she signed, sealed, and executed it, is a *petitio principii*, simply.

The fact that Mrs. Foster was a married woman *does* make a potential element of the case. Observe the statement of the case! "She was *fearful* that the speculation which her husband was going into would not come out right: she did not like to mortgage *that* place;" her paternal property, perhaps, the home of her own childhood. "But *he*"—her husband—wanted to raise money, and "she did not *like* to refuse him, and *so* she consented to sign." The case is an affecting illustration of the extent to which a woman becomes, in marriage, "subdued to the very quality of her lord." Her woman's fears had foreseen what her husband's intelligence never suspected; but like a woman, lovely and confiding, she yielded everything to *him*. This court will surely remember the language of Marshall, C. J., in *Sexton* v. *Whea-*

*ton:** "All know and feel the sacredness of the connection between husband and wife. All know that the sweetness of social intercourse, the harmony of society, the happiness of families, depend upon that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other." Does any one doubt, if this magistrate—the great offender in the case—had done the duty which the laws of the State from which he derived his commission put upon him; that is to say, had refused to take any acknowledgment till the blanks in the deed were filled with $12,800, and its contents, in fact and in truth and spirit made known to the lady—that however Mrs. Drury might have "*so* consented," not "*liking to refuse him*," the magistrate could never have certified that she executed it "freely." This separate examination, if faithfully made—this certificate, itself a certificate of *quasi* judicial approbation to what she does—if conscientiously given; given, as with the body of our higher magistracy we may hope that it only is given; is the protection with which the law hedges the gentle nature of a woman—her crowning grace and glory—from the dangers, and perhaps the ruin, which, without the law's protection, it is certain in many cases to bring upon her. The argument which treats her as an independent person, and would approximate her actions to those of our own sex—which would say that *all* that a man may do without examination, she may do *if* examined—violates the central germ of truth upon the subject, the law of the inherent moral differences of our natures; the true and fine conception of the case, which gives to characters, thoughts, passions, sentiments, and all things within, their sex. A certificate in blank is an absurdity, as respects a married woman, if we look to the wise reasons of the law. By law, such a woman has no power to convey her estate at all. The law gives it to her on condition that she be examined separately, and consent fully and freely to the exact thing which she does. The certificate must have been in fact, and when made a true certificate; and everything certified

* 8 Wheaton, 229; 1 American Leading Cases, 42.

to have been done by the *feme covert* must have been exactly and specifically done.

It is objected that the parol proof tends to contradict the official certificate of acknowledgment, and cases are cited in support of this objection. But they have no application. Here is no attempt to aid a defective certificate of acknowledgment, as in some of the cases cited. Nor is it an attack, by parol proof, upon *a perfect certificate.* It is simply proof of *what the instrument was* which was so acknowledged and certified; that it *was not then* the instrument which is produced by the complainant.

Mr. Justice NELSON delivered the opinion of the court.

By the laws of Minnesota, an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a *feme covert*, is an essential prerequisite to the conveyance of her real estate or any interest therein. And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney. These disabilities exist by statute and the common law for her protection, in consideration of her dependent condition, and to guard her against undue influence and restraint.

Now, it is conceded, in this case, that the instrument Mrs. Foster signed and acknowledged was not a deed or mortgage; that, on the contrary, it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. We agree—if she was competent to convey her real estate by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted. Although it was, at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient.

But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the *feme covert* and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing.

It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *feme coverts*. Instead of the transaction being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated.

There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the *feme covert*, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that acts of the officer for this purpose are judicial and conclusive. We express no opinion upon the soundness of this doctrine, as it is not material in this case. The case before us is very different. There is no defect in the form of the acknowledgment, or in the private examination. No inquiry is here made into them. The defect is in the deed, which it is not made the duty of this officer to write, fill up, or examine, and for the legal validity of which he is no way responsible. The two instruments are distinct. The

deed may be filled up without any official authority, and may be good or bad. The acknowledgment requires such authority. The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was, therefore, nugatory. The truth is, that the acknowledgment in this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert*. The argument in support of its validity would be equally strong.

Our opinion is that, as it respects Mrs. Foster, the mortgage is not binding on her estate.

We may regret the misfortune of the complainant from the conclusion at which we have arrived; but it seems to us impossible to extend the relief prayed for by the bill of foreclosure, without abrogating the protection which the law for ages has thrown around the estates of married women. Losses of the kind may be guarded against, on the part of dealers in real estate, by care and caution; and we think that this burden should be imposed on them, rather than that a sacrifice should be made of the rights of a class who are dependent enough in the business affairs of life, even when all the privileges with which the law surrounds them are left unimpaired.

DECREE AFFIRMED.

N. B. A decree made below, on a cross-bill ordering the mortgagee to cancel the wife's name on the mortgage, was affirmed here. The cross-bill set up, substantially, the facts disclosed in the answer to the original bill; and the proofs taken in each case were the same.

MILES v. CALDWELL.

1. The established rule, that where a matter has been once heard and determined in one court (as of law), it cannot be raised anew and reheard in another (as of equity), is not confined to cases where the matter is made patent in the pleadings themselves. Where the form of issue in the trial, relied on as estoppel, is so vague (as it may be in an action of ejectment), that it does not show precisely what questions were before

Statement of the case.

the jury and were necessarily determined by it, parol proof may be given to show them.

2. The reasons which rendered *in*conclusive one trial in ejectment, have force when the action is brought in the fictitious form practised in England, and known partially among ourselves; but they apply imperfectly, and have little weight, when the action is brought in the form now usual in the United States, and where parties sue and are sued in their own names, and the position and limits of the land claimed are described. They have no force at all in Missouri, where the modern form is prescribed, and where, by statute, one judgment is a bar.

3. A State statute, enacting that a judgment in ejectment—provided the action be brought in a form which gives precision to the parties and land claimed—shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as of practice, and being conclusive on title in the courts of the State, is conclusive, also, in those of the Union.

MILES brought ejectment against Caldwell, in the Circuit Court of Missouri; the action being brought, not in the fictitious form, still sometimes used in the United States, but in the form now more frequent with us, in which the parties actually suing appear in their proper names, as Thomas Miles against William Caldwell, and where the land claimed is described as by metes or bounds, or by both; the action being entitled, in Missouri, "trespass in ejectment." Both parties in the present suit claimed under one Ely, who, in 1837, and prior to that time, was owner of the land; Caldwell claiming under a mortgage made by Ely to Gallagher in that year; and a subsequent release by Ely;* Miles, under a mortgage of 1838, by Ely to Carswell and McClellan, and a foreclosure and sale founded on it. The defendant, Caldwell, in that ejectment, contended that his own title, under the mortgage to Gallagher, was good; and that the title of Miles, under the mortgage to Carswell and McClellan, was bad, as having been made in fraud of creditors. Miles, the

* The mortgage to *Gallagher* was never foreclosed. The mortgagee had obtained a judgment against Ely on a note which the mortgage was given to secure, and under an execution issued on that judgment the land was sold, and by several mesne conveyances the complainant became invested with such title or claim as that sale could confer. Having some doubts of the validity, under the laws of Missouri, of this title, Caldwell procured from Ely, the mortgagor, the release above mentioned.

plaintiff, on the other hand, contended that the mortgage to Gallagher had been satisfied; and that his own mortgage was not fraudulent, but given for a valid debt. Both these points—that is to say, the point whether Gallagher's mortgage had or had not been paid, and whether that of Carswell and McClellan was fraudulent or was good—were submitted to the jury, who, on instructions from the court, passed upon them, finding a verdict for the plaintiff, Miles. Indeed, as to the question of fraud, there was an express agreement, now before this court, that the mortgage to Carswell and McClellan was, in the action of ejectment, impeached for fraud; and the record of that suit also established the fact that the question, whether the mortgage to Gallagher had been paid off in full, was submitted to them. But neither of these points were points *put in issue by the pleadings themselves;* nor, indeed, was it practicable so to put them in issue in the action,—that of ejectment.

In this state of the facts, Caldwell, wishing, as he represented, to have his title "quieted," filed his bill on the *equity* side of the court, where the judgment at law had been obtained, to enjoin execution on the judgment, and to prevent Miles's taking possession of the land.

The grounds of the complainant's application were these:

1. That his title was good and valid, founded on the senior mortgage; and, being the true legal title, should prevail.

2. That the mortgage to Carswell and McClellan was fraudulent, because made for the purpose of hindering and delaying creditors; and that a court of equity should decree it to be void, and prevent its being used to the injury of complainant.

3. That he had made valuable improvements, in good faith, on the land, supposing it to be his own, for which he was entitled to compensation before it was taken from him.

It is necessary here to say, that in Missouri one of the Revised Statutes enacts, that in ejectment, as in other actions authorized by it, a judgment, except one of nonsuit, "shall be a bar to any other action between the same parties, or those claiming under them, as to the same subject-matter."

The court below granted the injunction, and an appeal came here.

Mr. Green, in support of the decree: Caldwell, being in possession, under a senior mortgage, had a right to stay. Even if the judgment on the note did not foreclose the mortgage, he had a release from Ely which gave him the equity of redemption. Admitting that the question of the payment of Gallagher's mortgage, and the good faith of that of Carswell and McClellan were in issue on the trial at law, what is there to prevent their being passed on here? The action was ejectment; a proceeding in which it is matter of common knowledge that one judgment never binds. Moreover, it is a rule that nothing will be held as concluded by the verdict which is not put in issue by the pleadings. *Outram* v. *Morewood*,* confines the conclusiveness to questions expressly so put.

[On the third ground assigned for relief—valuable improvements put on the land—Mr. Green made no remarks.]

Mr. Gantt, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. The complainant's first proposition—that his title is good, founded on the prior mortgage, and, being the true legal title, should prevail—contains no element as it is stated, or in the facts which go to make up his title, that calls into action the powers of a court of chancery. If under the proceedings which took place in regard to the mortgage of Gallagher,† the complainant acquired the legal title to the real estate in question, a court of law would notice that title, and is as much bound to respect it as a court of equity. If he did not really obtain the legal title, but having the possession, was entitled to be treated as a mortgagee in possession, a court of law is bound to protect him in that possession against any title, not paramount to the mortgage under which he held.

* 3 East, 346.

† See *supra*, p. 36, note.

We cannot perceive that there is any circumstance connected with the title of complainant, which brings his case within the jurisdiction of a court of equity. Although it is true that in the practice of the English courts, and in those States of the Union where the fictitious action of ejectment is still in use, chancery will interfere where there have been repeated verdicts in favor of the same title to prevent further litigation, it is *not* true that chancery will interpose in favor of the unsuccessful party in the first trial, upon the sole ground that he has the legal title, and, therefore, ought to have succeeded in the action at law. It would be a novelty that a court of chancery, which in proper cases quiets a title which has been *established* by several verdicts and judgments at law, should reverse its course of action to quiet a title strictly legal, with no impediment to its assertion in a court of law, where it had been *defeated* in the only action in which it had been thus set up.

2. The second proposition, in respect of which complainant asks relief,—that the mortgage to Carswell and McClellan is fraudulent, made to hinder creditors, &c.,—is one of the common grounds of equity jurisdiction. To relieve against fraud, and to set aside and cancel fraudulent conveyances, are among the ordinary duties of courts of chancery. Courts of law, however, have concurrent jurisdiction of questions of fraud, when properly raised; and, although they cannot cancel or set aside fraudulent instruments of writing, yet when they are produced in evidence by a party claiming any right under them, their fraudulent character may, under proper circumstances, be shown, and their validity in the particular case contested.

It is a general rule, growing out of the concurrent jurisdiction of the courts of law and chancery over this subject, as well as a variety of others, founded also upon the principle that it is the interest of the public, that there should be some end to litigation, that when a matter has once been heard and determined in one court, it shall not be subject to re-examination in another court between the same parties. The defendant in this suit invokes the benefit of this rule as

regards the question of fraud in the mortgage from Ely to Carswell and McClellan, and also as to the fact charged by him that the Gallagher mortgage had been fully satisfied, and was no longer of any force; alleging that both questions were submitted to the jury and decided against complainant in the action of ejectment, the judgment in which is now sought to be enjoined. Of the fact of such submission and finding there can, in this case, be no doubt. Under the instructions of the court, which are in proof in this record, if the jury found either of these issues in favor of Caldwell, the plaintiff was not entitled to a verdict. The plaintiff, however, did get a verdict. It thus appears conclusively that the jury found that there was no fraud in the second mortgage, and that the first had been satisfied.

The complainant, however, seeks to evade the force of the general principle on the ground that the verdict and judgment in actions of ejectment have not that conclusive effect between the parties which they have in other actions, either in courts of law or equity. It must be conceded that such is the general doctrine on the subject, as applicable to cases tried under the common law form of the action of ejectment.

One reason why the verdict cannot be made conclusive in those cases is obviously due to the fictitious character of the action. If a question is tried and determined between John Doe, plaintiff, and A. B., who comes in and is substituted defendant in place of Richard Roe, the casual ejector, it is plain that A. B. cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the demise may be laid from the same lessor, for there is no privity between John Doe and John Den. Hence, technically, an estoppel could not be successfully pleaded so long as a new fictitious plaintiff could be used. It was this difficulty of enforcing at law the estoppel of former verdicts and judgments in ejectment, that induced courts of equity (which, unrestrained by the technicality, could look past the nominal parties to the real ones) to interfere, after a sufficient number of trials had taken place, to determine fairly the validity of the title; and by injunction,

directed to the unsuccessful litigant, compel him to cease from harassing his opponent by useless litigation.

There was, perhaps, another reason why the English common law refused to concede to the action of ejectment, which is a personal action, that conclusive effect which it gave to all other actions, namely, the peculiar respect, almost sanctity, which the feudal system attached to the tenure by which real estate was held. So peculiarly sacred was the title to land with our ancestors, that they were not willing that the claim to it should, like all other claims, be settled forever by one trial in an ordinary personal action, but permitted the unsuccessful party to have other opportunity of establishing his title. They, however, did concede to those solemn actions, the writ of right and the writ of assize, the same force as estoppels, which they did to personal actions in other cases.

The first of the above reasons, for the inconclusiveness of the action of ejectment, does not exist in the case before us. That is not the old fictitious action, but is a suit by Thomas Miles against William Caldwell, in which the former complains of the latter "in a plea of trespass and ejectment," and sues for the possession of the land and for damages for its detention. If Caldwell should sue Miles to regain possession after the latter had obtained it under his judgment, there exists no technical reason to prevent Miles from pleading the former judgment, and alleging that it involved the same subject-matter as that for which the second suit was brought.

How far the peculiar sanctity attaching to titles to real estate is still a reason, if it were ever one, for taking judgments in ejectment out of the general rule of conclusiveness, we will consider hereafter. At present we proceed to inquire into a qualification of the rule which is alleged to apply in all cases where the action relied on as an estoppel was in tort, namely, that nothing will be held as concluded by the verdict which was not put directly in issue by the pleadings. If this principle is a sound one, the plea in this case being the general issue of not guilty, no parol proof can

be received to show what questions of fact were submitted to the jury under that issue. The case of *Standish* v. *Parker*,* would seem to countenance this doctrine. But, after a careful examination of the authorities, we do not think that the rule is sustained, nor do we believe it to be founded on sound principle. No reason is perceived why parol proof should be admitted to show what facts were proved, or were put in issue, under the general issue in assumpsit, that would not be equally applicable to the same issue in trespass. Yet it is quite clear, from numerous authorities, that the facts put in issue in assumpsit may be shown in another action by parol.† The case of *Outram* v. *Moorewood* is a leading case on the subject. It is there decided that the action of trespass is conclusive on all questions put expressly in issue by the pleadings. But there is nothing in the opinion touching the introduction of parol proof, for the pleas in that case rendered it unnecessary, the facts in dispute having been set forth in a special plea. In *Kitchen* v. *Campbell*,‡ the former action was trover for the conversion of goods; and the same plaintiff having afterwards sued in assumpsit for their value, his defeat in the former suit was held to be a bar to his recovery in the second action. Although it is not stated in the case what was the plea in the action of trover, there is no reason to suppose that it was other than not guilty; nor does it seem that any importance was attached to the form of the plea. In *Burt* v. *Sternburgh*,§—an action of trespass *quare clausum fregit*,—the plaintiff was allowed to introduce the record of a former recovery between the same parties in an action of trespass, and then to prove by parol that the *locus in quo* was the same, and that the title relied on by defendant in the action then on trial, was the same title which had been set up and defeated in the first action. In *Doty* v. *Brown*,‖ the action was replevin for oats, hay, &c. The case

* 2 Pickering, 20.

† Washington Steam Packing Co. *v.* Sickles, 24 Howard, 333.

‡ 3 Wilson, 304.

§ 4 Cowen, 559.

‖ 4 Comstock, 71.

turned on the validity of a bill of sale, which was alleged to be fraudulent and void as to creditors. The defendant relied on a judgment of a justice of the peace in a former suit, between the same parties, for the conversion of a part of the goods covered by the same bill of sale. The justice was allowed to testify that he had rendered his judgment in favor of defendant on the ground that the bill of sale was fraudulent as to creditors; and this was held conclusive in the Court of Appeals of New York.

We are of opinion that the prevailing doctrine of the courts at present is, that whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury, and were necessarily passed on by them. In the case under consideration, the record leaves no doubt on that subject.

Reverting now to the question of policy, grounded on the supposed sanctity of land titles as affecting the conclusiveness of judgments in trespass or ejectment, we remark that it is the settled doctrine of this court in reference to all questions affecting the title to real estate, to permit the different States of the Union to settle them each for itself; and when the point involved is one which becomes a rule of property, we follow the decisions of the State courts, whether founded on the statutes of the States or their views of general policy.

As regards the particular question before us, there is a great difference in the different States in the value attached to real estate, and to the title by which it is held, as compared with other species of property. But no doubt is entertained that in all of them the feeling is far removed from that which formerly prevailed in England, or which prevails there even now. While some of our older States still uphold many of the safeguards of the common law, with its complicated system of conveyancing, operating as a strong drag upon the facility and frequency of transfers of real property, our Western people traffic in land as they do in horses

or merchandise, and sell a quarter-section of land as readily and as easily as they do a mule or a wagon. The laws of the people correspond with their habits. Deeds of conveyance are, by statute, rendered exceedingly simple and effectual, the main safeguard being a well-digested system of registration. In consonance with this general facility of traffic, it is their policy to prevent those endless litigations concerning titles to lands, which, in other countries, are transmitted from one generation to another. The rapid settlement of a new country requires that a title once fairly determined shall not be again disturbed as between the same parties.

The Revised Statutes of Missouri of 1855,* concerning the action of ejectment, say: "A judgment, except of nonsuit, in an action authorized by this act, shall be a bar to any other action between the same parties, or those claiming under them, as to the same subject-matter." We hold this enactment to be binding on the Federal courts as well as those of the State. It is a rule of property. It concerns the stability of titles to land, and it would be highly improper to adopt in the Federal courts a rule tending to increase litigation and unsettle those titles, which is in conflict with the one prescribed by the law-making power of the State. It is a matter which involves something more than a mere rule of practice. It is a question whether a matter, which is conclusive of the title to land in the State courts, shall have the same effect in the Federal courts. It is our opinion that it should.

3. As regards the claim for improvements made in good faith by complainant, the matter is not alluded to by his counsel in this court at all. It is barely mentioned by the counsel for appellant, and no importance seems to have been attached to it either here or in the court below. Such a right must depend wholly upon the statutes of Missouri, and none are cited to us. We are unwilling to enter upon an investigation of the law and the facts both under such circumstances. Besides, without deciding the point, we may

* Page 695, ch. 58, § 33.

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remark that upon an examination of the statute of Missouri on that subject, and looking to the policy which dictated it, it does not seem probable that it was intended to give this kind of relief to an unsuccessful defendant in ejectment, while he was still contesting the title of the plaintiff. As to this point, we incline to rule that the bill shall be dismissed without prejudice.

GRIER, J., expressed his concurrence, adding as another reason why the bill should have been dismissed, that even if the mortgage given to Carswell and McClellan had been fraudulent,—which his Honor, after examining the testimony, said it was not,—the complainant, who was not a creditor, had no equity to found his bill.

DECREE REVERSED, with costs; case remanded to the court below, with directions that there the bill be dismissed with costs; the dismissal, however, to be without prejudice to any remedy of the complainant for compensation for improvements on the land made in good faith.

TOOL COMPANY *v.* NORRIS.

1. An agreement for compensation for procuring a contract from the Government to furnish its supplies is against public policy, and cannot be enforced by the courts.
2. Where the special and general counts of a declaration set forth the same contract, and an instruction directed to the legality of the contract, is refused with reference to the special counts, it is unnecessary, in order to bring up to this court for consideration the writing thereon, to ask the instruction with reference to the general counts to which it is equally applicable, although upon the special counts the verdict passed for the plaintiff in error.

IN July, 1861, the Providence Tool Company, a corporation created under the laws of Rhode Island, entered into a

contract with the Government, through the Secretary of War, to deliver to officers of the United States, within certain stated periods, twenty-five thousand muskets, of a specified pattern, at the rate of twenty dollars a musket. *This contract was procured through the exertions of Norris, the plaintiff in the court below, and the defendant in error in this court, upon a previous agreement with the corporation, through its managing agent, that in case he obtained a contract of this kind he should receive compensation for his services proportionate to its extent.*

Norris himself, it appeared,—though not having any imputation on his moral character,—was a person who had led a somewhat miscellaneous sort of a life, in Europe and America. Soon after the rebellion broke out, he found himself in Washington. He was there without any special purpose, but, as he stated, with a view of "*making* business—anything generally;" "soliciting acquaintances;" "getting letters;" "getting an office," &c. Finding that the Government was in need of arms to suppress the rebellion, which had now become organized, he applied to the Providence Tool Company, already mentioned, to see if they wanted a job, and made the contingent sort of contract with them just referred to. He then set himself to work at what he called, "concentrating influence at the War Department;" that is to say, to getting letters from people who might be supposed to have influence with Mr. Cameron, at that time Secretary of War, recommending him and his objects. Among other means, he applied to the Rhode Island Senators, Messrs. Anthony and Simmons, with whom he had got acquainted, to go with him to the War Office. Mr. Anthony declined to go; stating that since he had been Senator he had been applied to some hundred times, in like manner, and had *invariably* declined; thinking it discreditable to any Senator to intermeddle with the business of the departments. "You will certainly not decline to go with me, and introduce me to the Secretary, and to state that the Providence Tool Company is a responsible corporation." "I will give you *a note*," said Mr. Anthony. "I do not want *a note*," was the reply; "I want the weight of your *presence* with me. *I want the*

influence of a Senator." "Well," said Mr. Anthony, "*go to Simmons.*" By one means and another, Norris got influential introduction to Mr. Secretary Cameron, and got the contract, a very profitable one; the Secretary, whom on leaving he warmly thanked, "hoping that he would make a great deal of money out of it."

But a dispute now arose between Norris and the Tool Company, as to the amount of compensation to be paid. Norris insisted that by the agreement with him he was to receive $75,000; the difference between the contract price and seventeen dollars a musket; whilst the corporation, on the other hand, contended, that it had only promised "a liberal compensation" in case of success. Some negotiation on the subject was had between them; but it failed to produce a settlement, and Norris instituted the present action to recover the full amount claimed by him.

The declaration contained several counts; the first and second ones, special; the third, fourth, and fifth, general. The special ones set forth specifically a contract, that if he, Norris, procured the Government to give the order to the company, the company would pay to him, Norris, "for his services, in obtaining, or causing and procuring to be obtained, such order, all that the Government might, by the terms of their arrangement with the company, agree to pay above $17 for each musket." The general counts were in the usual form of *quantum meruit*, &c.; but in these counts, as in the special ones, a contract was set forth on the basis of a compensation, *contingent* upon Norris's procuring an order from the Government for muskets for the Tool Company; *reliance on this contingent sort of contract running through all the counts of the declaration.* There was no pretence that the plaintiff had rendered any other service than that which resulted in the contract for the muskets.

On the trial in the Circuit Court for the Rhode Island District, the counsel of the Tool Company requested the court to instruct the jury, that a contract like that declared on in the first and second counts was against public policy, and void; which instruction the court refused to give. The

same counsel requested the court to charge, "that upon the *quantum meruit* count the plaintiff was not entitled in law to recover any other sum of money, for services rendered to the Tool Company in procuring a contract for making arms, than a fair and reasonable compensation for the time, speech, labor performed, and expenses incurred in performing such services, to be computed at a price for *which similar services could have been obtained from others.*" The court gave this instruction, with the exception of the last nine words in italics. The jury found *for the defendant on the first and second*—that is to say, upon the special—*counts*, and for the plaintiff on the others, and judgment was entered on $13,500 for the plaintiff. The case came, by writ of error, here.

Messrs. Payne and Thurston for the Tool Company, plaintiff in error: The general principle that "many contracts which are not against morality are still void as being against sound policy," is one that was distinctly announced so long ago, at least, as Lord Mansfield's day,* and one which will not be denied. Thus, no recovery can be had upon a contract for the payment of a part of the profits of an office to the former incumbent, in consideration of his resignation of such office;† and the principle has been extended to the case of a contract stipulating merely for the *resignation of an office*, without any agreement to exert any influence toward the appointment of a successor, and this, too, where the sum agreed to be paid for such resignation was only an equitable return of a portion of a sum of money previously paid by the retiring officer upon a like contract to his successor, who had also been his predecessor in the same office.‡ In consistency with the doctrine that benefits from the Government ought not to be the result of any corrupting influence, but should be awarded on the principle of *dctur digniori*, it has been held that an agreement on the part of one person to pay a sum of money to another person, as an inducement

* Jones *v.* Randall, Cowper, 39.

† Parsons *v.* Thompson, 1 Henry Blackstone, 322.

‡ Eddy *v.* Capron, 4 Rhode Island, 394.

for the latter *not to propose to carry the mail* upon a certain post-route in opposition to the former, is against public policy and void, although no act whatever was done by the party, to whom the promise was made, to influence the success of the other party's application, and the applicant was a suitable and responsible man to perform the service.* Similar principles governed the court in the Vermont case of *Pingry* v. *Washburn*,† where it refused to sustain an agreement to pay a sum of money for withdrawing opposition to the passage of an act affecting the interest of a corporation. The Supreme Court of Massachusetts, in *Boynton* v. *Hubbard*,‡ remark, in reference to the class of illustrations now being considered: "It is upon this same principle that bargains to procure offices are rescinded, *not on account of fraud in either of the parties, but for the sake of the public, because they tend to introduce unsuitable persons into public offices.*"

Another, and a large class of cases to which the principle has been applied, relate to agreements for compensation for procuring legislation. All such have, without an exception, been held to be void. In *Marshall* v. *Baltimore and Ohio Railroad Co.*,§ this court stated that it was an undoubted principle of the common law that it will not lend its aid to enforce a contract "which *tends to corrupt* or contaminate, by improper influences, the integrity of our social or political institutions." And again: "Bribes in the shape of high contingent compensation must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them."

That it is not necessary for the element of sinister or personal influence to be contemplated by the agreement, or to be, in fact, resorted to by the agent, in order to render such agreement for service obnoxious to the law, is directly asserted in other cases. The plaintiff in *Harris* v. *Roofs*‖ sought to recover in *indebitatus assumpsit*, and on a *quantum*

* Gulick et al. *v.* Bailey, 5 Halstead, 87.
† 1 Aiken, 264.
‡ 7 Massachusetts, 112.
§ 16 Howard, 314.
‖ 10 Barbour, 489.

meruit, for his services and expenses in prosecuting before the legislature of New York a claim, in behalf of the defendant, to a certain tract of land derived under an Indian grant. It does not appear from the case that the plaintiff was to observe any secrecy, or that his true representative character was not fully understood. Neither was it suggested that he was expected to employ, or did in fact make use of, any sinister or improper influence with the members of the legislature. It was shown that he appeared at hearings of the committee to whom the same was referred, and that the value of his services to the plaintiff, and the expenses by him incurred during his stay in Albany, were equal to the amount charged, which was not a large sum, he having failed of establishing the defendant's title. Some question was made whether his compensation was not to be contingent, as was proved to have been the agreement with a former agent of the defendant in the same business. The court, however, use the following language: "Even without any agreement to share in the avails of the claim, we think the claim invalid as against public policy and sound legislation. It certainly would imply a most unjustifiable dereliction of duty to hold that the employment of individuals to visit and importune the members is necessary to obtain justice. Such practices would have a tendency to prevent the free, honorable, and correct deliberation and action of this most important branch of sovereignty. We cannot think it good public policy to require our courts to enforce such contracts. It can neither be necessary or proper for the legislature to be surrounded by swarms of hired retainers of the claimants upon public bounty or justice. To *legalize* such a system would, to say the least, be a reflection upon the ability and industry of our legislators."

The Louisiana case of *Gill* v. *Williams & Davis*,* and another in Massachusetts, *Fuller* v. *Dame*,† are in point. The principle to be deduced from the cases is, in its fullest force, applicable to the one at bar. The evil tendencies of

* 12 Louisiana Annual, 219.

† 18 Pickering, 472.

an agreement to procure a favor from one of the departments of the Government for a compensation contingent upon the success of the undertaking, are as great as in the case of an agreement to procure legislation upon a similar consideration. The heads of the several departments exercise by delegation the high duties which, by law, have been intrusted to them, and are only the executive ministers appointed to carry out the will of the law-making power. The authority to make contracts for arms was derived from the legislature. It would have been competent for Congress to have authorized the making of such contracts through one of its own committees, or by the concurrent action of the two houses of which it is composed, to have settled upon and agreed to the terms of each contract. It follows, therefore, that if the agreement set up by the defendant in error would be condemned if it related to the procurement of legislation beneficial to the plaintiff in error, it must, for the same reasons, fail of support if it relates to the procurement of the same benefit from the Secretary of War, to whom the power of conferring it had been delegated.

If any one ever doubted of the wisdom of such principles as the cases which we have cited a little way back decide, will he doubt it after reading the statement of this case? With a sense of decorum, the reporter will probably suppress some of its salient features,—the *tacenda* of the case. Its general character he will not dare, even for decorum's sake, to falsify. "Wounds cannot be cured without searching." This case has been probed, and requires to be laid open.

The transaction is creditable to no one concerned but to Mr. Anthony. Such principles as the court below declared in regard to the contract are wholly untenable. And the effect is seen in the fact that, for service which any clerk in the employ of the company might have rendered in a single day, and at a trifling expense, the jury awarded a compensation nearly double what is allowed to one of your Honors for the service of a year upon this bench.

May it please this court, a profound thinker of our own

country has observed that nothing so base as American politics had become, before the breaking out of our rebellion, had been seen in human history since the Roman Empire was put up at auction. Our politics, it may be hoped, have grown no worse during the honorable contest which our country has been waging. But may it not be feared that what are called the morals of business have been descending to the level of politics rapidly? No one expects absolute purity in politics or business, especially in time of war. Contractors followed the armies of Wellington as they follow those of Grant. The Treasury was plundered when William Pitt was Chancellor of the Exchequer; and we may doubt, Mr. CHIEF JUSTICE, whether, when YOU held a corresponding office, you were able to keep the hands of all your subordinates as clean as you ever kept YOUR OWN. These are the necessary consequences of the disordered condition in which we now temporarily are. But they are not to be encouraged; least of all are they to have judicial sanction. This court will pronounce, we feel assured, that this agreement for contingent compensation, as the reward of procuring contracts with the Executive Department of the Government, is *contra bonos mores*, and wholly void.

Mr. Blake, contra.

1. It is not easy to conceive of a more ungracious defence. Confessedly, the contract was procured through the exertions of Norris alone. Of course, he gave his time, spent his money, invoked the aid of acquaintances, solicited influence, waited about the ante-rooms, and went through such operations as persons seeking contracts at Washington generally go through; operations distasteful in the extreme to any man of independence; impossible, indeed, for such a man to undergo. There is no imputation upon the generally fair character of Mr. Norris, nor allegation that Mr. Cameron acted corruptly. Having got the contract through Norris's labors, having made an immense sum by it, the company now turn round, and plead the illegality of their agree-

ments! Is not this base? More than this, is it not a case for the maxim, "*Nemo allegans turpitudinem suam audiatur?*"

The cases cited do not apply. Not one is a case like this. There is no case which says that a corporation may not employ an agent to negotiate with the War Department, for a contract to manufacture arms; or that, if the agent is openly acting as such, the terms of his compensation may not lawfully be whatever the corporation and himself agree on.

2. The refusal of the court to charge that such a contract was unlawful, was expressly directed to the contract between Norris and the Tool Company, as specifically set forth in the first and second counts; that is to say, as set forth in the *special* counts. In *them*, Norris set up a specific agreement to give him all above seventeen dollars a musket. But on these two counts the jury found for the Tool Company. Of course, the instruction asked for by the company on these counts, and refused, is not open to consideration here.

Mr. Justice FIELD delivered the opinion of the court.

Several grounds were taken, in the court below, in defence of this action; and, among others, the corporation relied upon the proposition of law, that an agreement of the character stated,—that is, an agreement for compensation to procure a contract from the Government to furnish its supplies,—is against public policy, and void. This proposition is the question for the consideration of the court. It arises upon the refusal of the court below to give one of the instructions asked.

A suggestion was made on the argument, though not much pressed, that the instruction involving the proposition cannot properly be regarded, inasmuch as it was directed in terms to the agreement set forth in the special counts of the declaration, upon which the jury found for the defendants. There would be much force in this suggestion, if the general counts, upon which the verdict passed for the plaintiff, did not also aver that his services were rendered in procuring the same contract from the Government. The instruction was directed especially to the legality of a contract of that

kind, which having been once refused with reference to some of the counts, it was not necessary for counsel to renew with reference to the other counts to which it was equally applicable. The subsequent instructions were, therefore, directed to other matters.

It was not claimed, on the trial, that the plaintiff had rendered any other services than those which resulted in the procurement of the contract for the muskets. We are of opinion, therefore, that the proposition of law is fairly presented by the record, and is before us for consideration.

The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.

The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely

from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements.*

The same principle has also been applied, in numerous instances, to agreements for compensation to procure appointments to public offices. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy.†

Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly;

* Marshall *v.* Baltimore and Ohio Railroad Company, 16 Howard, 314; Harris *v.* Roof's Executors, 10 Barbour, 489; Fuller *v.* Dame, 18 Pickering, 472.

† Gray *v.* Hook, 4 Comstock, 449.

Statement of the case.

it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is

SO ORDERED.

GREGG *v.* FORSYTH.

Error does not lie to a refusal of the Circuit Court to award a writ of restitution in ejectment.

FORSYTH had brought ejectment against Gregg in the Circuit Court for Illinois, and obtained judgment for the land sued for. On writ of error taken by Gregg, this court reversed that judgment and remitted the case with directions to issue a *venire de novo*. Between the time, however, that the Circuit Court gave its judgment of recovery, and that when this court gave *its* of reversal, Forsyth had been put in possession of the premises by a *habere facias*, and had collected, moreover, the costs of the suit.

As soon as the mandate of this court reversing the judgment was sent down to the court below, but before it had been filed or a rule entered in pursuance of its directions, Gregg moved the court for a writ of restitution. This motion the court refused to grant. Whereupon, a writ of error—the present writ—was brought.

Mr. Justice NELSON delivered the opinion of the court.

Upon the facts of this case, it will be seen that at the time the motion was made in the court below, the cause was not then pending in the court. Although the mandate had been

Opinion of the court.

sent down to the circuit from this court it had not been filed there, nor had the rule been entered in pursuance of its directions reversing the judgment. The court had not, therefore, obtained possession of the cause, and this was, doubtless, the reason for refusing the motion for restitution. The plaintiffs in error were entitled to restitution both of the premises and costs on the reversal of the judgment, and the modern practice is to apply to the court on the coming down of the mandate from the appellate tribunal and the entry of the judgment of reversal for a writ of restitution, setting forth the facts entitling the party to the remedy and giving notice of the motion to the adverse party. The earlier and more formal remedy was by *scire facias.**

It seems that the writ of restitution may be granted though a new venire has been directed. In *Smith's Lessee* v. *Trabue's Heirs*,† this court held, that a writ of error would not lie to an order of the Circuit Court awarding a writ of restitution on motion, and dismissed the case for want of jurisdiction. The writ in the present case must be dismissed for the same reason. The order is not considered a final judgment within the meaning of the Judiciary Act.

DISMISSAL ACCORDINGLY.

BANKS *v.* OGDEN.

1. A plat of an addition to a town, not executed, acknowledged, and recorded in conformity with the laws of Illinois, operates in that State as a dedication of the streets to public use, but not as a conveyance of the fee of the streets to the municipal corporation.
2. A conveyance, by the proprietor of such an addition, of a block or lot bounded by a street, conveys the fee of the street to its centre, subject to the public use.

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* Rex *v.* Leaven, 2 Salkeld, 558; Sympson *v.* Juxon, Cro. Jac. 699; 2 Sellon's Prac. 387; 2 Tidd's do. 1033, 1188; Safford *v.* Stevens, 2 Wendell, 164; Close *v.* Stuart, 4 Id. 95; Smith's Lessee *v.* Trabue's Heirs, 9 Peters, 4; Jackson *v.* Hasbrouk, 5 Johnson, 366; Cassel *v.* Duncan, 2 Sergeant & Rawle, 57; Russel *v.* Gray, 6 Id. 208; Ranck *v.* Backer, 13 Id. 41.

† 9 Peters, 4.

Statement of the case.

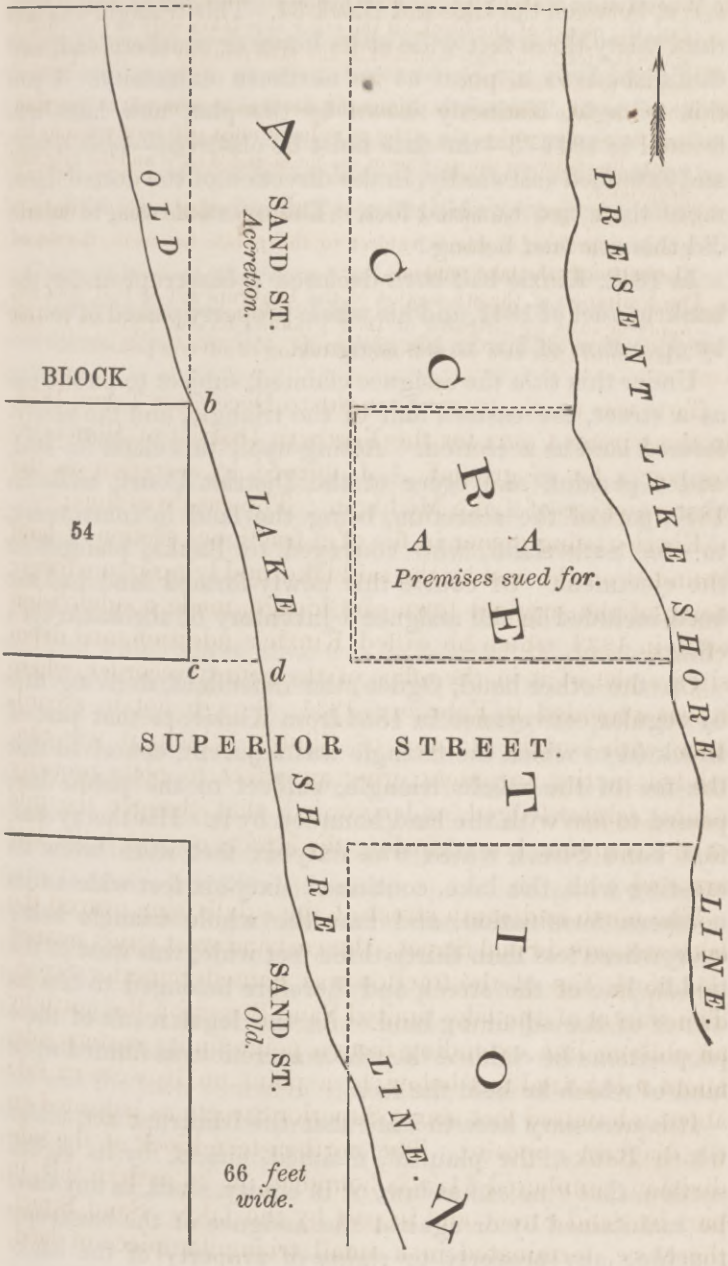
3. When a street of such an addition is bounded on one side by Lake Michigan, the owner of the block on the other side takes only to the centre; while the fee of the half bounded by the lake remains in the proprietor, subject to the easement.
4. When the lake boundary so limits the street as to reduce it to less than half its regular width, the street so reduced must still be divided by its centre line between the grantee of the lot bounded by it and the original proprietor.
5. Accretion by alluvion upon a street thus bounded will belong to the original proprietor, in whom, subject to the public easement, the fee of the half next the lake remains.
6. The limitation of the 8th section of the bankrupt act of 1841 does not apply to suits by assignees or their grantees for the recovery of real estate until after two years from the taking of adverse possession.

THIS was an ejectment brought to December Term, 1859, in the Circuit Court for the Northern District of Illinois, to recover a lot of ground, *A A*, formed by accretion on the western shore of Lake Michigan. The case was thus:

Kinzie, being owner in fee of a fractional section of land bounded on the east by the said lake, and lying immediately north of the original town of Chicago, made a subdivision of it in 1833, which he called Kinzie's addition, and deposited a plat of it in the office of the county recorder, where it was recorded in February, 1834: though not in accordance with certain statutes of Illinois, which, it was contended in the argument, give an effect to plats properly made, acknowledged, and recorded, that changes the rule of the common law regarding the streets on which the lots are sold.

The north and south street of the subdivision nearest the lake was called Sand Street; the east and west street nearest the north line of the fraction was named Superior Street. The waters of the lake limited Sand Street on the north by an oblique line extending from a point on its eastern side, about a hundred feet below, to a point on its western side about a hundred feet above Superior Street; as indicated on the diagram opposite. The northeastern block of the subdivision, numbered 54, was bounded, on its eastern side, in part by Sand Street and in part by the lake. Sand Street, therefore, terminated in a small triangular piece of land,

Diagram.


OLD
SAND ST.
Accretion.
BLOCK
54
b
c
d
LAKE SHORE
SUPERIOR STREET.
SAND ST.
Old.
66 feet wide.
CROCKER'S
ADDITION
A A
Premises sued for.
PRESENT LAKE SHORE LINE.
OLD LINE.

b, *c*, *d*, between the lake and Block 54. This triangle was less than thirty-three feet wide at its lower or southern end, and diminished to a point at its northern extremity. Upon this triangle, distinctly shown by the plat, new land was formed in 1844–'5—the date must be observed—*by accretion;* and extended eastwardly, in the direction of the dotted lines, more than two hundred feet. The question was, to whom did this *new land* belong?

In 1842, Kinzie had been declared a bankrupt under the bankrupt act of 1841, and his whole property passed of course by operation of law to his assignee.

Under this title the assignee claimed, subject to public use as a street, the eastern half of the triangle, and the newly-formed land as accretion. Acting upon this claim he sold, under petition and order of the District Court, made in 1857, part of the accretion, being the land in controversy, to one Sutherland, who conveyed to Banks, plaintiff in the ejectment. Of course this newly-formed land had not been included in the assignee's inventory of the bankrupt's effects.

On the other hand, Ogden, the defendant, deriving title by regular conveyance in 1833 from Kinzie, to that part of Block 54 to which the triangle was adjacent, conceived that the fee of the whole triangle, subject to the public use, passed to *him* with the land bounded by it. His theory was, that Sand Street, which was sixty-six feet wide below its meeting with the lake, continued sixty-six feet wide to its northern termination, and that the whole triangle being everywhere less than thirty-three feet wide, was west of the middle line of the street, and therefore belonged to him as owner of the adjoining land. As the legal result of these propositions he claimed the whole accretion, as formed upon land of which he held the fee.

It is necessary here to state that the bankrupt act, under which Banks, the plaintiff, claimed, enacts, by its eighth section, that "no *suit* at law, or in equity, shall, in any case, be maintained by or against the assignee of the bankrupt, touching any property or rights of property of the bank-

rupt, transferable to or vested *in him*, in any court whatever, unless the same be brought within two years of the declaration of bankruptcy, or after the cause of suit shall have first accrued." At what date Ogden, the defendant, *went into possession, did not appear.* The bankrupt act (§ 10) also enacts that all proceedings in bankruptcy shall, if practicable, be brought to a close by the court within two years after a decree.

Upon this case the court below instructed the jury that the law was for the defendant; and, judgment having been so entered after verdict, the case was now before the court on error.

Mr. Fuller, for Ogden, defendant below and in error.

1. The first question is, whether or not Kinzie had any title remaining in him to any land east of Block 54, after making and recording the plat of Kinzie's addition, and the conveyance of 1833?

By making and recording the plat, Kinzie dedicated all the land which there then was in front of the block; and, so far as it sufficed to make a street, to public use, and as the land increased, by accretion or otherwise, the public was entitled to extend the street in a line with that part of it south of this block. "Where a city is laid out with streets running to the water," says a California case,* "such streets should be held to continue on to the high water, if the city front is afterwards filled in, or the space enlarged by accretion or otherwise. Any other doctrine would be destructive of the interests of commercial communities." The curved line on Kinzie's plat, showing the course of the lake opposite to the block, was not meant to declare its boundary in all time on that side. It meant simply to show that along that line was the then course of the water; that *there* was where the lake came, and to prevent purchasers from supposing that the street held good for its original width of sixty-six feet below or southward. If it was washed away after that,

* Wood *v.* San Francisco, 4 California, 194.

it was the purchaser's loss. If it was extended by accretion, his gain. Had a street of full width been there, it would have carried the grant to the middle; but, before the middle was reached, the granted premises touched the waters of the lake; and the purchaser, like Kinzie himself had been, became riparian owner, and entitled to the privileges of such ownership,—one of which is that above stated, of having the *whole* road.

Independently of this he may rely on the common law principle of *ad medium filum*, or to the dividing line. The land in front of Block 54, at its widest part, did not suffice to make *one-half* the width of the street when the grant of the lot was made; and the conveyance of the block invested the purchaser with the fee, not only of the block itself, but of all the land to the water's edge. "As between grantor and grantee," says a recent and leading case in New York,* "the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. There is no difference in this respect between the streets of a city and country highways." This case overrules all the preceding ones in New York which had been supposed to establish a different rule. There is, indeed, no doubt—notwithstanding several dicta and some decisions to the contrary—that the rule, in the broad and imperative way in which it is above asserted—is now rapidly becoming—has in fact become the rule of our courts. They are disposed to regard the matter not as one of intention or of construction at all, but as one of policy; and as in *Paul* v. *Carver*,† to carry the grant to the middle line, in spite of words limiting it in the clearest way to the edge.‡ And this is reason; for, whether the new ground arise from the abandonment of a former street, or from the creation of new soil by accretion, there is no reason for giving it to the old owner. In neither case did *he* ever expect to have it. In the first he has been

* Bissell *v.* The New York Railroad Co., 23 New York, 61.

† 26 Pennsylvania State, 223.

‡ See Dovaston *v.* Payne, 2 Smith's Leading Cases, 199*, 6th edition, and the English and American notes to that case.

paid for it in the price of the adjoining lots made of higher price by being on the street; in the latter he has parted, as he supposed, with every vestige of soil, and should not be allowed to block up and intercept light and view—in this case a view upon a noble lake, itself a matter of value to any residence—by building upon soil so accidentally and unexpectedly obtained, and so to injure persons who supposed, as *he* did, that they had acquired ownership to the water's edge. The purchaser is therefore a riparian owner, and is entitled, as such proprietor, to the accretions which have been formed in front of the block. "The question," says this court, in one case,* "is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually, by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain." This rule was also tacitly recognized in *Jones et al.* v. *Johnston*;† *Johnston* v. *Jones et al.*,‡ here as applicable to accretions formed on Lake Michigan, and at almost the precise place where the accretions in question have been formed. The same rule has elsewhere been held applicable to the Detroit River.§ To the same effect is *Seaman* v. *Smith.*‖

That this right to the accretion is not divested by the intervention of a public highway between the riparian estate and the water-course, was decided by the Supreme Court of Louisiana; a region where, from the nature of their soil, this whole subject of accretion and diminution is specially studied and most wisely settled in the well-considered case of *Morgan* v. *Livingston.*¶ "If there be a public road between a field and the river," says that case, "still that which is

* New Orleans *v.* United States, 10 Peters, 717.
† 18 Howard, 150.
‡ 1 Black, 209.
§ Lorman *v.* Benson, 8 Michigan, 18.
‖ 24 Illinois, 523.
¶ 1 Louisiana Condensed Reports, 451.

made by alluvion accrues to the field." This case was decided in 1819. In 1841 the same question came before the same court in the case of *Municipality* v. *The Orleans Cotton Press;** and the court cited the language used in the former case, with approval, as a correct statement of the law on this subject. It added further, "that the intervention of a public road between the front tract and the river does not prevent accretion by alluvion, because the road and the levee themselves belong to the front proprietors, subject to the public use;" and the court, in summing up the points intended to be decided, say:

"We are of opinion that urban property fronting on a watercourse is entitled to alluvion, as well as rural estates; and that cities can acquire *jure alluvionis* only in virtue of a title which would constitute them front proprietors. That the defendants must be considered as owning down to the road last laid out, and that the intervention of the road does not in law prevent their being regarded as front proprietors, and entitled to any alluvion which now exists or may hereafter be formed between the levee and the water, subject to the public use under the administration of the municipal authorities."

The language first quoted is descriptive of the present case, and that cited last states the rule which should be applied. The principles established by these cases have been affirmed in the later ones.†

The right to accretion is one that belongs to the principal estate, not to the person of the owner, nor to the proprietor of the easement. It does not belong to the latter, because he enjoys a benefit in another man's property or estate, and the loss or gain of that estate is not his, but the owner's. "The right to future alluvion," says one of the cases cited by us, "is inherent in the property itself, and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land, just as much as the natural

* 18 Louisiana, 122.

† Mrs. Kennedy *v.* Municipality No. 2, 10 Louisiana Annual, 54, A.D. 1855; Remy *v.* The Second Municipality, 11 Id. 161, A.D. 1856; Barrett *v.* New Orleans, 13 Id. 105, A.D. 1858.

fruits of a tree belong to the owner of the land; and that such an attempt to transfer from the owner of the land to the city the future increase by alluvion, would be as legally absurd as if the legislature had declared, that after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."*

It cannot be contended, we think, that the *medium filum* was to the middle of the triangle only. Such a view would be unreasonable. It would be a view first of all extremely technical. It would decide, moreover, that *because* the purchaser of Block 54 had less than anybody else, less than he needed for the proper enjoyment of his lot, less than was usual and natural, he should have but *half* of that. Is it possible to suppose that Kinzie meant to reserve one-half the triangle? Of what use could such a piece of ground be to him? Of what necessity was it not sure to prove to the purchaser? A *full street* is supposed to be equally divided, because the owner on each side needs half; but here there was no owner on the east or lake side. The broad and fathomless Michigan was there. Ownership was not predicable of that side at all, and was predicable of the other side only. Had the road been full sixty-six feet wide, yet we might say that at common law, even then coming to the water's edge, it was a case where the owner would take it all. In grants on tidal waters the grant is almost universally to low water mark; and this for the obvious reason that, if this mark change, the purchaser may still have as near as possible what was sold and what was bought. By analogy we may fairly contend that here the purchase is to the water's edge, even had the street been full, there being nothing to be sold beyond it. That seems to be the doctrine of the Louisiana case; specially, as we have said, worthy of respect in this branch of law.

The case does not show that Kinzie ever asserted or supposed he had any interest left after his deed of 1833. Years

* Municipality No. 2 *v.* Orleans Cotton Press, 18 Louisiana Annual, 240.

after he had parted with his interest there, the accretion began to form. It was not inventoried among the assets of his bankrupt estate, because it did not then exist. Fifteen years after that, a "prowling assignee" asks for, and obtains, an order to sell the demanded premises, which had no existence, either in fact or law, until after Kinzie had been declared a bankrupt, and when he was no longer the owner of the principal estate, or any part of it, to which the right to accretions could attach. The assignee takes no greater interest than the bankrupt had in the estate assigned to him, and we cannot well see how a right to accretions, which is an incident to the principal estate, can arise or exist in favor of one who had no such estate.

2. Kinzie was declared a bankrupt in 1842, under the act of August 19, 1841. The petition and order for a sale of the demanded premises were made in 1857. If any interest or estate was left in Kinzie, after his conveyance of 1833, his assignee, and those claiming under him, are barred from maintaining this suit by the 8th section of the bankrupt act. This, like all limitation laws, was intended as a "statute of repose," and to insure a prompt settlement of the bankrupt estate; and the public good requires that full effect be given to it by the courts.

It is a practice too common all over the country for assignees to make sales of real and pretended interests in the bankrupt estate down to the present time, and for the purchasers to bring suits upon the titles thus acquired. It cannot be pretended that this is done for the benefit of the creditors. It is now more than twenty years since that law was enacted and repealed, and the interests of the creditors of the bankrupts have, in most cases, passed away, and these proceedings are instituted obviously for speculating and litigious purposes. They belong to the class of suits described by Lord Bacon as "contentious suits," which that great judge declares "ought to be spewed out as the surfeit of courts."* The act, in express terms, limits the right of the

* Essay of Judicature.

assignee to bring any suit, at law or in equity, against any person claiming an adverse interest touching the property, and rights of property, assigned to him, to two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued. The present cause of action (if there is any) arose fifteen years before the petition for the sale of the demanded premises was filed. The assignee acquired title to them at the date of the assignment, or he never did; and if his right was barred, so was that of his grantee, for it was a limitation against the right to recover these premises, and he could transfer no greater right than he had. This point has been decided in New York.*

Mr. Wills, contra.

The CHIEF JUSTICE delivered the opinion of the court, and, after stating facts, proceeded as follows:

The rule governing additions made to land, bounded by a river, lake, or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.

There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake. The controversy turns on ownership.

In deciding this controversy, we derive no important aid from the statutes of Illinois, referred to in the argument.

* Cleveland *v.* Boerem et al., 24 New York, 613, S. C., 27 Barbour, 252.

The plat of Kinzie does not appear to have been executed, acknowledged, and recorded, in conformity with either of them.* It operated, therefore, only as a dedication; and the law applicable to dedications must control our judgment.

It is a familiar principle of that law, that a grant of land bordering on a road or river, carries the title to the centre of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. There is indeed a passage in one of the judgments of the Supreme Court of Illinois which, if taken literally, would exclude grantees of lots in towns and cities from any interest whatever in the streets beyond the common use. The court said: "In the case of a valid plat," that is, a plat duly executed, acknowledged, and recorded, "the title to the ground set apart for public purposes is held by the corporation for the use and benefit of the public; in the case of a dedication by a different mode the fee continues in the proprietor, burdened with the public easement."† This rule would limit the grantee of Block 54 to the lines of the block, and he would take nothing in Sand Street; but the propositions quoted were not essential to the decision of the question before the court, and there are other cases‡ which seem to warrant a belief that when the operation of an ordinary dedication shall come directly before that tribunal, it will not apply any other principle to its construction than that generally recognized.

We shall assume, therefore, that the owner of the southeast part of Block 54 was the owner of the adjacent part of Sand Street to its centre. But adjacent to that part of the block, Sand Street had been reduced, as the plat clearly shows, to the small triangle already described; and it must follow that it was to the centre line of the street thus reduced that the defendant acquired title. He took, subject to the public use, the westerly half of the triangle and no more.

But Kinzie was the original owner of the whole fractional

* Jones *v.* Johnson, 18 Howard, 153. † Manly *v.* Gibson, 13 Illinois, 312.

‡ Canal Trustees *v.* Havens, 11 Illinois, 557; Waugh *v.* Leech, 28 Id. 488.

section. He retained every part of which he did not divest himself by deed or dedication. By the dedication of Sand Street, he gave to the public the use and only the use of the land within the artificial and natural lines marked on the plat. By the conveyance of Block 54 west of the street, he conveyed the fee of Sand Street within those lines to its centre. On the east side of the street, opposite that block, he conveyed nothing, for he had nothing to convey. The fee, therefore, of the eastern half of the triangle which there formed the street, remained in him. In the words of the Supreme Court of Illinois, clearly just when applied to the land in question, "the fee continued in the proprietor, subject to the easement."

Upon Kinzie's bankruptcy the fee of this strip of land passed to the assignee. It was about this time, or shortly afterwards, that the alluvion began to form upon it, and continued to increase until the commencement of the suit below. The title to the accretion, thus made, followed the title to the land and vested in the assignee.

It is unnecessary to consider the effect of the accretion, under the dedication, upon the width of the street; for, whatever that effect may have been, the fee of the east half and of the accretion beyond the true width, whatever that width was, remained constantly in Kinzie or the assignee. A part, therefore, of the bankrupt's estate remained unsold when the order of sale, under which the plaintiff in error claims, was made by the District Court; and the only remaining inquiry is, whether that order was lawfully made.

The eighth section of the bankrupt act of 1841 limited suits concerning the estate of the bankrupt by assignees against persons claiming adversely, and by such persons against assignees, to two years after decree of bankruptcy or first accrual of cause of suit. There is no express limitation upon sales, nor any limitation upon any action other than suits, by the assignee, except a general requirement in the tenth section, that all proceedings shall, if practicable, be brought to a close by the court within two years after decree. We are not satisfied that the limitation in the eighth

section can be applied to sales of real estate made by assignees under orders of district courts having general jurisdiction of proceedings in bankruptcy. But it is not necessary now to pass upon this point. The limitation certainly could not affect any suit, the cause of which accrued from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession; and there is nothing in the record which shows when the adverse possession relied on by the defendant in error commenced, and therefore nothing which warrants the application of the limitation to the petition for the order of sale.

We think the court below erred in instructing the jury that the defendant in error, upon the case made, was entitled to their verdict. Its judgment must therefore be reversed, and the cause remanded with directions to issue a

NEW VENIRE.

BROOKS *v.* MARTIN.

1. After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms,—*the results* of the contemplated operation completed,—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract.
2. Where one partner, who is in sound health, is made sole agent of the partnership by another, who is not, and who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies.

MARTIN filed a bill in equity in the Federal Court of Wisconsin to set aside a contract of sale which he had made to Brooks of his interest in a partnership venture, and for an account and division of the profits; the ground of the prayer being his own alleged embarrassed condition at the time of the sale; his ignorance of the partnership business; fraud on the part of the defendant, Brooks; concealment by Brooks of what he knew; misrepresentation in what he

professed to tell; and want of consideration proportioned to the real value of the interest which the complainant had in the concern. The answer admitted the purchase by Brooks, but denied the fraud. The court gave the relief prayed; and from its decree herein an appeal, the present suit, came here.

The case, as proved by the evidence, and as shown and assumed by this court after a very careful examination of an immense mass of testimony,—twelve hundred pages closely printed,—set forth in part in the opinion, but, as involving very voluminously controverted issues of fact, not necessary, nor indeed possible, to be presented here,* was in substance this.

On the 11th February, 1847, the United States, being then at war with Mexico, Congress passed a law by which warrants were directed to be issued to soldiers for a certain quantity of land each; but in order to protect the soldier entitled to the warrant against the rapacity of land brokers and others who would profit of his improvidence, the statute provided, by a ninth section, that any sale or contract going to affect the title or claim to any such bounty made *prior* to the issue of such warrant, should be "null and void *to all intents and purposes whatsoever.*"† Just after the passage of this statute, that is to say, in June, 1847, the complainant, Martin (who was a banker in New Orleans), Brooks, the defendant, and a certain Field, entered into a partnership at New Orleans; the *ostensible* object of the firm being "the purchase and sale of bounty land warrants that may *have* been or *may be* issued under the law of Congress," &c. The purchases and sales were to be conducted by Brooks and Field, and the money was to be furnished by Martin. *Brooks was the brother-in-law of Martin, and had been a clerk in his banking-house.* Field was a stranger. It was, therefore, agreed that Brooks should, in the actual management of affairs, re-

* The printed record made a book of 1201 pages of long primer, solid; a volume, of itself, larger than any volume of reports of this court ever published.

† 9 Stat. at Large, 125.

present Martin, and have full and exclusive control of the business; an agreement, of course, by which he obtained a preponderating influence in the management of the partnership over Field. The bill, indeed, alleged that Brooks had a power of attorney from Martin, authorizing him, on all occasions, to represent him in the partnership business. This fact was denied in the answer; but the answer admitted that Brooks was authorized by Martin to control the business. Martin advanced, in cash, over $57,000; and large purchases having been made of soldiers' claims, the parties closed their operations in New Orleans, where little was done after a few months in the way of purchasing warrants. Brooks then came to Washington to attend to the issue of warrants. Field, with two brothers of his, went to Wisconsin to locate the warrants and sell the lands. Martin still remained in New Orleans, carrying on his business of banker. From the time that Brooks and Field left New Orleans, *the management of the entire business fell, apparently, under the direction of Brooks.* None of it was conducted in New Orleans, nor, except five or six, which Brooks bought at the suggestion of Martin, were any further warrants bought there. The accounts were kept in Wisconsin, two thousand miles from where Martin was, and who had no opportunity of hearing anything about the partnership except as it was communicated to him by Brooks or Field, or one of the brothers Field, who were employed as clerks or agents in the business. No reports of the business were made to Martin; and, as the testimony showed, Brooks and Field managed it entirely without consulting him, irrespectively of his interest. The firm was known indifferently as Brooks & Field, and as Brooks, Field *& Co.*

In the winter of 1847–8, Martin failed in business, and his health, including specially, it seemed, his nervous condition, became considerably prostrated. During the winter just named, and when much embarrassed and absorbed about his business, he applied for information to Brooks, who was then in New Orleans, and who gave him a very discouraging account of everything; one, the court as-

sumed, which might naturally make Martin "glad to escape with a few thousand dollars which it owed him as a creditor;" an account which the court considered that it was impossible to regard as true.

In June, 1848, Martin, at the invitation of Brooks, went to Pittsburg, in Pennsylvania, to meet Brooks, who then and there, on the 28th June, 1848, bought out his interest in the partnership. *Martin, at this time, had never been in the West, and, in fact, knew little or nothing as to the particulars of what had been done there.* There was no evidence, indeed, except the answer of the defendant, which was discredited by facts, that Martin ever had a remote conception of the condition of the business. On the contrary, there were letters in the record begging for statements on that subject.

On the other hand, when Brooks and Martin met in Pittsburg, Brooks had just come from Wisconsin, where he saw Field and his brothers, and where he had the partnership books for examination, and spent several days in examining them. That *he* knew the real condition of the concern, and was fully and minutely informed as to every item of its business, was considered by the court as "beyond dispute."

It appeared, in addition, by letters from Brooks to one George Field, a brother of Field, the partner, written before the sale was made, that Martin had directed that all remittances should be made to *him* at Washington; showing by allusions in them to a remittance which George Field had proposed to make to Martin, and to certain friends and correspondents of his named Lake & Co., in New York, that Brooks specifically, and apparently with an interested motive, desired that no remittance should thus be made. In one letter, written June 20th, 1848, that is to say, *eight days before the sale*, and after he had invited and was expecting Martin to meet him at Pittsburg in contemplation of the purchase which he there made, Brooks says:

"I can hardly express to you how much I feel obliged to you for the soundness of the judgment that dictated to you to remit directly to me, rather than to New York or any other place, without my direction. I had been rendered somewhat una-

miable the day before by a letter from George Field, in which he suggested the propriety of remitting directly to New York. I feared he had so directed you. *It would have greatly embarrassed my operation. I want all advice*, as well as all remittances, to pass through myself. If Mr. Lake OR ANY ONE ELSE ask information in relation to our matters, refer him to me, advising me of the circumstance."

The partnership at this date,—as the court, after a computation made by it on an analysis of the evidence, showed and assumed,—presented clear cash profits, ...	$15,000
It had, also, as the court showed, and assumed it to be proved, 45,000 acres of land, which, estimated at Government rates,—a low rate of estimate in view of the fact that they had been carefully selected by Field and his two brothers, one of whom had been sent to examine the land personally before the warrants were located, and who was early in the field and made judicious selections,—gave about	57,000
Or a total profit of	$72,000

of which Martin's share, for the partnership, by its terms, was not an equal one, *came to* $30,000.

The consideration of Brooks's purchase was an *agreement* by him to pay all debts of the partnership, about $45,000, and a payment, as *he* alleged, of $3000 to Martin, though, as Martin asserted, a payment of about one-half a balance due him on another account; which balance, it was evident, that Brooks was bound for. Brooks gave no security for his performance of his agreement to pay these debts.

At the time when this bill was filed, to wit, on the 3d of August, 1857, which was apparently so soon as Martin had examined into the facts of the case, *all the claims purchased by the firm had been turned into land warrants, and the warrants had been sold or located. Where the purchase had been made prior to the date of the warrant granted, assignments were subsequently made by the soldier. A portion of the lands thus located had been sold, part for cash, partly on mortgage, and the assets of the partnership consisted now almost wholly of cash securities or of land.*

Besides a full denial of the offensive allegations, as made by the bill, the defendant set up as follows:

That notwithstanding the statement in the articles of partnership that the business of the firm related to the purchase and sale of bounty land *warrants and scrip*, such was not the true purpose of its formation, nor the business which it really transacted; but that the partners intended, and really did engage in buying up the *claims* of the soldiers, who were then returning from Mexico by way of New Orleans, for bounty land or scrip, *long before any scrip or land warrants were issued* by the Government [a fact of which there appeared, indeed, by the evidence, to be no great doubt]; that this was an illegal traffic, forbidden by the act of Congress of February, 1847, above referred to, and against public policy; that, accordingly, the plaintiff could have no relief in a court of equity against his copartner, even if it were made to appear that the latter realized a large sum out of the venture, and defrauded the former of his share of the amount so realized.

2. That no such fiduciary relation existed between the parties, from the mere fact of *partnership*, or from anything shown in the case, as entitled the complainant to relief.

Mr. Howe for the appellant, Brooks.

1. It is quite apparent what was the true purpose of this partnership. However that purpose was veiled,—and the veil was but a transparent one,—the enterprise was set on foot to do exactly that thing which the sixth section of the act of Congress declared no one should do; to do that which the act makes "null and void *to all intents whatsoever*." That the traffic was actually one in *claims* is, in effect, confessed. The evidence on that point is conclusive. The suit, then, is brought in violation of a maxim of the very horn-books, *Ex turpi causâ non oritur actio*. In *Russell* v. *Wheeler*,* the Supreme Court of Massachusetts say: "No principle of law is better settled, than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." In *Shiffner* v. *Gordon*,† Lord Ellenborough laid

* 17 Massachusetts, 281. † 12 East, 304.

it down as a settled rule, "that when a contract which is illegal remains to be executed, the court will not assist either party in an action to recover for the non-execution of it." In the New York case of *Beldin* v. *Pitkin*,* Thompson, J., says: "It is a *first principle*, and not to be touched, that a contract, in order to be binding, must be lawful." Other cases, English and American, show how deep and firm are the foundations of the rule, and how far the rule itself will reach and ramify.†

2. Partners, in a case like this, do not stand to each other in the relations of trustee and *cestui que trust*. All the partners were business men. Martin's business was that of a banker, a pursuit requiring great business intelligence and sharpness. Partners do not rely on each other as the ward relies on its guardian, or as the *cestui que trust* of any kind on her trustee. On the contrary, they consult as equals in capacity, caution, and ability, to take care, each, of himself; and guard themselves as often, one against the other, as all do, against third parties.‡

3. As respects facts, it is vain to say that Martin's *mind* was enfeebled, though his body may have been. This, indeed, is not pretended. He was competent, perfectly competent, to attend to business. The consideration was as much as the case called for. The concern was yet on the tide of experiment; a tide which was as likely to ebb as to flow, and which, in its ebb, might leave the shore strewed with wreck. Uncertainty and risk,—risks, civil and, perhaps, criminal,—belonged, as yet, to the whole enterprise. Without any doubt at all, the sales of their warrants by the soldiers, before the issue of them, were void to "all intents." Being void to "*all* intents," the soldiers could come forward *at any time*, and successfully claim the land as their own. Here is a fact to be kept constantly in view. What profits

* 2 Caines, 149.

† Springfield Bank *v.* Merrick, 14 Massachusetts, 322; Russell *v.* DeGrand, 15 Id. 39; Wheeler *v.* Russell, 17 Id. 281; Simpson *v.* Bloss, 7 Taunton, 246; Aubert *v.* Maze, 2 Bosanquet & Puller, 371.

‡ See Wheeler *v.* Sage, 1 Wallace, 518.

the concern would ultimately give was a matter which, like the "means" of Signor Antonio in the Merchant of Venice, was still "in supposition." It was a worse case still; for the outlays were both certain and large; and what penalties might attend the violation of the statute, as we have said, remained to be seen.

Mr. Carpenter, contra.

1. We do not admit that the parties meant to violate the act of Congress. The act, moreover, did not declare it criminal to buy bounty rights. This case is analogous to cases arising under the Statute of Frauds, which declares contracts of certain kinds void, unless in writing. The contract, though voidable, has never been regarded as criminal.

But quite independently of this, the bill relates to transactions wholly subsequent to and independent of the purchase of the bounty rights. The case falls within the English precedent of *Tenant* v. *Eliott.** In that case, the defendant, a broker, effected an insurance for the plaintiff, which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality upon which an action for money had and received was brought. The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction. The same principle was applied and enforced in *Farmer* v. *Russell,*† and in *Thomson* v. *Thomson,*‡ by Sir William Grant, as great a judge as ever sat in Chancery.

2. The general position taken on the other side, as to the relations of partners to each other, may be true in some cases. It is not true in all, nor true here. Brooks was not the partner, but the agent of Martin. He was his brother-in-law, and had been his clerk. He had a special know-

* 1 Bosanquet & Puller, 3.

† Id. 296.

‡ 7 Vesey, 473; and see, also, Sharp *v.* Taylor, 2 Phillips's Ch. 801.

ledge of the condition of the business, which Martin had not. It matters not that the parties did not stand in the *technical* relation of trustee and *cestui que trust.* That is not essential in any case. The principle is a general one, and it applies to "all cases where confidence is reposed, to agents, attorneys, solicitors, guardians," &c.* In all such cases, "the transaction is scanned with the most searching and questioning suspicion." The party must show that "he took no advantage *whatever* of his situation; that he gave to his *cestui que trust* all the information which he possessed or *could obtain* upon the subject; that he advised him as he would have done in relation to a third party offering to become a purchaser, and that the price was fair and adequate." And the *onus* is on the party purchasing.†

3. How can these principles be applied, and the purchase stand? Martin relied wholly on Brooks, who systematically prevented his getting information. The letter of Brooks, June 20, 1848, to George Field, proves this fact, and proves, also, a fraudulent design. The purpose of this letter cannot be concealed. Neither was there any consideration. Brooks, indeed, agreed to pay the partnership debts; but, in the first place, the debts were far more than provided for by the vast profits; and, second, Brooks gave no *security* to pay them or save Martin harmless, if they had not been. As a partner, he was bound to pay them at any rate. So he *gave* nothing. Neither did Martin *get* anything, for he was bankrupt already; and the agreement to discharge the debts was of no value. Even if it had been, the consideration was wholly inadequate in view of the large profits made.

Mr. Justice MILLER, stating the facts of the case, as he proceeded, and showing that its different parts were proved by the testimony, delivered the opinion of the court to the following effect:

We think that, in point of fact, the allegation of the an-

* 1 Leading Cases in Equity, by Hare & Wallace, note to Fox *v.* Mackreath, 72.

† Id.

swer,—that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, "I refuse to proceed with this partnership, because the purpose of it is illegal," Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement," Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell* v. *Wheeler*,* *Sheffner* v. *Gordon*,† *Belding* v. *Pitkin*,‡ and the others cited by counsel for appellant, and no further.

All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in

* 17 Massachusetts, 281. † 12 East, 304. ‡ 2 Caines, 149.

the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case.

In *Sharp* v. *Taylor*,* a case in the English Chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition, she made several trips, which were profitable; and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with plaintiff for his share of the profits, or to

* 2 Phillips's Ch. 801.

acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham and from his opinion we make the following extracts: "The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor" (the defendant) "received the money; and plaintiff is now only seeking payment for his share of the realized profits. . . . . As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? . . . . The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. . . . . The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, is distinctly taken in *Tenant* v. *Elliot*,* and *Farmer* v. *Russell*,† and recognized and approved by Sir William Grant, in *Thomson* v. *Thomson*."‡

These cases are all reviewed in the opinion of this court in the case of *McBlair* v. *Gibbes*,§ and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus

* 1 Bosanquet & Puller, 3.

† Id. 29.

‡ 7 Vesey, 473.

§ 17 Howard, 232.

announced is sound, and that it is directly applicable to the case before us.

The plaintiff alleges in his bill, that on the 28th day of June, 1848, he sold his interest in the partnership business to the defendant Brooks; that in making the sale he was overreached by the fraud of Brooks, who, by concealment of what he knew, and false representations in what he professed to tell, took advantage of the embarrassed financial condition of plaintiff, and his ignorance of the partnership business, and procured from him the sale for a consideration totally disproportioned to the real value of his interest in the concern. The defendant admits the purchase of plaintiff's interest, but denies the fraud, and insists that the transaction was in all respects fair and honest. The issue thus generally stated here, is the one mainly contested in the case; and so contested that a record of a thousand printed pages is mostly filled with testimony on this subject.

If the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller; and as, therefore, under no special obligation to deal conscientiously with each other, we are satisfied that no such fraud is proven as would justify a court in setting aside an executed contract. But there *are* relations of trust and confidence which one man may occupy towards another, either personally, or in regard to the particular property which is the subject of the contract, which impose upon him a special and peculiar obligation to deal with the other person towards whom he stands so related, with a candor, a fairness, and a refusal to avail himself of any advantage of superior information, or other favorable circumstance, not required by courts of justice in the usual business transactions of life. It is contended that the relation of Brooks towards Martin was of this character; and before we can dispose of the question of fraud, it is necessary to determine whether the claim thus set up is well founded; and if it is, what are the principles upon which courts of equity determine the validity of contracts between parties so situated. It is argued that the partnership exist-

ing between the parties constitutes of itself a relation which calls for the application of the principles which we have alluded to; and Judge Story, in recapitulating the confidential relations to which they are appropriate,* mentions partner and partner as one of them. It is not necessary to decide here whether, in all cases, a sale by one partner to another of his interest in the partnership concern, will be scrutinized with the same closeness which is applied to fiduciary relations generally; for there are special circumstances in this case which bring it clearly within the rules applicable to that class of cases.

1. The defendant was not only the partner of plaintiff, but he was his special agent in the management of the business. The bill alleges that he had a power of attorney from plaintiff, authorizing him to represent, on all occasions, the interest of plaintiff in the conduct of the affairs of the firm; and although this is denied in the answer, and is not proven, the answer *does* state that at the time the partnership was formed, it was distinctly agreed between plaintiff and defendant that the latter was to have the full and exclusive control of the business, and should so far represent the plaintiff as to give defendant a preponderating influence in the management of the partnership over Mr. Field, the third partner. The record leaves no doubt that he acted throughout in accordance with this agreement.

2. It is abundantly established by the testimony that, within some two or three months after the partnership was formed, the parties closed their operations in New Orleans, after having invested over $50,000, advanced by Martin, in the purchase of soldiers' claims; and that thenceforth very little was done in the way of purchasing claims or warrants. That Brooks then came to Washington to procure the warrants to be issued, and Field went to Wisconsin to seek a market for their sale. From that time forward, Brooks and Field had the entire management of the business, mainly under the direction of Brooks; and none of it was conducted

* Equity Jurisprudence, § 323.

in New Orleans save the purchase of five or six warrants made by Brooks on Martin's suggestion, nor were any reports made of the business to Martin.

Brooks and Field thus managed the entire concern, at a distance of near two thousand miles from Martin, and, as we think the testimony shows, without consulting him in any way, and with very little regard for his large interest in the business.

Under these circumstances, Brooks must be held to have been not only the partner, but the special agent of Martin; and the purchase made by him of Martin's interest must be tested by the rules which govern such transactions as between principal and agent.

What are these rules? "On the whole, the doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage."* Or, to speak more specifically, "if a partner who exclusively superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void."†

Speaking of a purchase by a trustee from his *cestui que trust*, Lord Chancellor Eldon says, in the case of *Coles* v. *Trecothick*,‡ that though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence; so much, that it is very hazardous for a trustee to engage in such a transaction. "A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; provided the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character

* 1 Story's Equity, § 323. † Id. § 220. ‡ 9 Vesey, 234.

of trustee. I admit," he says, "it is a difficult case to make out, wherever it is contended that the exception prevails." This has long been regarded as a leading case, and the above remarks have been often cited by other courts with approbation. We think them fully applicable to a purchase, by an agent from his principal, of the property committed to his agency.*

We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter.

In regard to the adequacy of the price, it is obvious that Brooks did not pay to Martin anything which he was not bound to pay before the sale was made, or assume any obligation under which he did not already rest; nor did Martin receive anything which Brooks did not then owe him, or his promise to do anything for which Brooks was not previously bound. The only matter in which their relations were changed was, that Martin sold to Brooks his share of the profits of the business, and Brooks assumed to bear all Martin's share of the losses.

So the condition of the partnership business, at this time, shows a balance of $15,000† of profits, all of which was cash, or funds equal to cash. It further appears, that there were on hand and unsold over 45,000 acres of land, which, at the Government rate of $1.25 an acre, gives an aggregate value of $57,000. Add this to the $15,000 above mentioned, and we have $72,000 as the probable profits of the partnership venture, at the time of this sale.

* See, also, Michoud *v.* Girod, 4 Howard, 503; Bailey *v.* Teakle, 2 Bockenborough, 51–54; Hunter *v.* Atkyns, 3 Mylne & Keene, 113; Maddeford *v.* Austwick, 1 Simons, 89.

† The court here made a computation giving this result.

It is said that the danger that soldiers would seek to reclaim the warrants, or the lands on which they had been located, under the provisions of the act of 1847, already mentioned, must have detracted largely from the amount which any prudent man would have given for Martin's interest in the concern. This danger was, however, a very remote and improbable one, and must have so appeared, when we consider that these claims have been bought from young men scattered over the different States of the Union, with no means of ascertaining where the warrants were located, or in whom the title was vested; and that the amount, in each case separately, was not worth the trouble and expense of the search and subsequent litigation. But while these considerations might have some weight, if the question of adequate price were otherwise in doubt, they can go but a little way to establish that point, in the circumstances of the present case.

Martin's share of the profits were $30,000, for which Brooks gave him substantially nothing.

Was Martin placed by Brooks in possession of all the information known to himself, and which was necessary to enable Martin to form a sound judgment of the value of what he was selling?

[His honor here examined the evidence on this question of fact,—some of it of an inferential kind,—minutely, and went on thus]:

But we are not left alone to this negative and inferential testimony on the subject. We have letters from Brooks to the Fields, written before the sale was made, in which he urges that all remittances shall be made to him at Washington, showing from the allusions in them to a proposed remittance to Martin, and to Lake & Co., who were Martin's correspondents in New York, that his intention was that no remittance should be made to Martin. When we consider that the letter of June 20th was written at a moment when he was expecting in a few days an interview with Martin, which he had himself suggested, and that he was no doubt then contemplating the very purchase which he made at the

Statement of the case.

interview, and that he knew that Lake was the other partner in the firm of Martin & Co., we look upon it as remarkable; pointing clearly to one conclusion, namely, a determination to keep from Martin all the funds of the concern, and all information of its condition, in order that he might perform the *operation* of buying Martin's interest at a sacrifice.

We are of opinion, from a careful examination of the testimony, that Brooks occupied towards Martin a relation of confidence and trust, being his partner, his agent, and his brother-in-law, and having also entire control of the partnership business; that he took advantage of this position to conceal from Martin the prosperous condition of the concern, and purchased from him his interest, for a price totally disproportioned to its real value; and that, under such circumstances, it is the unquestionable duty of a court of chancery to set aside the contract of sale.

DECREE AFFIRMED WITH COSTS.

Mr. Justice CATRON dissented briefly; on the ground that the partnership, having been formed for the purpose of speculating in soldiers' *claims* to warrants, the original transaction was a fraud upon the act of Congress; violating public policy; and that in such a case equity does not interfere.

BADGER *v.* BADGER.

Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where,

1. The trust is *clearly* established.
2. The facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust.*

And in cases for relief, the *cestui que trust* should set forth in his bill, specifically, what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of his rights.

BADGER died in 1818, leaving a widow and ten children, one of whom only was of age at that time; the others being

minors, of different ages. One of them came of age in 1824; another in 1828; a third in 1831; a fourth in 1834; a fifth in 1835; a sixth in 1837. The eldest son, Daniel Badger, took administration on the estate in 1819, an uncle being joined with him; and soon after filed an inventory of the estate, its debts, and liabilities. In 1820, having settled one administration account, the administrators obtained leave from the court to sell certain portions of the real estate. None of these proceedings were the subject of question.

In 1827, they filed a further account, which had indorsed upon it what purported to be the written approval of the widow and heirs, the latter acting by their guardians. By this account they claimed credit for several thousand dollars, alleged to have been advanced for the estate, and in 1830 got leave from court to sell as much real estate as would pay this balance. Public sale of the real estate was accordingly made; when it was bought by a friend of Daniel Badger, the administrator, and soon afterwards conveyed to him. The widow died in 1855, aged 74.

In 1858, *James* Badger, a son and heir, whose age did not appear, further than from the fact of the father's death in 1819,—and one of the persons *who by his guardian, now dead, had approved of the account of* 1827,—filed a bill against his brother Daniel,—administrator, as aforesaid,—in the Circuit Court for the Massachusetts District, charging that the account of 1827 was false and fraudulent; that the real estate had been sold beneath its value, and bought in for his said brother, the administrator; that before this purchase he had silenced the objections of some of the heirs who opposed the sale by purchasing their shares; and had forged, or fraudulently procured the signature of the widow, his mother; and in this way had obtained license from the court to sell. The bill alleged, that "the fraudulent acts and doings of the said Daniel were unknown to the complainant and his coheirs, until within five years last past," and prayed an account, &c.

The answer of Daniel Badger, the defendant, denied the allegations of the bill generally; and, on the last point, de-

nied "that the complainant, or any of the said heirs-at-law of said intestate, did not have personal knowledge of all acts and doings of said Daniel (the administrator), in reference to the sale and purchase of these estates until within five years."

There was much testimony from different members of the family; the charges of the bill being more or less supported by the evidence of heirs who had sold out what rights they had to James Badger, the complainant below. Some of the witnesses testified that Daniel, the defendant, who bore his father's name exactly, had often declared that, being the oldest son and bearing the paternal name, he was entitled to *all* the property. One of the witnesses was a daughter, born in 1807.

The court below dismissed the bill as being stale. On appeal the question was, whether this was rightly done?

Mr. Robb, for the complainant in error: We are entitled to the relief prayed for, unless we have lost our rights by the lapse of time, or the statutes of limitations, or are otherwise estopped from asserting them.

It may be true that courts of equity consider themselves bound by the statutes of limitations, which govern courts of law in like cases; and in many other cases they act upon the analogy of the limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession; courts of equity will act upon the like limitations, and apply it to all cases of relief sought upon equitable titles or claims touching real estates. These, as abstract propositions, we do not controvert. But they do not furnish any ground for refusing the relief prayed for in this bill. If the defendants invoke the protection of this abstract principle, they must clearly bring themselves within it. It is not for the plaintiff to show that he is *not* barred by the statute, but for the defendants to show that he is; they must make it appear by a proper plea and proof, that they are entitled to the benefit of the limitation. It will be said that more than twenty years had elapsed since the sales took place, before

this suit was commenced, and that this is apparent on the record. But it does not appear that this plaintiff became *of age* twenty years before the commencement of the suit. The inference is that he did not.

Nor are we barred by any rule of limitations, peculiar to courts of equity, because of alleged laches. We do not admit "that courts of equity treat a less period than the one specified in the statute as a bar to the claim." Story, J., says:* "In a case of trusts of lands, nothing short of the statute period, which would bar a legal estate or right of entry, would be permitted to operate in equity as a bar of the equitable estate." Certainly no bar, either legal or presumptive, will begin to run until after the cause of action or suit has arisen; and in equity, in cases of fraud and mistake, it will begin to run only from the time of the discovery of such fraud or mistake, and not before. The license to sell, we assert and show, was procured by fraud.

Daniel Badger sustained to his mother and brothers and sisters, more especially the minors, a relation of peculiar trust and confidence, of both natural and legal obligation. He was not only administrator, and thus the guardian of their interests, but he was her son and their protector. It was his duty, imperatively imposed, to deal with them frankly and truthfully and honestly, and a court of equity will hold him strictly to it. If he suffered them to be deceived, this was a fraud upon them. But whether fraud or mistake, they will not be barred, either by the statute or by laches, until they discovered it. When was that? Certainly not until long after these sales took place. There can be no acquiescence without full knowledge of facts. Even a written acknowledgment of acquiescence in his acts, made in ignorance of their rights, would not bind them. In *Michoud et al.* v. *Girod et al.*,† this was so held, in the following words: "Even acquittances given to an executor, without full knowledge of all the circumstances, where information had been withheld by the executor, are not bind-

* Baker *v.* Whiting, 3 Sumner, 486.

† 4 Howard, 503.

ing." And this court set aside and annulled a decree in favor of one of the executors for a large amount, although there had been a judgment in his favor by a competent court, after a full trial before arbitrators, and an allowance of the sum so found to be due him in the executor's account.

When did they first discover that they had been deceived and imposed upon by their brother? or, in other words, when did they first learn that their estates were not legally liable to be taken and sold for payment of debts? for not until that time will the limitation begin to run.

The bill alleges, substantially, that this was not known to them until within five years before the commencement of the suit. The answer does not deny this. It is, at least, evasive. The bill does not allege that they "had no knowledge of the sale and purchase of these estates until," &c., and the answer denies what is not alleged,—leaving the allegation unanswered.

Sufficient does not appear to make it the duty of this court to shield the defendant from accountability for his acts,—acts certainly never permitted to such a trustee,—on the ground that the plaintiff has grossly neglected to enforce his rights in the premises.

But, in cases of actual fraud, courts of equity do not adopt or follow the statutes of limitations; they will grant relief within the lifetime of the party who committed it, or within thirty years after it has been discovered, or become known to the party whose rights are affected by it.

The rule, as stated by the court, in *Michoud et al.* v. *Girod et al.*, just cited, is universally recognized and applied by courts of equity. It has been affirmed by this court in subsequent cases, and we do not think it will be controverted. It was held, in that case, that "a purchase, *per interpositam personam*, by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud upon the face of it;" and that "this rule applies to a purchase by executors, though they were empowered by the will to sell the estate;" and "that a purchase so made by executors will

be set aside." The sales in the case at bar took place in 1830; the present suit was begun in 1858, and in the lifetime of the person upon whom the fraud is proved, and within thirty years after it had been discovered. There was sufficient motive for an *heir's* not attempting to set the sale aside, in the fact that the widow would have had her dower in whatever land might be recovered.

Mr. Merwin, contra.

Mr. Justice GRIER delivered the opinion of the court.

The numerous cases in the books as to dismissing a chancery bill because of staleness, would seem to be contradictory if the dicta of the chancellors are not modified by applying them to the peculiar facts of the case under consideration. Thus, Lord Erskine, in an important case once before him, says: "No length of time can prevent the unkennelling of a fraud." And Lord Northington, in *Alden* v. *Gregory*,* with virtuous indignation against fraud, exclaims: "The next question is, in effect, whether delay will purge a fraud? Never—while I sit here! Every delay adds to its injustice and multiplies its oppression." In our own court, Mr. Justice Story has said:† "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief."

Now these principles are, no doubt, correct, but the qualifications with which they are stated should be carefully noted:

1st. The trust must be "clearly established."

2d. The facts must have been fraudulently and success-

* 2 Eden, 285.

† Prevost *v.* Gratz, 6 Wheaton, 481.

fully concealed by the trustee from the knowledge of the *cestui que trust.*

The case of *Michoud* v. *Girod*, cited by the appellant's counsel, is an example of the class in which the concealment of the fraud was the aggravation of the offence. The facts of the case were "clearly established" by records and other written documents, and the court were not called on to found their decree on the frail memory or active imaginations of ancient witnesses, who may not be able, after a great lapse of time, to distinguish between their faith and their knowledge, between things seen or heard by themselves, and those received from family or neighborhood gossip, or upon that most unsafe of all testimony, conversations and confessions,—remembered or imagined,—partially stated or wholly misrepresented. The fraudulent concealment was also clearly established. The heirs, who lived in Europe, were deceived by the false representations of the executor, and kept in total ignorance of the situation and value of the estate, having no other information on the subject than that communicated to them by him. The delay was not the consequence of any laches in the heirs, but was caused by the successful fraud of the executor, and was but an aggravation of the offence.

But the case before us has none of the peculiar characteristics of those to which we have referred. For more than twenty-five years the widow and heirs have acquiesced in this sale, and it is more than thirty since the administration account was settled, which is alleged to have been fraudulent. The guardian of the complainant, who approved the account, is dead; the widow died in 1855. Two of the heirs were of full age in 1831, and the others afterwards. This bill was filed in 1858. The bill does not state the age of complainant. But at the time of filing his bill, he must have been over forty years of age.

The whole transaction was public, and well known to the widow and the heirs, and their guardians. The purchase of the estate by the administrator could have been avoided at once, if any party interested disapproved of it. There was not and could not be any concealment of the facts of the

case. The complainant claims as assignee of his elder brothers and sisters, and uses them as witnesses to prove the alleged fraud after a silence of over thirty years. They attempt to prove the signature of their mother to the documents on file in the court to be forged, and this after the death of the mother, who lived for twenty-eight years after the transaction without complaint or allegation either that her signature was fraudulently obtained or forged. A daughter, who was twenty-three years of age when this sale was made, and had full knowledge of the whole transaction, after near thirty years' silence, now comes forward to prove that her concurrence and assent was obtained by fraud; and now, after the death of the guardian and the mother, who could have explained the whole transaction, the aid of a court of chancery is demanded to destroy a title obtained by judicial sale, after the parties complaining, with full knowledge of their rights, have slept upon them for over a quarter of a century.

Now, the principles upon which courts of equity act in such cases, are established by cases and authorities too numerous for reference. The following abstract, quoted in the words used in various decisions, will suffice for the purposes of this decision:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

"In many other cases they act upon the analogy of the like limitation at law. But there is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance

or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

The bill, in this case, is entirely defective in all these respects. It is true, there is a general allegation, that the "fraudulent acts were unknown to complainant till within five years past," while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill. That his mother was entitled to dower in the land if the sale was set aside, was no impediment to his pursuit of his rights, while her death may have removed the only witness who was able to prove that his complaint of fraud was unfounded, and that it was by the consent and desire of the family that the property was kept in the family name by the only one who was able to advance the money to pay the debts of the deceased; a fact fairly to be presumed from her silence and acquiescence for twenty-four years.

The court below very properly dismissed this bill, and refused to examine into accounts settled by the courts with the knowledge of all parties concerned, and commencing forty years and ending thirty years ago, and to grope after the truth of facts involved in the mists and obscurity consequent on such a lapse of time.

If a further reason were required for affirming this decree, it might be found in the statute of Massachusetts, declaring that "actions for land sold by executors, administrators, or guardians, cannot be maintained by any heir or person

claiming under the deceased or intestate, unless the same be commenced within five years next after the sale. But we prefer to affirm the decree for the reasons given, without passing any opinion on the effect of this statute.

DECREE AFFIRMED WITH COSTS.

BROBST *v.* BROBST.

1. Where the Circuit and District Judge agree in parts of a case, and dispose of them by decree finally, but are unable to agree as to others; and certify as to them a division of opinion, both parts of the case may be brought to the Supreme Court at once and heard on the same record.
2. A party allowed to enter an appeal bond, *nunc pro tunc*, in a case where the court supposed it probable that his solicitors had been misled by a peculiar state of the record and mode of bringing up the questions from the court below.

IN this case, in the court below, some questions had been disposed of finally by the Circuit and District Judges, and others were suspended by their inability to agree and a consequent division of opinion. An *appeal* was taken from the part covered by the final decree, and *a certificate of division upon the residue of the case.* No appeal bond had been entered.

A motion was now made to dismiss the appeal for want of an appeal bond entered into as required by the act of Congress. It was also objected that no appeal could be taken from the decision of the court below, until the certificate of division of opinion in the same cause between the judges was disposed of in this court.

Mr. Justice NELSON delivered the opinion of the court.

It appears that an appeal has been taken from that part of the case covered by the final decree, and a certificate of division upon the residue.

There is no objection to this practice. It has been recognized and acted upon in several instances in this court.

Statement of the case.

The questions arising on this appeal, and on the certificate of division, come up together, and are heard on the same record.

The omission to file the bond, under the circumstances, may be corrected by filing one in conformity with the act of Congress. The peculiar state of the record, and mode of bringing up the questions from the court below, probably misled the solicitors.

Let a rule be entered, that the appellant have sixty days from notice of it, to file a bond with the clerk of the court, to be approved by the proper officer, upon complying with which, this motion be dismissed; otherwise granted.

DAY *v.* GALLUP.

1. In trespass in a State court against the marshal of the United States for levying on goods which ought not to have been levied on, the marshal's title *as* marshal is not necessarily drawn in question. He may be sued, not as marshal, but as trespasser. Hence, a judgment in a State court against a marshal for making a levy alleged to be wrong, is not necessarily a proper subject for review in this court, under the 25th section of the Judiciary Act, allowing such review in certain cases where "an authority exercised under the United States is drawn in question, and the decision is against its validity."
2. Where a proceeding in the Federal court is terminated so that no case is pending there, a State court, unless there be some special cause to the contrary, may have jurisdiction of a matter arising out of the same general subject, although, if the proceeding in the Federal court had not been terminated, the State court might not have had it.

THE 25th section of the Judiciary Act provides that a final judgment in the highest court of law of a State, in which is drawn in question the validity of an "authority exercised under the United States," and the decision is against its validity, may be reviewed in this court. With this act in force, Gallup sued Derby & Day, Gear, and Allis, in a *State* court of Minnesota, in trespass, for taking and carrying away goods. On the 1st April, 1860, the defendants justified under certain writs of attachment and execution, issued out of the *Federal* court for Minnesota, in a certain suit therein

pending, wherein Derby & Day were plaintiffs, and one Griggs defendant. In this suit judgment had been given 10th September, 1859, execution issued on the next day, and returned satisfied on the 19th. The justification set up that Allis was attorney of Derby & Day, and Gear, marshal of the United States; that the taking was by Gear as United States marshal, under and by virtue of the writs, and at the request of Derby & Day. The debt from Griggs to Derby & Day, the affidavits and order on which the attachment and the judgment on which the execution were issued, were also pleaded by the defendants below, and that the property was the property of Griggs. The plaintiff below replied, denying that the property was the property of Griggs, but not denying the character of the defendants, or that the taking was under Federal process.

Gallup's suit against Derby & Day, Allis, and the marshal, was brought to trial June 18th, 1860; but, before the swearing of a jury, was discontinued as to the marshal.

On trial of it against the remaining defendants, Derby & Day, and Allis, it was not contended by the plaintiff that any of these parties were guilty of any but a constructive taking; that is to say, of more than having authorized the marshal to seize under his process; and before the defendants had offered any evidence, and before there had been any proof of a suit pending in the Federal court, or of an attachment issued out of such court, or that the said goods had been taken under process, the defendants' counsel moved, on the part of the defendants, Derby & Day, and Allis, and also for each of them separately, to dismiss the case, on the ground that there was nothing in the evidence which showed that they, or either of them, had had anything to do with the act of Gear, the marshal, in taking the goods; a defence set up by Allis in his answer as to other defendants than the marshal, and as was said in the motion, not denied in the reply. This the court refused to do; the defendants excepting. The defendants then called the clerk of the Federal court, and gave in evidence the substance of the attachment suit of Derby & Day against Griggs; showing, or endeavor-

Argument for the plaintiff in error.

ing to show, that the goods attached had originally been *their* goods; that Griggs had bought them on credit, and that the alleged sale by him to Gallup was a fraud; that the goods were in fact still the property of Griggs. They offered in evidence, also, the simple writ of attachment, which, under exception, the court refused to let go before the jury, unless the affidavit on which it was founded was also produced. Verdict was, however, given against Derby & Day, and Allis, the attorney, though afterwards set aside as to this last. Judgment having been entered against Derby & Day, the case was taken by writ of error to the Supreme Court of Minnesota, in which it was affirmed; and it was now before this court on writ of error, the question being whether there had been drawn in question, in that Supreme Court of Minnesota, any authority exercised under the United States.

Mr. Peckham for the plaintiff in error: The justification of the defendants below of the alleged trespass was under a *writ of attachment* issued out of the United States District Court. Here, then, is a valid defence under the authority of a United States court and marshal admitted on the record, and which the State court must have overruled, in order to have rendered the judgment they did. The proceeding is in Minnesota, and, of course, under its code. When a fact is stated in a pleading under the code of Minnesota, which constitutes of itself a defence, *the intent to rely* on it as such is a necessary inference.*

And the court is bound to give judgment according to the pleadings, without any demurrer being interposed. A judgment entered upon a trial in the face of an admission by the pleadings, showing that there ought to be no such judgment, would be erroneous.†

* Bridge *v.* Payson, 5 Sandford, N. Y. 210. The code of New York and of Minnesota being substantially the same, the decisions of New York are considered as applying.

† Id. p. 217. See, also, Van Valen *v.* Lapham, 13 Howard's New York Practice Reports, 246.

Argument for the plaintiff in error.

Now, under the case of *Crowell* v. *Randall*,* it appears in this case, by necessary intendment, that the question must have been raised and was decided. Aside, too, from its being raised by the pleadings, it was raised, although unnecessarily, on the trial. For the defendants below objected, and excepted to being obliged to produce in evidence more than the simple writ of attachment, thus claiming that the simple taking under United States process *was in itself a defence*, and without producing the affidavits, &c., on which it was founded, which would, of course, be necessary to sustain a defence founded only on fraud.

It is true that Derby & Day were not asserted to be guilty otherwise than constructively; that is to say, as being plaintiffs in the suit, and as having directed the levy and received the benefits. But it is certain that if the *act is justified* in or by the *actual* doer, it must be justified by the constructive one also. The case is the same as if the proceeding were against the marshal alone.

Now, it is settled by *Freeman* v. *Howe*, in this court,† that, as between State and United States courts, whenever an action has been commenced in one of them, the court in which it is commenced has exclusive jurisdiction over any "*res*" that may be in controversy, and over any "question" that may arise in any stage of the litigation, whether immediate or ancillary. In this case, for example, that the question whether the marshal was a trespasser or not, involves a question of right and title to the property under the Federal process, which it belongs to the Federal and not State courts to determine; that is, to say it again, and in other words, that in the State courts (and *vice versâ* where the State court first commences the action) the property must be regarded as in the possession of the marshal *as marshal*, or in the custody of the law. The case, in fact, decides that as the question "of title to the property under the Federal process" can only be "determined" in the Federal courts, it is incumbent on the State courts to leave that question to them, and that

* 10 Peters, 368.

† 24 Howard, 457.

in the State courts the marshal can never be held as a trespasser where he has, in good faith, under process, levied on goods *as the property* of the defendant in the writ; that whenever the marshal would have a right to seize goods on the allegation or claim that they belonged to the defendant in his writ, his acts in such cases, in the State courts, must be regarded as official; and the question as to whom the goods did belong can be litigated only in the courts of the United States.

The principle was, in fact, illustrated in the early case of *Slocum* v. *Mayberry*.* "If," says Marshall, C. J., in that case,—"if the officer has a right, under the laws of the United States, to seize for a *supposed* forfeiture, the *question*, whether that forfeiture has been actually incurred, belongs exclusively to the Federal courts, and cannot be drawn to another forum. And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law, or in the Admiralty, for *damages* for the illegal act."

In *Freeman* v. *Howe*, it was held, that the case did "involve a question of right and title to the property under the Federal process, which belonged to the Federal, and not State courts, to determine."

In this case there was no possession of the *res* by the marshal *as marshal*, unless on the assumption of the exclusive authority of the Federal court to decide the question of title. If Gallup desired to bring his action of trespass in the State court, the proper way for him to have done, was first to have litigated the naked right of property in the Federal court. If successful in that, he then could have brought his action either of trespass or replevin. Such a course would not have been new. It was successfully pursued in *Gelston* v. *Hoyt*.† In that case, the *question* of forfeiture was first litigated in the Federal court, and decided in favor of the claimant. The claimant then brought trespass in the State court, and recovered.

* 2 Wheaton, 1.

† 3 Id. 246.

Argument for the defendant in error.

Mr. J. H. Bradley, contra: The State court, it will be conceded by the other side, had either exclusive or concurrent jurisdiction both of the parties and the subject-matter, unless that jurisdiction is concluded by the fact that the property was taken under process issued by the Federal court. Now, the title to the property had not been called in question in that court, and there had been no decision respecting it. The return of the execution, in that case, was dated 19th September, 1859; the complaint filed 26th September, 1859. The Federal court, therefore, at the time this suit was brought, had no possession of or control over the parties or the subject-matter. The case between *Derby & Day* v. *Griggs*, in the Federal court, had been decided; the money made on the execution, and the debt satisfied.

It is supposed the jurisdiction of the State court was concluded, by the fact that the alleged trespass was committed by the marshal in execution of process; and these parties assisting him, their liability will depend on his; and as at that time the Federal court had jurisdiction, this action could not be brought in the State court. The case of *Freeman* v. *Howe* is relied on. The principle on which that case rests, and which is the basis of all preceding cases in this court on that point, is that when the possession or control of person or property has been taken by a Federal court, in the exercise of its jurisdiction, it will retain that possession and control to the conclusion of the case. It follows, that all questions touching the rightfulness of such possession are to be decided by it. This court, in the case cited, has suggested the remedies for persons claiming such property, and not already parties to the suit. But neither the reasons given by the court, in the decision of those causes, or any one of them, nor the judgments themselves, can be read to exclude the State courts from providing remedies for injuries received by individuals from acts of the officers of the Federal court done *colore officii*, especially after the case between the parties in the Federal court is at an end, and the rights of the parties so injured have not been drawn in question and decided in the Federal court.

Argument for the defendant in error.

If the person or property is taken under an attachment, or under a proceeding *in rem*, the retention of possession is necessary to the due exercise of the jurisdiction of the Federal court; if it is taken under an execution, the process is returnable into that court, and that court claims the exclusive right to determine all the questions in the cause.

If an action had been brought by Gallup in the Federal court against these plaintiffs, it cannot be doubted or denied that he might have maintained it pending the suit between them and Griggs in that court. Or he might have resorted to one of the remedies suggested in *Freeman* v. *Howe*, to raise the question of the right of property. The first, because they were citizens of different States; the last, because that court had the custody and control of the property in dispute in another suit, between other parties. This last reason fails when that litigation is ended; and Gallup's rights, postponed as to the forum pending that suit, revive when the property is no longer in the custody or control of the Federal court, and his right to it has not been called in question and decided in that court. The result is, that the jurisdiction of the State court is suspended while the property is held in the custody of the law; it revives as soon as that custody ceases. If this be so, there is no error in the record from the State court.

But if this be not so, still the remedy by the action of trespass or case may be proceeded with, even while the property taken by the marshal is in the custody of the Federal court. It is unimportant where the property is. Even if it has been destroyed, this action may be prosecuted. The suits are between different parties, for different causes of action. The validity of the process of the Federal court is in nowise called in question; its exclusive jurisdiction over the parties and the subject-matter in controversy between them, is not interrupted; its process, from the impetration of the writ to the satisfaction of the judgment, is unimpaired. If these actions could be brought and maintained in that court, between proper parties, leaving the custody of the property where it was first put by the law, so here the State court,

having concurrent jurisdiction, must be allowed to proceed with it, leaving the property still in the custody of the law. It never has been said by this court, that a State court has no jurisdiction to inquire into trespasses, *vi et armis*, committed by marshals under a pretence of process. The tests are: Is the subject-matter of the two suits the same? Can both suits be carried on without a conflict of authority between the two courts? If so, they may well be prosecuted in the two forums at the same time. If not, then the court which first obtained jurisdiction of the parties and the subject-matter will retain it to the end.*

In the Federal court, a party is pursuing his remedy to recover a debt. That is the subject-matter of the suit. As part of the process in that suit, property is taken, and is to be held in the custody of the law until that cause is finally disposed of, unless that court shall in the meanwhile order it to be released. It will not tolerate the interference of any other court with property so situated.

In the State court having concurrent jurisdiction with the Federal court, the action is brought, not to recover possession of the property thus held in the custody of the law in the Federal court, but to recover damages for the unlawful taking. The cause of action, or subject-matter of this suit, is the injury sustained by the party from whom that property was taken under color of process. The process may be *omni exceptione major;* and yet the taking under the color of that process may be a trespass. Either court may have, and must have, the power to decide this last question without infringing on the jurisdiction of the other. The property is in the custody of the law, to enable that court to decide, not the right of property, but the demand in that suit. No question as to the authority of the Federal court to issue the process is involved, directly or indirectly. If it shall appear that the property was subject to that process, the marshal is justified. The process is good; but that does not afford protection to him for taking the property of

* Smith *v.* McIver, 9 Wheaton, 532; Shelby *v.* Bacon, 10 Howard, 56.

another, for abusing the process. He is not sued *qua* marshal, but as trespasser. He sets up his defence *qua* marshal, and it fails, and that is a question which a State court is competent to try, equally with a Federal court.

Mr. Justice WAYNE delivered the opinion of the court.

The dates in this case show that at the time Gallup's suit was brought there was no case pending in the Federal court, respecting the goods which had been attached under that court's process, on attachment. On the 18th of June, 1860, before a jury was sworn in the case, it was dismissed as to Gear, the marshal. On that day a jury was sworn, and on the 20th of the month *they returned a verdict for Gallup*, with interest and costs. In fact, it becomes plain that the defendants did not then consider that there was any necessary connection between Gallup's complaint and themselves on account of the seizure and sale of the former's goods under the process of the Federal court; for on the trial of the cause, before any proof had been given that there had been a suit in the Federal court from which an attachment had been issued, or that the goods of Gallup had been seized and sold under its process, and after the defendants had examined witnesses and *Gallup had rested his case upon that testimony*, the defendants moved to dismiss Gallup's complaint as to all of them conjointly, and for each of them separately, *on the ground* that the defence of Allis in his answer was not denied in the reply as to the defendants, Derby & Day and Allis, or on the part of them separately, and because there was no evidence to connect them with the taking of the goods. The motion was refused; the defendants excepting to the decision of it. And then the defendants introduced as a witness the clerk of the Federal court; and he, to use the language of the record, proved *substantially* the suit in the Federal court of Derby & Day against Griggs, and the defendants regarded the sale by Griggs to Gallup as fraudulent. In no part of the record does it appear that the authority of Gear, as marshal, to take the goods, was drawn in question. Nor is it to be inferred from any pleading by the

defendants. The facts are, that, from the return of the execution satisfied, the Federal court had no control over the parties. The case between the plaintiffs in error against Griggs had been decided, the money made on the execution, and the debt paid.

Upon the facts of the case, as they appear in the record, we have determined that no one of the questions described in the 28th section of the Judiciary Act necessarily arose or was decided by the Supreme Court of Minnesota. We think it unnecessary to particularize such decided questions as will give jurisdiction to this court under that act. We therefore dismiss the writ of error to the Supreme Court of Minnesota.

DISMISSAL ACCORDINGLY.

HUMISTON *v.* STAINTHORP.

A decree in chancery, awarding to a patentee a permanent injunction, and for an account of gains and profits, and that the cause be referred to a master to take and state the amount, and to report to the court, is not a final decree, within the meaning of the act of Congress allowing an appeal on a final decree to this court.

STAINTHORP and Seguine had filed a bill in the Circuit Court for the Northern District of New York, against Humiston, for infringing a patent for moulding candles; and had obtained a decree against him.

The decree was that the complainants were entitled to a *permanent injunction*, and for an account of gains and profits, and that the cause be *referred to a master to take and state the amount and report to the court.*

A motion was now made to dismiss the cause for want of jurisdiction.

Mr. Gifford, in favor of the motion of dismissal: An appeal lies only from a final decree; this is an interlocutory one.

Argument in favor of the motion.

A final decree in equity is one which finally decides and disposes of the whole merits of the case, and reserves no questions or directions for the future judgment of the court from which an appeal could be taken. This court will not allow a case to be divided up into a plurality of appeals.

In *The Palmyra*,* restitution with costs and damages was decreed, and an appeal taken before the damages had been assessed. The court held that the decree was not final, and dismissed it. They say, "The decree of the Circuit Court was not final in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages."

The case of *Barnard et al.* v. *Gibson*,† was one on letters patent. The decree referred it to a master to ascertain and report the damages. An appeal was taken; a motion made to dismiss it, and the motion was granted. The court say, "The decree in the case under consideration is not final within the decisions of the court. The injunction prayed for was made perpetual, but there was a reference to a master to ascertain the damages by reason of the infringement."

In *Perkins* v. *Fourniquet*,‡ the decree was that the complainant was entitled to two-sevenths of certain property, and referred it to a master to take and report an account of it, reserving all other questions until the coming in of the master's report. It was held that this was not a final decree on which an appeal could be taken.

In *Pulliam et al.* v. *Christian*,§ the decree set aside a deed and directed an account from trustees. This was held not to be a final decree, and an appeal from it was dismissed.

In *Craighead et al.* v. *Wilson*,‖ a bill was filed claiming property as heirs. A decree was made, which, among other things, referred it to a master to take an account. The court held that this decree was interlocutory, and that no final decree could be made until after the coming in of the master's report, and the appeal was dismissed.

* 10 Wheaton, 502.
† 7 Howard, 650.
‡ 6 Id. 206.
§ 6 Id. 209.
‖ 18 Id. 199.

In *Crawford* v. *Points*,* a decree was made directing an account. An appeal was taken before the accounting. On a motion to dismiss the appeal, the court say, "The decree is not final. . . An account is directed to be taken of the rents and profits, &c. While these things remain to be done, the decree is not final, and no appeal from it would lie to this court."

In *Beebe et al.* v. *Russell*,† the court thus distinguishes between the two sorts of decrees: "A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision. When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

These cases seem conclusive.

Mr. Norton, contra.

I. The precise question whether an appeal may be taken from such a decree does not seem to have arisen in this court, but the principles which have controlled the decisions concerning appeals, establish the right of appeal from the decree herein.

In *Ray* v. *Law*,‡ it was held (Marshall, C. J.), "That a decree for a sale under a mortgage is such a final decree as may be appealed from," although in such cases there follows a decree confirming the sale, and it may be for execution for a deficiency. That case was followed in *Whiting* v. *Bank of United States*,§ the court saying, in reference thereto, "This decision must have been made upon the general ground that a decree, *final* upon the merits of the controversy between the parties, is a decree upon which a bill of review would lie, without and independent of any ulterior proceedings."

In *Forgay* v. *Conrad*,‖ where the decree set aside as void

* 13 Howard, 11. † 19 Id. 285. ‡ 3 Cranch, 179.
§ 13 Peters, 6. ‖ 6 Howard, 201.

Argument against the motion.

certain deeds of lands and slaves, and directed an account of profits, and expressly retained a part of the bill for further decree, it was held that an appeal from same was well taken.

In *Barnard* v. *Gibson*,* relied on by the other side, where the decree was for an injunction and an account of profits, and expressly reserved "the question of costs and all other questions" not specifically passed upon, it was held that from such decree an appeal would not lie; and in that case this court did not undertake to reverse its former decisions, but to abide thereby.

Now the decree in this case, though different from that in either of the cases thus referred to, is much nearer that in *Forgay* v. *Conrad* than the one in *Barnard* v. *Gibson*, for it fully disposes of the merits, without reserving any question whatever, and leaves nothing uncompleted but an accounting, like that in *Forgay* v. *Conrad;* and upon the principle established in those cases, the appeal was well taken. That principle is, that whenever a decree *decides the merits of the controversy*, it *is final*, for the purposes of an appeal, though ulterior proceedings have to be had and a further or additional decree yet remains to be made. Thus in *Forgay* v. *Conrad*, the court say of the decree therein, "undoubtedly it is not final, in the strict technical sense of the term," and then adopting a wider view of the act of Congress, lay down the principle that when a decree decides the right in controversy, and permits it to be carried into execution, it is *pro tanto, final* for the purposes of an appeal. And the only way of reconciling *Barnard* v. *Gibson* with that case is, that it reserved the question of costs and other questions.

II. An appeal from such a decree as this is, should be allowed:

1st. Because it disposes of *the entire merits*, and leaves nothing but a mere accounting.

2d. Because the court below has power to render and enforce such a decree (and the practice of rendering and

* 7 Howard, 653.

enforcing such decrees has become very general), and unless an appeal be allowed therefrom, the right of appeal to this court is virtually annulled in this class of cases, where the decree is for the complainant.

3d. Because the accounting in such cases is necessarily tedious and expensive, and should therefore be postponed until the merits are finally disposed of; for if the decree be reversed the accounting becomes a needless waste of time and money, and even if it be modified, as to the nature or extent of the patent or of the infringement of same, such accounting becomes almost equally useless.

Mr. Justice NELSON delivered the opinion of the court, and after stating the case said:

The decree is not final within the act of Congress providing for appeals to this court, according to a long and well-settled class of cases, some of which we only need refer to in disposing of the case.*

MOTION GRANTED.

MURRAY *v.* LARDNER.

Coupon bonds, of the ordinary kind, payable to bearer, pass by delivery. And a purchaser of them, in good faith, is unaffected by want of title in the vendor. The burden of proof, on a question of such faith, lies on the party who assails the possession. *Gill* v. *Cubit* (3 Barnewall & Cresswell, 466), denied; *Goodman* v. *Harvey* (4 Adolphus & Ellis, 870), approved; *Goodman* v. *Simonds* (20 Howard, 452), affirmed.

LARDNER was the owner of three bonds of the Camden and Amboy Railroad Company, for $1000 each. They were coupon bonds of the ordinary kind, and *payable to bearer*. He resided in the country, about nine miles from Philadelphia, but had an office in that city, where he went to transact business two days in the week, Wednesdays and Saturdays. He kept the bonds in a fire-proof in this office.

* The Palmyra, 10 Wheaton, 502; Barnard et al. *v.* Gibson, 7 Howard, 650; Crawford *v.* Points, 13 Id. 11; Craighead *v.* Wilson, 18 Id. 199; Beebe et al. *v.* Russell, 19 Id. 283.

Statement of the case.

Murray was a broker of character, engaged in the negotiation of such bonds in New York.

On the night of Wednesday, the 23d February, 1859, Lardner's fire-proof was broken open, and the three bonds stolen. The theft was not discovered till Saturday, the 26th. Notices of the robbery appeared in the Philadelphia Ledger (the newspaper of Philadelphia having the largest circulation there), and in leading New York papers, on Monday, the 28th. In the meantime, however, *on the morning after the theft*, to wit, on Thursday, the 24th, two days before the discovery of it (Saturday, the 26th), and four days before the first notices in New York (Monday, the 28th), these bonds were negotiated to Murray, at his office in Wall Street, New York, for full value. The testimony of Parker —a broker in that city for the negotiation of loans, and a person, like Murray, of unquestionable character — presented the history of the transaction, in substance, thus:

"On the 24th of February, 1859, a man came into my office, and proposed to borrow $2000 on the three bonds in question. I did not know him. He was quite gentlemanly in appearance; very well dressed; manners unexceptionable; quite intelligent; answered questions without hesitation. Applications of this sort—applications, I mean, from strangers—are not unusual; they occur often, though not every day. I asked the person who he was, and he said that he was Dr. A. D. Bates, of Milford, Sussex County, New Jersey. After some conversation with him, I took the bonds to effect a loan, and went to Mr. Murray, who I knew dealt in this particular species of security, and proposed to borrow from him $2000, on the three bonds, for Bates. Mr. Murray and I had some conversation as to the terms of the loan, and as to his charge for brokerage. At this interview, I said to Mr. Murray that Bates was a stranger to me. Murray said to this that he would have to satisfy himself how Bates came by the bonds, before he could make the loan, and asked me whether Bates had any city references. I told him that I had already asked Bates that same question; that he had no city references, but knew only physicians. I stated to Murray that Bates had told me that he had bought the bonds for investment, and now wanted the money to pay for some

lands which he had purchased. After awhile, Bates came to my office again. I then went with him to Mr. Murray's office, where I introduced him to Murray. This was towards three o'clock. Murray asked him of whom he got the bonds. He said of Mr. Lardner, of Philadelphia; nothing else. Neither Murray nor I knew Mr. Lardner. Murray asked him if he was acquainted in the city. He replied, that he supposed, if he had time, that he could find a dozen people in the city that knew him; ladies and gentlemen. Murray asked him if he knew any physicians. He said that he knew Dr. Mott and Dr. Parker; very well known men in New York: he may have mentioned others. In reply to a question from Murray, whether he knew Dr. Hosack, the family physician of Murray, he answered that he did not; that Dr. Hosack was of the old school, and he, Bates, was of the new. Murray asked him if he knew Dr. Riggs, a physician of New Jersey, with whom he, Murray, had had some dealings. Bates said that he did by reputation. He told Murray what he wanted the money for. Murray told him he would lend him the money on the terms which he had named to me. The loan was accordingly made without further inquiry; Murray taking the bonds and paying the money, and Bates executing what is called a stock-note."

The testimony of Murray was, in the main, corroborative of this, so far as it related to himself; particularly as to the inquiries which he, Murray, had made of Bates, as to his acquaintance with medical men, Drs. Hosack, Riggs, &c. He stated, however, that he had no remembrance of Parker's telling him that *he* did not know Bates, which, if it had been said, Murray thought would have awakened his suspicion. Murray admitted, however, *that it was always his custom to know from whom securities came before dealing, and that it was the custom of brokers generally;* but he added that he did not think it necessary to inquire about Bates, "he being introduced by Parker."

"Dr. A. D. Bates, of Milford, Sussex County, New Jersey," was never seen, nor could be heard of, after the interviews above described. Neither could any such place as "Milford, Sussex County, New Jersey," from which place he stated that he came, be found on the maps of that State.

Argument for the broker.

On detinue brought by Lardner for the three bonds, in the Circuit Court for the Southern District of New York, the defendant's counsel asked the court to charge,

"That there were no such suspicious circumstances attending the transaction between Bates and Murray as to put Murray on inquiry; and that Murray was not chargeable with bad faith by any omission on his part to inform himself in regard to the bonds, and Bates's title to them, further than he did."

The court refused so to charge, and charged as follows:

"It will be for you, gentlemen of the jury, to say whether the defendant has made out,—as the burden lies upon the defendant,—whether he has made out that he received the paper in good faith, without any notice of the defect of the title; in other words, of the theft from the plaintiff; or whether there were such circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper."

The instruction was excepted to; and the jury having found for the plaintiff, Lardner, the correctness of the law, as thus given to them in charge, was the question before this court in error.

Mr. Carlisle, for Murray, the plaintiff in error: The bonds were ordinary coupon bonds, payable to bearer; such as by the most recent decisions of this court are declared to be "negotiable by the commercial usages of the whole civilized world;"* "possessed of *all* the qualities of commercial paper."† They were entitled, therefore, to the immunities which, under the commercial law, attach to that species of security. Now, there was no evidence so much as *tending* to show knowledge, notice, or even reasonable grounds of suspicion, that the bonds were not the property of the person who negotiated them to Murray; nor any evidence *tending* to show that they were not taken by Murray *bonâ fide*, and

* Mercer County *v.* Hackett, 1 Wallace, 95.

† Gelpcke *v.* City of Dubuque, Id. 206.

in the usual course of business. If this is so, there was error in submitting Murray's title to the verdict of a jury, who, by such submission, were empowered to dispose of his rights *without any evidence*, but simply as their notions of natural justice, without regard to the rules of law, might dictate. We submit that the charge was in conflict with the law, as finally settled by this court upon this *questio vexatissima*, in *Goodman* v. *Simonds*.* On the ground that it has been thus decided, counsel at *this* bar need not consider or examine English cases at all. It would be disrespectful to this court to do so; for in this very court, and in the case cited, all the authorities, not only in this country but in England, were laboriously reviewed, and it was held to be error to have charged the jury that, "if *such facts and circumstances were known* to the plaintiff as *caused him to suspect*, or as would have caused one of *ordinary prudence to suspect* that the drawer had *no interest* in the bill, &c., or right to *use the bill for his own benefit*, and by *ordinary diligence he could have ascertained*, &c., then they must find for the defendants." There must be actual bad faith; a matter not at all here pretended. If the judgment of this court is to stand, the judgment below must be reversed.

Mr. J. H. Bradley, contra: The charge was as favorable to the defendant below as he had a right to ask. Any obligation less strict upon the purchaser of bonds like these, would encourage robberies of a class of securities held for investment, as much as, or more, than they are used in commerce.

Here was a man, a perfect stranger to every one concerned,—confessedly not belonging to the city where he was attempting to borrow money,—offering bonds which he says that he had bought in another city still; not the place of his residence either. He comes unaccompanied by any one. He brings no note of introduction. He is not asked for any identification of himself; nothing in short to prove, even imperfectly, that such a man as "Dr. A. D. Bates" existed, or that Sussex County, New Jersey, had such a

* 20 Howard, 343.

Argument for the owner of the bonds.

town as Milford at all. He states that he got the bonds from Mr. Lardner; but he is not asked who Mr. Lardner is, nor when he got them, nor where is his broker's bill of purchase, the sort of bill given on every regular broker's sale. He looks well enough; is showishly dressed; is not a clown in manners, and can answer questions glibly. And this is his whole evidence of character when Mr. Murray accepts him as a negotiator in a large money transaction. Both Murray and Parker were impressed—Murray especially—with the idea that "Dr. A. D. Bates" might be an impostor. It is plain that Parker did tell Murray that *he* did not know Bates. Why, else, did Murray inquire about Bates's knowing Dr. Hosack, &c., as it is admitted that he did? It is plain, also, they saw the danger of dealing with any person so wholly unvouched. And they did ask for references. They got them, too; but they never took the pains to follow them out, although they had time to do so. With a perfect sense of the propriety of having some knowledge, neither party takes the least pains to get any; and this in a case where the expression of even an intention to get it would have probably revealed the whole fraud, and, as Parker had the bonds in his possession, have restored them to their true and honorable owner, Mr. Lardner. The "commissions" were too tempting. It was "near three o'clock," says the testimony. Delay might lose a customer—and "commissions." Quite uncertain — as it is obvious that these parties were—whether Bates was a thief or not, they still take as true his wholly unsupported account of everything, though as to how he came by the bonds they scarcely inquire.

Now, instructions of a court must be taken in reference to the facts. The facts here were undisputed, and upon them the instruction was singularly proper. It is contended that it was inconsistent with what is decided in *Goodman* v. *Simonds* in this court. But we think it quite consistent with what was there declared, interpreting one part of the opinion in that case by the other. The court there says:*

* Page 365.

Argument for the owner of the bonds.

"We now repeat, that a *bonâ fide* holder of a negotiable instrument for a valuable consideration, *without notice of facts which impeach its validity between the antecedent parties*, ... holds the title unaffected by those facts."

It says, also, in another place:*

"Unless it be first shown that he had knowledge of such facts and *circumstances*, at the time the transfer was made." . . . . . "And the question, whether he had such knowledge or not, is a question of fact *for the jury*," &c.

These abstract expressions might, or might not, if left by themselves, support the case of the other side. But the court brings them into closer limits, by declaring of the purchaser,† as follows:

"While he is not obliged to make inquiries, *he must not wilfully shut his eyes to the means of knowledge which he knows are at hand;* . . . . . for the reason that such conduct, whether equivalent to notice or not, *would be plenary evidence of bad faith.*"

The parties here did shut their eyes to means of knowledge which they knew were at hand. They had a strong scent of fraud, and were on its track. But they would not respect the scent nor follow the track. In reference to the case, the judge's charge was consistent enough with what is above declared in this court, in *Goodman* v. *Simonds*.

A distinction exists between this case and the one just named and so much relied on by the other side, in that this case arises on coupon bonds; while that was on ordinary commercial paper. These bonds, it is to be remembered, are owned everywhere for *investment*. They are negotiable, we admit. But they are not bank bills, nor should they be put, in all respects, on the footing of bank bills, or even of mercantile paper. Bank paper is money, "circulation," "currency." Ordinary commercial paper is circulating continually among merchants. But these bonds are held for

* Page 366.

† Page 367.

investment. In this particular case, Murray, alone of New York brokers, was in the habit of dealing in them. Bank bills must pass at once. You can't stop to inquire how the person offering them got them. He could not, perhaps, possibly tell. Moreover, the amount of bank bills that persons have at any one time is not often very large; and if stolen, "hue and cry" is raised at once. The same thing is true, though in a less degree, of commercial paper. But these coupon bonds are different. If a man invests in them,—as every one does invest in them, and the rich largely,—he must count the amounts which are thus negotiable by thousands and tens of thousands, and hundreds of thousands of dollars. These bonds are put away. Here, then, are these securities in every man's house, in his chamber, in his office, in his counting-room; and he looks for them only when he cuts their coupons to collect his interest twice a year. Indeed, he may cut off several coupons at once, and so not see his bonds thus often. Their negotiability should have such protection as is needed for *that class of securities;* but the law should not give such protection to *their* negotiability as it does to that of bank bills, and so offer inducements to servants, clerks, &c., to steal and sell them.

The whole class of principles which Mr. Carlisle would maintain, it will be conceded, are in opposition to the law as laid down in *Gill* v. *Cubitt** by Lord Tenterden, a commercial lawyer by pre-eminence, and a judge as well acquainted with the extent to which the necessities of trade should control the general code of morals, as any judge who has succeeded him. His immediate successor, Lord Denman, spoke of him in a great case in the House of Lords,† as "one of the most learned and *reflecting* of judges;" one who "understood the law of England, and had as good a right to give a confident opinion upon it as any of the most distinguished men who have at any time appeared in Westminster Hall."

* 3 Barnewall & Cresswell, 466.

† Queen *v.* Millis, 10 Clark & Finnelly, 822, 823.

Opinion of the court.

Mr. Justice SWAYNE delivered the opinion of the court.

The question presented by the instruction excepted to is not a new one, either in commercial jurisprudence or in this court.

The general rule of the common law is, that, except by a sale in market overt, no one can give a better title to personal property than he has himself. The exemption from this principle of securities, transferable by delivery, was established at an early period. It is founded upon principles of commercial policy, and is now as firmly fixed as the rule to which it is an exception. It was applied by Lord Holt to a bank bill in *Anon*, 1st Salkeld, 126. This is the earliest reported case upon the subject. He held that the action must fail "by reason of the course of trade, which creates a property in the assignee or bearer."

The leading case upon the subject is *Miller* v. *Race*,* decided by Lord Mansfield. The question, in that case, also related to a bank note. The right of the *bonâ fide* holder for a valuable consideration was held to be paramount against the loser. He put the decision upon the grounds of the course of business, the interests of trade, and especially that bank notes pass from hand to hand, in all respects, like coin. The same principle was applied by that distinguished judge in *Grant* v. *Vaughan*,† to a merchant's draft upon his banker. He there said: In "*Miller* v. *Race*, 31st Geo. II, B. R., the holder of a bank note recovered against the cashier of a bank, though the mail had been robbed of it, and payment had been stopped, it appearing that he came by it fairly and *bonâ fide*, and upon a valuable consideration, and there is no distinction between a bank note and such a note as this is." In *Peacock* v. *Rhodes*,‡ he said: "The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless, perhaps, in the single case, which is a hard one, but has been determined, of a note for money won at play." The question has since been considered no longer an open one in the

* 1st Burrow, 452. † 3 Id. 1516. ‡ 2 Douglass, 633.

English law, as to any class of securities within the category mentioned.

What state of facts should be deemed inconsistent with the good faith required was not settled by the earlier cases. In *Lawson* v. *Weston*,* Lord Kenyon said: "If there was any fraud in the transaction, or if a *bonâ fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000."

In the later case of *Gill* v. *Cubitt*,† Abbott, Chief Justice, upon the trial, instructed the jury, "That there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant." The jury found for the defendant, and a rule *nisi* for a new trial was granted. The question presented was fully argued. The instruction given was unanimously approved by the court. The rule was discharged, and judgment was entered upon the verdict. This case clearly overruled the prior case of *Lawson* v. *Weston*, and it controlled a large series of later cases.

In *Crook* v. *Jadis*,‡ the action was brought by the indorsee

* 4 Espinasse, 56.

† 3 Barnewall & Cresswell, 466.

‡ 5 Barnewall & Adolphus, 909.

of a bill against the drawer. It was held that it was "no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained; the defendant must show that the plaintiff was guilty of gross negligence."

In *Backhouse* v. *Harrison*,* the same doctrine was affirmed, and *Gill* v. *Cubitt* was earnestly assailed by one of the judges. Patterson, Justice, said: "I have no hesitation in saying that the doctrine laid down in *Gill* v. *Cubitt*, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man cannot recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bonâ fide*, but under the circumstances mentioned in *Gill* v. *Cubitt*, does not acquire a property in it. I think the fact found by the jury here that the plaintiff took the bills *bonâ fide*, but under circumstances that a reasonably cautious man would not have taken them, was no defence."

In *Goodman* v. *Harvey*,† the subject again came under consideration. Lord Denman, speaking for the court, held this language: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title."

A final blow was thus given to the doctrine of *Gill* v. *Cubitt*. The rule established in this case has ever since obtained in the English courts, and may now be considered as fundamental in the commercial jurisprudence of that country.

In this country there has been the same contrariety of

* 5 Barnewall & Adolphus, 1098.

† 4 Adolphus & Ellis, 870.

decisions as in the English courts, but there is a large and constantly increasing preponderance on the side of the rule laid down in *Goodman* v. *Harvey*.

The question first came before this court in *Swift* v. *Tyson*.* *Goodman* v. *Harvey*, and the class of cases to which it belongs were followed. The court assumed the proposition which they maintain, to be too clear to require argument or authority to support it. The ruling in that case was followed in *Goodman* v. *Simonds*,† and again in the *Bank of Pittsburg* v. *Neal*.‡ In *Goodman* v. *Simonds*, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions:

The possession of such paper carries the title with it to the holder: "The possession and title are one and inseparable."

The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

The burden of proof lies on the person who assails the right claimed by the party in possession.

Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence, and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder.

The rule laid down in the class of cases of which *Gill* v.

* 16 Peters, 1. † 20 Howard, 343. ‡ 22 Id. 96.

Cubitt is the antetype, is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion.

We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In *Miller* v. *Race*, Lord Mansfield placed his judgment mainly on the ground that there was no difference in principle between bank notes and money. In *Grant* v. *Vaughan*, he held that there was no distinction between bank notes and any other commercial paper. At that early period his far-reaching sagacity saw the importance and the bearings of the subject.

The instruction under consideration in the case before us is in conflict with the settled adjudications of this court.

JUDGMENT REVERSED, and the case remanded for further proceedings in conformity to this opinion.

HECKERS *v.* FOWLER.

1. This court has jurisdiction to review a judgment entered in the Circuit Court by the clerk of that court, on the mere finding of a referee appointed by it to hear and determine all the issues in a case.
2. References to persons noways connected with the bench, to hear and determine all the issues in a case, are ancient and usual; and in the Federal courts, as in others, proper, if the case referred be of a kind for assistance of that sort.
3. Entry of judgment by the clerk, on the return of the report of such referee, is regular, and is a judgment of the court, though made without any presence or action of the court itself.
4. A reference with direction "to *hear and determine* all the issues" in a case, does not require the referee to *report* them all. It is answered by his reporting the sum due after hearing all the issues.

JOHN FOWLER brought suit in the Circuit Court for the Southern District of New York, against John and George Hecker, to recover damages for a breach of covenant. The declaration alleged that the plaintiff, who was the patentee of an improvement in making flour, had granted to the Heckers the right to supply a particular district with such flour, &c., paying so much per barrel. Defence, that the patent was worthless, and that the plaintiff had failed to maintain its validity at his own cost, as he had agreed to do. Replication; issue, and joinder. While the case was thus pending, the attorneys of the parties agreed to refer it to a "referee, to hear and determine the same, and all issues therein, with the same powers as the court, and that an order be entered, making such reference; and that the report of said referee have the same force and effect as a judgment of said court." One of the judges accordingly "ordered that the cause be *referred* to H. Cramm, Esq., to hear and determine *all the issues herein*, with the fullest powers ordinarily given to referees; and that on filing the report of the said referee with the clerk of the court, judgment be entered in conformity therewith, the same as if the cause had been tried before the court." The referee heard the case, and without stating what his findings were upon any of the several issues presented in the pleadings, made

the finding, simply and generally, that there was due to plaintiff, John Fowler, from the defendants, John and George Hecker, the sum of $9500, besides costs, all which he "reported" to the court. On this, the attorneys of Fowler drew up the form of a judgment, and without the presence or action of the court, except the order of reference already alluded to, filed it with the clerk, who thereon entered judgment, as a judgment of the court, for the amount reported, with costs. The defendant took this writ of error.

It is necessary here to state that, by the code of New York,* a referee is clothed with the attributes of a judge. A trial by him is to be conducted in the same manner as a trial by the court; he may grant adjournments, allow amendments, compel the attendance of witnesses. His decisions may be excepted to and revised, as in cases of appeal from courts of record. It is also enacted, that "the report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court."

Mr. Norton, for the plaintiff in error: No objection, we think, can properly be taken to the right of this court to entertain the matters here presented; although it might be suggested that the facts in this case not having been found either by a general or special verdict, nor agreed upon in a case stated, and there being no bill of exceptions, there are no questions open to revision here, and hence that this court will affirm the judgment of the court below, of course. We apprehend it to be clear, however, that while this court will not review the judgment of inferior courts made without the intervention of juries, or on a case stated, it will, at the same time, exercise its superintending care in preventing the judgments of State judicial officers from being interpolated into the records of the courts of the United States, and being enforced by the process of those courts.

* § 272.

Argument for the plaintiff in error.

Assuming, then, the jurisdiction to exist, we observe:

1. That the declaration, which relies on a contract in restraint of trade, does not set forth a sufficient cause of action. But,

2. The case presents to us a record of mixed proceedings, commenced before a judicial officer of the United States, conducted by a judicial officer unknown to the courts of the United States, whose judgment (or a paper purporting to be a judgment) is filed in the office of the United States Circuit Court, attached to the pleadings by its clerk, and made a part of the record in this case. Will such a proceeding be allowed? State courts are authorized by statutes to have such proceedings; but without statute the proceedings would be very irregular, and there is no statute of the United States which authorizes them in the Federal courts. This court has, indeed, decided, that if the parties agree to submit the trial both of fact and law to the judge, they constitute him an abitrator or referee, whose award must be final and conclusive between them; but no consent can constitute this court appellate arbitrators. But in this and in other cases which might be cited, the judgment was rendered by a judge created by the laws of the United States, whose function it is to pronounce judgments in the courts of the United States. In this record there is no such judgment. Whatever is rendered, is rendered by a person wholly *un*judicial, and *dehors* the tribunal; or coming into it only *pro hac vice*. Even if it is a judgment *in* the Circuit Court, it is not a judgment *of* the court.

3. The referee did not decide the case in conformity with the order of court. He did not "determine *all* the issues of the case;" but made a single and general finding that there was due such a sum.

4. But even the referee's judgment was not properly entered. In fact, though he made a report, he gave no judgment. The clerk gave the judgment. It is, therefore, invalid, and cannot be enforced.

Mr. Andrews, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

Suit was brought in this case by the present defendant, and judgment was rendered in his favor in the court below. Action was referred, under a rule of court, by consent of the parties, and the judgment in the case was rendered upon the report of the referee, made in pursuance of the rule of reference. Original defendants sued out this writ of error, and now seek to reverse the judgment upon the several grounds hereinafter mentioned. Errors assigned at the argument were in substance and effect as follows:

1. That the declaration and the matters therein contained are not sufficient in law to enable the plaintiff to maintain the action.

2. That the Circuit Court erred in passing the order that the action should be referred, and that the matters in controversy should be heard and determined by a referee.

3. That the action of the referee was erroneous, because he did not determine all or any of the issues involved in the pleadings.

4. That the judgment set forth in the transcript is invalid, and not such a one as can be enforced in the Circuit Court of the United States.

1. First objection was not much pressed at the argument, and is entirely without merit, as will be obvious from a brief examination of the record. Plaintiff was assignor and patentee of a certain invention, described as a new and useful improvement in the preparation of flour for the making of bread; and the substance of the declaration was that the defendants, in consideration that the plaintiff had granted to them the exclusive right to supply a certain district with such prepared flour, and to manufacture and vend therein the patented ingredients used in the preparation of the same, promised to account with and pay over to the plaintiff a certain tariff for every barrel of flour so supplied, and for the patented ingredients, when manufactured and sold separately, to be used in its preparation. Agreement was in

writing and under seal, and the action was, covenant broken to recover damages for the neglect and refusal to account and pay the tariff according to the terms of the contract. Pending the suit, the defendants appeared and pleaded to the merits. They made no objection to the declaration, and if they had, it must have been overruled, as it is in all aspects sufficient and well drawn.

2. Substance of the second objection is, that the Circuit Court erred in allowing the reference. Defence, among other things, was that the plaintiff agreed to maintain the validity of the patent at his own expense during the period the defendants should be engaged in the business, and that he neglected and refused so to do, and that the patent was invalid and worthless. Replication of the plaintiff reaffirmed the facts set forth in the declaration, and tendered an issue to the country, which was duly joined by the defendants. Pleadings being closed, the parties agreed in writing to refer the cause to a referee, "to hear and determine the same and all the issues therein, with the same powers as the court, and that an order be entered making such reference, and that the report of the referee have the same force and effect as a judgment of the court."

Following that agreement is the order of the court allowing the reference, which is the subject of complaint. Recital of the record is, that on reading and filing the agreement "the court ordered that the cause be referred" to the referee therein named, to hear and determine all issues therein with the fullest powers ordinarily given to referees, and that on filing the report of the said referee with the clerk of the court, judgment be entered in conformity therewith the same as if said cause had been heard before the court, and the attorneys of the parties annexed their consent in writing to the order.

Intention of the court and of the parties was to refer the action; and the requirement of the referee was that he should hear and determine the matters in controversy, and make his report to the court in which the action was pending. Defendants insist that such a reference of a pending suit in

the Circuit Court of the United States is invalid, because such courts have no power to authorize such a proceeding. Such is the substance of the several propositions submitted by the defendants on this branch of the case. They admit that the State courts have such powers, but insist that the power is derived from statute, and that the Circuit Courts cannot exercise it, because there is no act of Congress which confers any such authority.

Where the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State, the Circuit Courts of the United States have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. Record shows that the plaintiff was an alien, and that the defendants were citizens of the State where the suit was brought. Amount in dispute exceeds the sum or value of five hundred dollars, and inasmuch as the suit was of a civil nature, at common law, the jurisdiction of the court was clear beyond cavil.*

Scope of the objection, however, does not directly involve the question of jurisdiction, but has respect to the mode of trial as substituting the report of a referee for the verdict of a jury. Circuit Courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States. Practice of referring pending actions is coeval with the organization of our judicial system, and the defendants do not venture the suggestion that the practice is repugnant to any act of Congress. On the contrary, this court held, in the case of the *Alexandria Canal Co.* v. *Swan*,† that a trial by arbitrators, appointed by the court, with the consent of both parties, was one of the modes of prosecuting a suit to judgment as well established and as fully war-

* 1 Stat. at Large, 78.

† 5 Howard, 89.

ranted by law as a trial by jury, and, in the judgment of this court, there can be no doubt of the correctness of that proposition.

Doubts were, nevertheless, entertained whether a bill of exceptions would lie to the ruling of the Circuit Court in overruling the objections filed by the losing party to the acceptance of the report or award of a referee appointed under a rule of court: *York and Cumberland R. R. Co.* v. *Myers.** Opinion of the court in that case shows that the action, at the time of the reference, was pending in the Circuit Court of the United States for the District of Maine. Myers brought the suit, and the parties, before trial, agreed to refer the action to three persons, to be appointed by the court. Presiding justice named three persons as referees, and the rule issued by the clerk provided that their report, or the report of a majority of them, "was to be made to the court as soon as may be, and that judgment thereon was to be final, and execution to issue accordingly." Subsequently, one of the persons so appointed was, with the leave of the court, authorized by the parties to sit alone, and he made a report awarding damages to the plaintiff.

Corporation defendants, when the report was made, submitted written objections to the acceptance of the same, and examined the referee in support of the objections. Question presented was, whether the report should be accepted or rejected; but the circuit judge overruled the objections, accepted the report, and rendered judgment for the plaintiff for the amount reported by the referee. Defendants excepted to the rulings of the court, and sued out a writ of error to reverse the judgment. Preliminary objection in this court was that the bill of exceptions would not lie, because the proceedings, as it was insisted, had been irregular; but this court held otherwise, and decided the cause upon the merits. Conclusion of the court was that the equity of the statute, allowing a bill of exceptions in courts of common law, embraces all such judgments or

* 18 Howard, 246.

opinions of the court arising in the course of a cause as are the subjects of revision by an appellate court, and which do not otherwise appear on the record.*

Subordinate tribunal, say the court, must ascertain the facts upon which the judgment or opinion excepted to is founded, which undoubtedly is correct for the reason there given, that this court cannot determine, in cases at common law, the weight or effect of evidence, nor decide mixed questions of law and fact. Allusion is then made to the fact, that appellate courts in other jurisdictions are accustomed to revise such judgments and opinions, and the court say, "Upon principle we can see no objection to the introduction of the same practice into the courts of the United States, under the limitations we have indicated." Taken as a whole, that case is decisive of the question under consideration. But it is a mistake to suppose that the practice referred to was first sanctioned in this court by the opinion in that case. Ample authority for it is to be found in a decision of this court, pronounced more than forty years before the question in that case was argued. Reference is made to the case of *Thornton* v. *Carson*,† in which the opinion was given by Chief Justice Marshall. Statement of the case shows that two pending actions were referred by consent under a rule of court. Arbitrators made an award. Effect of the award was that the defendant was to pay to the plaintiff (Carson) the amount of the bonds in suit, unless by a certain day he made a conveyance to the plaintiff of the property described in the award; in which latter event he was to receive from the plaintiff a transfer of certain shares in a mining company, and to be discharged from the payment of the money, an entry to that effect to be made in the suits. Defendant failed to perform the act which would entitle him to such an entry in the case, and consequently became liable to pay the sums awarded by the referee. Oral

* Strother *v.* Hutchinson, 4 Bingham's New Cases, 83; Ford *v.* Potts, 1 Halsted, 388; Nesbitt *v.* Dallam, 7 Gill & Johnson, 494.

† 7 Cranch, 596.

objections were made to the acceptance of the award, but the court overruled the objections, and rendered judgment for the plaintiff on the award for the amount of the money awarded. None of the evidence introduced when the award was accepted appeared in the record, and no bill of exceptions was tendered to the ruling of the court, but the defendant removed the cause into this court by a writ of error. Under those circumstances, this court refused to revise the rulings of the Circuit Court; but, in disposing of the case, the court say, if he, the original plaintiff, failed to do that which warranted the court in entering judgment on the award, it was the duty of the complaining party to have shown that fact as a cause against entering judgment, and to have spread all the facts upon the record, which would enable this court to decide whether the court below acted correctly or not. Various other objections were also taken to the proceedings; but they were all overruled, and the judgment was affirmed. Similar views have been expressed by this court on other occasions, but it is not thought necessary to do more than to refer to the other cases, as those already examined are believed to be decisive.*

Practice of referring pending actions under a rule of court, by consent of parties, was well known at common law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment.†

3. Third objection is, that the action of the referee was erroneous, because he did not determine all of the issues between the parties. Evidently the objection is founded in

* Carnochan et al. *v.* Christie et al., 11 Wheaton, 446; Luts *v.* Linthicum, 8 Peters, 176; Butler *v.* Mayor of N. Y., 7 Hill, 329; Ward *v.* American Bank, 7 Metcalf, 486; Water Power Co. *v.* Gray, 6 Id. 174.

† Yates *v.* Russell, 17 Johnson, 468; Hall *v.* Mister, Salkeld, 84; Bank of Monroe *v.* Wadner, 11 Paige, 533; Green *v.* Palshen, 13 Wendell, 295; Caldwell on Arbitration, 359; Feeler *v.* Heath, 11 Wendell, 482; Graves *v.* Fisher, 5 Maine, 70; Miller *v.* Miller, 2 Pickering, 570; Com. *v.* Pejepscut Proprietors, 7 Massachusetts, 417, 420.

a mistaken view of the duty of the referee as prescribed in the rule of reference. He was not required, either by the agreement of the parties or by the order of the court, to report specially what his finding was upon the several issues presented in the pleadings. His duty was to determine all the issues, and to report the result of his finding. Referee reported that, having heard and examined the matters in controversy in the cause, and having examined on oath the several witnesses produced, there was due to the plaintiff the sum of nine thousand and five hundred dollars, besides the costs of suit. Presumption is, that he did determine all the issues, and inasmuch as there was no evidence to the contrary, the conclusion must be to the same effect.

4. Fourth objection is, that the judgment is invalid and cannot be enforced. Defect suggested is, that the judgment was rendered by the clerk and not by the court; but the record, when properly understood, does not sustain the objection. Judgments are always entered by the clerk under the authority of the court. Prevailing party is entitled to judgment, and it is not the practice in the Circuit Courts to require a rule for judgment to be entered in any case, as is the practice in some of the courts in the parent country.* Entry of judgment in term time is never made except by leave of court; but the motion need not be in writing, and the order of the court is seldom or never entered in the minutes. When the term closes, judgments are entered by the clerk under the general order without motion; and yet no one ever doubted that a judgment entered under such circumstances was the act of the court and not of the clerk. Reference of a pending action is ordinarily perfected in term time by an entry made under the case by the clerk, at the request of the parties, that it is "referred," and with the addition of nothing else except the names of the referees, or it may be done, as it was in this case, by a written agreement, signed by the parties or their attorneys, and filed in the case. When that is done a rule is then issued, or the

* 2 Tidd's Practice, p. 903; Archbold's Practice, by Chitty, 521.

order of the court may be entered in the minutes, as was done in this record. Duty of the referee is to notify and hear the parties, and then to determine the controversy, and make a report or award to the court in which the action is pending, and from which the rule was issued. Judgment, however, cannot in general be entered in conformity to the report or award until it is accepted or confirmed by the court.* Reason for the rule is, that whenever it is presented, and before it is accepted, the party against whom it is made may object to its acceptance; but if required by the court, he must reduce his objections to writing, and file them in the case. Hearing is then had, and after the hearing the court may accept or reject the report; or, if either party desires it, the report may, for good cause shown, be recommitted. Such a report of referees is in many respects a substitute for the verdict of a jury. Where there is no agreement to that effect, no judgment can be entered on such a report until the same has been accepted. Present case, however, must be determined upon the peculiar circumstances disclosed in the record. Parties agreed that the report of the referee should have the same force and effect as a judgment of the court, and the court ordered, by consent of parties, that on filing the report with the clerk of the court, judgment should be entered in conformity therewith, the same as if the cause had been tried before the court. Referee accordingly made the report and filed it as required, and thereupon the clerk entered the judgment pursuant to the order of the court and the agreement of the parties. Proceedings of the referee were correct, and the losing party made no objections to the report.† Judgment having been entered without objection, and pursuant to the order of the court and the agreement of the parties, it is not possible to hold that there is any error in the record.‡

* Brown *v.* Cochran, 1 New Hampshire, 200.

† Hughes *v.* Bywater, 4 Hill, 551.

‡ Bank of Monroe *v.* Widner, 11 Paige, 533.

Theory of the objection is unfounded in fact, and upon that ground it is overruled. The judgment of the Circuit Court is, therefore,

AFFIRMED WITH COSTS.

EX PARTE DUGAN.

On a mere petition for a *certiorari*, the court, according to its better and more regular practice, will decline to hear the case on its merits, even though the counsel for the petitioner produce a copy of the record admitted on the other side to be a true one. It will wait for a return, in form, from the court below.

ON a petition for a *certiorari* to the Supreme Court of the District of Columbia to send up the record of their proceedings upon a *habeas corpus* issued from that court upon the application of the petitioner, it was stated by *Mr. J. H. Bradley, counsel of the petitioner*, that a copy of the record had been obtained; and he asked this court, upon the admission of the Attorney-General that the copy was a correct one, to hear the case without a return from the court below. *The Attorney-General, on the other hand*, while admitting the copy of the record produced to be correct, moved the court, for reasons which he laid, to continue the case.

BY THE COURT. We think it the better, as well as the more regular practice, to await the return of the court below before taking any action on the merits. The *certiorari* will, therefore, be now awarded. Upon the coming in of the return the case will be regularly before us; and the motion for continuance made by the Attorney-General will then be disposed of.

ACTION ACCORDINGLY.

Statement of the case.

THE CIRCASSIAN.

1. A blockade may be made effectual by batteries on shore as well as by ships afloat; and, in case of an inland port, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.
2. The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it and blockaded by its blockade.
3. A public blockade, that is to say, a blockade regularly notified to neutral governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion, or under direction of his superiors, must, in the absence of clear proof of a discontinuance of it, be presumed to continue until notification is given by the blockading government of such discontinuance.
4. A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing; and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at time of capture, with ulterior destination to the blockaded port.
5. Evidence of intent to violate blockade may be collected from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture.

THE steamship Circassian, a merchant steamer under British colors, was captured with a valuable cargo by the United States steamer Somerset, for an attempted violation of the blockade established in pursuance of the proclamation of the President, dated 19th of April, 1861. Both vessel and cargo were condemned as lawful prize by the District Court for the Southern District of Florida; and the master, as representative of both, now brought the decree under the review of this court by appeal.

The capture was made on *the 4th of May*, 1862,—the date is important,—seven or eight miles off the northerly coast of Cuba, about half way between Matanzas and Havana, and

about thirty miles from Havana; the ship at the time ostensibly proceeding to Havana, then distant but two or three hours' sail. The main voyage was begun at Bordeaux. There she took a cargo,—no part of it contraband,—and was making her way to Havana when captured. Pearson & Co., of Hull, British subjects, were her ostensible owners. The cargo was shipped by various English and French subjects, and consigned to order. The bills of lading spoke of the ship as "loading for the port of Havana *for orders;*" and the promise of the bills was to deliver the packages "to the said port of Havana, *there to receive orders for the final destination of my said steamer*, and to deliver the same to Messrs. Brulatour & Co., or their order, he or they paying me freight in accordance *with the terms of my charter-party, which is to be considered the supreme law as regards the voyage of said steamer, the orders to be received for her and her final destination.*" The master swore positively that he did not know of any destination after Havana; nor did the *depositions* directly show an intention to break the blockade.

The evidence of this intent rested chiefly on papers found on the vessel when captured, and in the inference arising from the spoliation of others. Thus while on her way from Cardiffe to Bordeaux, the ship had been chartered by Pearson & Co. to one J. Soubry, of Paris, agent for merchants loading her; the charter-party containing a stipulation that she should proceed to Havre or Bordeaux as ordered, and then to load from the factories of the said merchants a full cargo, and "therewith proceed to Havana, Nassau, or Bermuda, as ordered on sailing, and thence to proceed to a port of America, and to run the blockade, IF SO ORDERED by the freighters."

With this charter-party was the following:

Memorandum of affreightment.

Taken on freight of Mr. Bouvet, Jr., by order and for account of Mr. J. Soubry, on board of the British steamer Circassian, &c., bound to *Nassau*, *Bermuda*, or *Havana*, the quantity, &c. Mr. J. Soubry engages to execute the charter-

party of affreightment; that is to say, that the merchandise shall not be disembarked but at the port of New Orleans, *and to this effect he engages to force the blockade, for account and with authority of J. Soubry.*

LAIBERT, Neveu.

And on this was indorsed, by one P. Debordes, who was the ship's husband or agent at Bordeaux, these words:

BORDEAUX, 15 February, 1862.

Sent similar memorandum to the parties concerned.

P. DESBORDES.

So, too, Bouvet wrote his correspondents in New Orleans, as follows, the letter being found on the captured vessel:

BORDEAUX, 1st April, 1862.

MESSRS. BRULATOUR & Co., New Orleans:

Confirming my letter of the 29th ult., copy of which is annexed, I inclose herewith bills lading for 659 packages merchandise, and 92 small casks U. P.; *also, copy of charter-party, and private memorandum, per Circassian*, in order that you may have no difficulty in settling the freight by that vessel.

The Circassian has engaged to force the blockade, but should she fail in doing so, you will act in this matter as you may deem best. I intrust this matter entirely to you.

Accept, gentlemen, my affectionate salutations.

E. BOUVET.

In addition to these papers, various private letters, mostly, of course, in French, from persons in Bordeaux to their correspondents at Havana and New Orleans, were found on the vessel. One of these spoke of the steamer as "loading entirely with our products for *New Orleans*, where, it is said, she has engaged to introduce them;" another describes her "as arrived at Bordeaux, a month since, to take on board a fine cargo, with which *to force the blockade;*" a third, as "a very fast sailer, loaded in our port for *New Orleans*, where she will proceed, after having touched at Havana;" a fourth,

as "about to *try to enter your Mississippi*, touching, previously, at Havana." So others, with similar expressions. A British house of Belfast, sending a letter by her to Havana, "takes it *for granted* that she will proceed with her freight to *New Orleans*." A French one of Bordeaux had a different view as to her getting there. This one writes:

"We are going to have a British steamer here of a thousand tons cargo *for your port*. We shall ship nothing by her, because the affair has been badly managed. Instead of keeping it a secret, it has been announced in Paris, London, and Bordeaux. Of course, the American Government is well informed as to all its details; and if the steamer ever enters New Orleans, it will be because the commanding officer of the blockading squadron shuts his eyes. If he does not, she *must* be captured."

In addition to this evidence, it appeared that a package of letters, which were sent on board at Panillac, a small place at the mouth of the Gironde, after the Circassian had cleared from Bordeaux, and was setting off *to sea*, *were burned after the vessel hove to*, and before the officers of the Somerset came on board, at the time of capture.

So far with regard to evidence of intent to break the blockade. This case, however, presented a special feature.

The capture, as already noted, took place on the 4th of May, 1862; at which date the *city* of New Orleans, for whose *port* the libellants alleged that the vessel had been really about to run, was in possession, more or less defined and firm, of the United States. The history was thus:

A fleet of the United States, under Commodore Farragut, having captured Forts Jackson and St. Philip on the 23d of April,* reached New Orleans on the 25th. On the 26th, the commodore demanded of the mayor the surrender of the city. The reply of the mayor was "that the city was under martial law, and that he would consult General Lovell."

* These forts were situated on opposite banks of the Mississippi River, about one-third of the way up to New Orleans from its mouths, and commanded the river approaches to the city. See chart, *infra*, page 140.

Statement of the case.

The rebel Lovell declared, in turn, that "he would surrender nothing;" but, at the same time, that he would retire, and leave the mayor unembarrassed. On the 26th, the flag-officer sent a letter, No. 2, to the mayor, in which he says:

"I came here to reduce New Orleans to obedience to the laws, and to vindicate the offended majesty of the Government. The rights of persons and property shall be secured. I therefore demand the unqualified surrender of the city, and that the emblem of sovereignty of the United States be hoisted upon the City Hall, Mint, and Custom House, by meridian of this day. And all emblems of sovereignty other than those of the United States must be removed from all public buildings from that hour."

To this the mayor transmitted, on the same day, an answer, which he says "is the *universal sense of my constituents*, no less than the prompting of my own heart." After announcing that "out of regard for the lives of the women and children who crowd this metropolis," General Lovell had evacuated it with his troops, and "restored to *me* the custody of its power," he continues:

"The city is without the means of defence. To surrender such a place were an idle and an unmeaning ceremony. The place is yours by the power of brutal force, not by any choice or consent of its inhabitants. *As to hoisting any flag other than the flag of our own adoption and allegiance, let me say to you that the man lives not in our midst whose hand and heart would not be paralyzed at the mere thought of such an act; nor can I find in my entire constituency so wretched and desperate a renegade as would dare to profane with his hand the sacred emblem of our aspirations. . . . . Your occupying the city does not transfer allegiance from the government of their choice to one which they have deliberately repudiated,* and they yield the obedience which the conqueror is entitled to extort from the conquered."

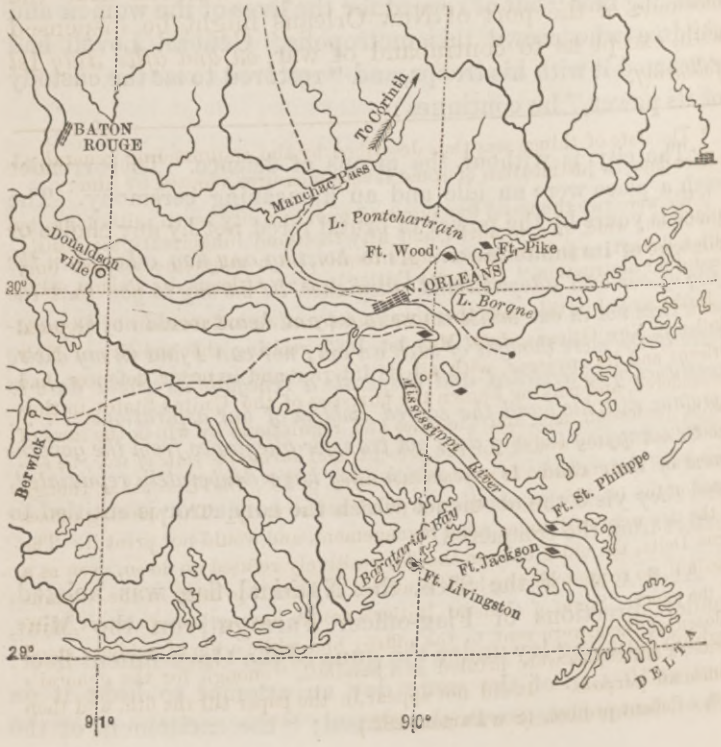
At 6 A.M. of the 27th, the National flag was hoisted, under directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A.M. of the same day an attempt to hoist it on the Custom House was abandoned; "the excitement of the

crowd was so great that the mayor and councilmen thought that it would produce a conflict and cause great loss of life."

On the 29th, General Butler reports that he finds the city under the dominion of the mob. "They have insulted," he says, "our flag; torn it down with indignity. . . . . I send a marked copy of a New Orleans paper containing an *applauding* account of the outrage."

On the same day that General reported thus:

"The rebels have abandoned all their defensive works *in* and *around* New Orleans, including Forts Pike and Wood on Lake Pontchartrain, and Fort Livingston on Barataria Bay. They have retired in the direction of Corinth, beyond Manchac Pass, and abandoned everything in the river as far as Donaldsonville, some seventy miles beyond New Orleans."



Statement of the case.

To the reader who does not recall these places in their relations to New Orleans, the diagram on the page preceding will present them.

A small body of Federal troops began to occupy New Orleans on the 1st of May. On the 2d, the landing was completed. The rebel mayor and council were not deposed. There was no armed resistance, but the city was bitterly disaffected, and was kept in order only by severe military discipline, and the rebel army was still organized and in the vicinity.*

The blockade in question, as already mentioned, was declared by proclamation of President Lincoln in April, 1861; and was a blockade of the whole coast of the rebel States. No action to terminate it was taken by the Executive *until the 12th of May*, 1862, when, after the success of Flag-officer Farragut, the President issued a proclamation that the blockade of the port of New Orleans might be dispensed with, except as to contraband of war, *on and after July 1st following.*

* The state of things was thus described by the commanding general, at a later date, in justification of some severe measures adopted by him:

"We were two thousand five hundred men in a city seven miles long, by two to four wide, of a hundred and fifty thousand inhabitants, all hostile, bitter, defiant, explosive; standing, literally, on a magazine, a spark only needed for destruction." (General Butler in New Orleans, by Parton, 342.)

In the record in this case, there was a copy of a proclamation by General Butler at New Orleans, *dated* May 1st, 1862, reciting that the city of New Orleans and its environs, with all its interior and exterior defences, had surrendered, and making known the purposes of the United States in thus taking possession, &c., and the rules and regulations by which the laws of the United States would, for the present, and *during the state of war*, be enforced and maintained. It appears (see *infra*, p. 258, *The Venice*) that, though *dated* on the 1st, this paper was not published so early. The printing offices of the city were still under rebel management, and would not print it. The True Delta, the chief one, on the 2d, positively refused to do so, even as a handbill, no request having been ventured to have it printed in the columns of the paper. Some of General Butler's troops having been printers, half a dozen of them were sent to the office; and while a file of soldiers stood beside, a few copies were printed as a handbill, "enough for the general's immediate purpose." It did not appear in the paper till the 6th, and then with a defiant protest. (See Parton, 282.)

The case thus presented two principal questions:

1. Was the port of New Orleans, on the 4th of May, under blockade?

2. If it was, was the Circassian, with a cargo destined to that place, then sailing with an intent to violate it?

Supposing the cargo generally guilty, a minor question was, as to a particular part of it, asserted to have been shipped by Leech & Co., of Liverpool, British subjects, and of which a certain William Burrows was really, or in appearance, "supercargo."

Burrows himself swore—his own testimony being the only evidence on the subject—that he did not know of any charter-party for the voyage; that *he received the bills of lading* (which, like all the bills, were in French) *from Messrs. Desbordes & Co., the ship's agents at Bordeaux;* that he knew nothing about any papers relating to other portions of the cargo; that he was going *to Havana to sell this merchandise, shipped by Leech, Harrison & Co.*, and was to return to Liverpool, either by the way of St. Thomas or New York; that he knew of no instructions to break the blockade; had heard nothing about the vessel's entering or breaking the blockade of any port, either before sailing or on the voyage, from any person as owner or agent, or connected with the vessel or cargo. No letters or other papers were found compromising this portion of the cargo other than as above stated.

The statutory port of New Orleans, as distinguished from the city of New Orleans itself, it may here be said, includes an extended region along the Mississippi above the city, parts of which were, at this date and afterwards, in complete possession of the rebels.

Messrs. A. F. Smith and Larocque, for the claimants of the ship and cargo:

I. A *blockade* is an interruption, by one belligerent, of communication, by any persons whatever, with a place occupied by another belligerent. No right exists in a belligerent,

as against a neutral, to blockade his own ports. That would be war upon the neutral. Blockade is a right of war *against the enemy*, and affects the neutral only incidentally, and from the necessity of the case. It is a right burdensome to neutrals, and is strict in its character. It is one which is claimed by the belligerent and yielded by the neutral, so long, and only so long, as a blockade is maintained which is in accordance with and recognized by the law of nations. The blockade of his own ports would be an embargo, an act of war against the neutral, thereby made and treated as an enemy. The embargo draws after it belligerent rights, and of a character entirely different from those that belong to a blockade; which are peaceful.

Now, was New Orleans, on the 4th of May, an enemy's port? Plainly not. *The United States* v. *Rice*,* in this court, some years since, is in point. In A.D. 1814, a place called Castine, on the south coast of the State of Maine, was captured by the British, then at war with us; and remained under the control of their military and naval forces until peace, in 1815. They established a custom-house under ordinary British laws. Certain goods were imported into the place during this interval; and, on the repossession of the place by the American Government, the question was, whether the goods were liable to duty under the laws of the United States. This court held that they were not. "By the conquest and military occupation of Castine," say the court, "the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over the place. The sovereignty of the United States was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory on the inhabitants, who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as *it* chose to recognize and impose." Our case is stronger than this. In the case

* 4 Wheaton, 253.

just cited, the port was an American port, which fell under really foreign rule. This rule was an unnatural, exceptional, and temporary one. It was never regarded by any party as otherwise, or other than as an occupation during war, to be relinquished when peace should come. Great Britain, of course, never expected to hold permanently an isolated point in our country. With peace, the port was surrendered to us. Here, however, New Orleans had been seized by an insurrectionary faction only; *certain* Americans in temporary and mad revolt. We never ceased to regard New Orleans as a city of the United States. We never acknowledged her as belonging to any State but a State of this Union; a State then, as now, part of our one common country. In due time, and in a short time, the mob was brought, by the power of the Government, under its actual control, as the Government has always considered it to be under its constitutional right. The people were, at all times, American citizens; and at any moment, had they laid down their arms, these rights would have been conceded to them. With the suppression of the insurgent organization, law and order resumed the throne; the place became, in fact and in form, what it was always in law,—a port of the United States. Everything was remitted to its former condition. The case is one where the fiction of postliminy happens to be a fact; the just and benignant fiction of the Roman law, *quæ fingit eum qui captus est in civitate semper fuisse.*

Very likely the presence of the Federal army was odious enough to both mob and gentry of New Orleans, to men and women alike, "neutrals" and rebels as well. The population may have been all hostile, bitter, defiant, explosive. Still, the Federal army *did* keep its possession there, and with no other opposition than that of offensive words, gestures, and looks. Probably it was never in any danger; for if *it* had been insufficient, the Federal *fleet* lay beside the town, and could have destroyed it in a day. Here is the fact. From the hour that General Butler landed till this day, New Orleans has been under the Government control.

Argument for the claimants.

That the fleet and army were not welcomed by the population with open hearts and arms, has nothing to do with the question.

The Government, then, was re-established, and everything was remitted. If this position be true, the right to capture was gone, no matter how guilty the design of the Circassian. "When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is, by subsequent events, entirely done away."*

II. *As to intent to run the blockade*, the only evidence tending to show this is derived from the documents found on board; and from these, the following are the most unfavorable inferences for the vessel and cargo which could be drawn:

1st. By the charter-party, the vessel was to proceed "to Havana, Nassau, or Bermuda, as ordered on sailing, and thence to proceed to a port of America, *and to run the blockade*, IF SO ORDERED BY FREIGHTERS."

2d. By a paper found, signed "Laibert, Neveu" (nephew), Laibert engages, on behalf of Soubry, that the merchandise should not be disembarked but at the port of New Orleans, and, to this effect, he engages to force the blockade for account and with authority of Soubry.

3d. The bills of lading contain an engagement by the master to convey the cargo to the port of Havana, there to "receive orders for the final destination of the steamer, and there to deliver the same to ——, they paying freight in accordance with the terms of the charter-party, which was to be considered the supreme law as regarded the voyage, the orders to be received for her, and her final destination."

4th. There are letters from *various shippers* to their correspondents in Havana and New Orleans, showing *their* belief that she was going to New Orleans.

This, we say, is all the evidence. Apart, therefore, from the memorandum signed "Laibert, Neveu," of the genuine-

* The Lissett, 6 Robinson, 387, 395.

ness of which and of whose authority there is no proof, how does the case stand? The Circassian was not, at the time of capture, and never had been, *sailing to New Orleans*, nor indeed to any port contiguous thereto; Havana and New Orleans are distant 650 miles. Then the controlling document is the charter-party; and, according to that, the eventual running of the blockade was dependent upon an option to be exercised by the charterer *on arriving at Havana:* the bills of lading were expressly made subject to the charter-party. Her voyage was, therefore, to Havana *for orders*—by the terms of the charter-party—by her bills of lading—and by the fact. At Havana there was a "*locus penitentiæ.*" The *orders* might never be given. Indeed, it is quite certain they never would have been given under the change of circumstances by the capture of New Orleans.

Authority supports the view that this change of purpose, if effected at Havana, would avoid the capture.

In *The Imina*,* Sir William Scott decided, that where the vessel had originally sailed for Amsterdam, a blockaded port, under circumstances which would have subjected her to condemnation before changing her course; but the master, in consequence of information received at Elsinore, altered her destination, and proceeded towards Embden, she was not taken *in delicto* on a subsequent capture.

What difference exists between a guilty purpose forborne by the master, *without the knowledge of the owners*, and one not yet fully matured, but resting in contingency, merely, at the time of capture?

III. *As respects the portion of the cargo under the care of Burrows.* The evidence of this person, the supercargo, exculpates the owners, and the portion of the cargo owned by them, from all participation in even an intention to violate the blockade. The bills of lading were in French, which it does not appear that he understood. If he did, they, as do those for all the rest of the cargo, contain an express stipulation for the delivery of the goods to order, at Havana, on

* 3 Robinson, 138, Amer. ed.; 167, English ed.

payment of the freight, according to the charter-party; and the reference to the latter instrument would neither authorize the carrying of the goods beyond that port, nor was it of a nature to awaken any uneasiness on the part of a supercargo bound only thither.

Finally. An affirmance of the decree below will give the sanction of this great American court to the extravagant pretensions set up in times past by the British Courts of Admiralty, and will even go beyond them. The inducement to do this is, we admit, great at this moment. We are engaged in putting down a vast, awful, and wicked rebellion. We have had no countenance from the British Government, and have been actively and constantly thwarted by the cupidity and wealth of British subjects. But the rebellion *will* be suppressed, and the United States will resume their natural and former place in the family of nations; the place of a great, upright, and enterprising neutral. "*Ita scriptum est.*" The nations of Europe will assume their places also; two of them the place of "natural enemies" to each other; a third, the mighty empire of the North, taking a rank equal to either, with hostility to both. "Let *us* not, with a short-sighted and foolish impatience, by snatching at a present and temporary advantage, sacrifice the permanent enjoyment of rights which we know not how soon we may require to exercise." Let us adhere, at this trying time, in the judicial department, to the positions which we have so ably maintained in better times past—times soon to return—in the executive; and ratify, by solemn examples, the code which it is our interest, and the true interest of the world, to establish. Let us confirm afresh, and in a manner which none will gainsay, by our patience in war, the principles which we have found so necessary to our interests in peace. Let us earn, as self-controlled belligerents, the right to be great and prosperous neutrals. And then, when the hour of danger has passed,—as surely, if not shortly, it will pass,—we shall find that we have not, in order to suppress the outbreaks of insane revolt, made a sacrifice of the sources of

that wealth which alone can make us either prosperous in peace or powerful in war.

Mr. Eames, contra, for the captors.

The CHIEF JUSTICE delivered the opinion of the court.

The Circassian, a merchant steamer, under British colors, was captured, on the 4th of May, 1862, by the United States war steamer Somerset, for attempted violation of the blockade, established in pursuance of the proclamation of the President, dated 19th of April, 1861.

The vessel and cargo having been condemned as lawful prize by the District Court of the United States for the Southern District of Florida, the master, as representative of both, has brought the decree under the review of this court by appeal.

That the rebellion against the national Government, which, in April, 1861, took the form of assault on Fort Sumter, had, before the end of July, assumed the character and proportions of civil war; and that the blockade, established under the President's proclamation, affected all neutral commerce, from that time, at least, with its obligations and liabilities, are propositions which, in this court, are no longer open to question. They were not more explicitly affirmed by the judges who concurred in the judgment pronounced in the prize cases at the December Term, 1862, than by the judges who dissented from it.

The Government of the United States, involved in civil war, claimed the right to close, against all commerce, its own ports seized by the rebels, as a just and proper exercise of power for the suppression of attempted revolution. It insisted, and yet insists, that no one could justly complain if that power should be decisively and peremptorily exerted. In deference, however, to the views of the principal commercial nations, this right was waived, and a commercial blockade established. It was expected that this blockade, effectively maintained, would be scrupulously respected by nations and individuals who declared themselves neutral.

Opinion of the court.

Of the various propositions asserted and controverted in the discussion of the cause now under consideration, two only need be examined in order to a correct understanding of its merits. It is insisted for the captors,

1. That on the 4th of May, 1862, the port of New Orleans was under blockade;

2. That the Circassian, with a cargo destined for New Orleans, was then sailing with intent to violate that blockade, and therefore liable to capture as naval prize.

Both propositions are denied by the claimants. We shall consider them in their order.

First, then, was the port of New Orleans under blockade at the time of the capture?

The city of New Orleans, and the forts commanding its approaches from the Gulf, were captured during the last days of April, 1862, and military possession of the city was taken on the 1st of May. Did this capture of the forts and military occupation of the city terminate the blockade of the port?

The object of blockade is to destroy the commerce of the enemy, and cripple his resources by arresting the import of supplies and the export of products. It may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland port, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter.

The capture of the forts, then, did not terminate the blockade of New Orleans, but, on the contrary, made it more complete and absolute.

Was it terminated by the military occupation of the city?

The blockade of the ports of the insurgent States was declared from the first by the American Government to be a blockade of the whole coast, and so it has been understood by all governments. The blockade of New Orleans was a part of this general blockade. It applied not to the city alone, but controlled the port, which includes the whole

parish of Orleans, and lies on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city.

Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment.

There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was and is of the latter sort. It was legally established and regularly notified by the American Government to the neutral governments. Of such a blockade, it was well observed by Sir William Scott: "It must be conceived to exist till the revocation of it is actually notified." The blockade of the rebel ports, therefore, must be presumed to have continued until notification of discontinuance.*

* The Betsey, Goodhue, Master, 1 Robinson, 282; The Neptune, 1 Id. 144.

Opinion of the court.

It is, indeed, the duty of the belligerent government to give prompt notice; and if it fails to do so, proof of discontinuance may be otherwise made; but, subject to just responsibility to other nations, it must judge for itself when it can dispense with blockade. It must decide when the object of blockade, namely, prevention of commerce with enemies, can be attained by military force, or, when the enemies are rebels, by military force and municipal law, without the aid of a blockading force. The Government of the United States acted on these views. Upon advice of the capture of New Orleans, it decided that the blockade of the port might be safely dispensed with, except as to contraband of war, from and after the 1st of June. The President, therefore, on the 12th of May, issued his proclamation to that effect, and its terms were undoubtedly notified to neutral powers. This action of the Government must, under the circumstances of this case, be held to be conclusive evidence that the blockade of New Orleans was not terminated by military occupation on the 4th of May. New Orleans, therefore, was under blockade when the Circassian was captured.

It remains to be considered whether the ship and cargo were then liable to capture as prize for attempted violation of that blockade.

It is a well-established principle of prize law, as administered by the courts, both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo to capture and condemnation.* We are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbors, and blockade running from neutral ports seems to have been organized as a business,

* Yeaton *v.* Fry, 5 Cranch, 335; 1 Kent's Commentaries, 150; The Frederick Molke, 1 Robinson, 72; The Columbia, 1 Id. 130; The Neptune, 2 Id. 94.

and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights. It is not likely to be abandoned until the nations, by treaty, shall consent to abolish capture of private property on the seas, and with it the whole law and practice of commercial blockade.

Do the Circassian and her cargo come within this rule?

The Circassian was chartered at Paris on the 11th of February, 1862, by Z. C. Pearson & Co. to J. Soubry, agent, and the charter-party contained a stipulation that she should proceed to Havre or Bordeaux, and, being loaded, proceed thence with her cargo to Havana, Nassau, or Bermuda, and thence to a port in America and "run the blockade, if so ordered by the freighters." With this charter-party was found on the ship, at the time of capture, a memorandum of affreightment given to Bouvet, one of the shippers, and signed "For account and with authority of J. Soubry,—Laibert, Neveu," and containing this engagement: "Mr. J. Soubry engages to execute the charter-party of affreightment; that is to say, that the merchandise shall not be disembarked except at New Orleans, and to this effect he engages to force the blockade." With this paper was the following note, signed "P. Desbordes:" "Sent similar memorandum to the parties concerned." This P. Desbordes was the ship's husband or agent at Bordeaux.

It is urged, on behalf of the claimants, that there is no evidence that Laibert had authority to act for Soubry; but the fact that the paper was found on the ship raises a presumption that he had that authority, and puts the burden of proof to the contrary on the claimants. Besides, it appears, from a letter written by Bouvet, that he forwarded by the ship, inclosed with this letter, the bills of lading of the goods shipped by him, and also "a copy of the charter-party and *private memorandum.*" It can hardly be doubted that the copy of the charter-party in the record is this copy forwarded by Bouvet, or that the memorandum found with it is the *private* memorandum of which he writes. The circumstance that a similar memorandum was sent to the parties con-

cerned raises an almost irresistible presumption that the other freighters shipped their merchandise under the same express stipulation to force the blockade.

It is hardly necessary to go further on the question of intent; but if doubt remained, it would be dispelled by an examination of the other papers and facts in the case. Every bill of lading contained a stipulation for the conveyance of goods described in it to Havana, in order to receive orders as to their ulterior destination, and for their delivery at that destination on payment of freight. Such, we think, is the true import of each bill before us. Almost every letter found on board the ship and contained in the record, affords evidence of intent to force the blockade. These letters were written, at Bordeaux, to correspondents at Havana and New Orleans, and speak of the steamer as "loaded entirely with our products for New Orleans;" as "arrived hither a month since, to convey to your place, New Orleans, by forcing the blockade, a very fine cargo;" as "loaded in our port for New Orleans, whither she will proceed after touching at Havana;" as "being a very fast sailer;" as "going to attempt the entrance of your river, after previously touching at Havana;" as "bound to your port, New Orleans;" as "bound from Bordeaux to New Orleans;" and as "having engaged to force the blockade." Most of these letters were written by shippers, and relate to merchandise described in one or another of the bills of lading. Finally, it is proved that on the eve, and almost at the moment, of capture, the captain ordered the destruction of a package of letters put on board the ship, after she had cleared from Bordeaux, at Panillac, a town on the Gironde, nearer the sea. These letters, doubtless, related to the ship, the cargo, or the voyage, probably to all. Their destruction would be a strong circumstance against the ship and cargo, were the other facts less convincing; taken in connection with them, it irresistibly compels belief of guilty intent at the time of sailing and time of capture.

It was urged in argument that the ship was bound primarily to Havana, and might discharge her cargo there, and

should not be held liable to capture for an intent which would have been abandoned on her arrival at that place.

We agree, that if the ship had been going to Havana with an honest intent to ascertain whether the blockade of New Orleans yet remained in force, and with no design to proceed further if such should prove to be the case, neither ship nor cargo would have been subject to lawful seizure. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage, and its discontinuance was not expected. The vessel was chartered and her cargo shipped with the purpose of forcing the blockade. The destination to Havana was merely colorable. It proves nothing beyond a mere purpose to touch at that port, perhaps, and, probably, with the expectation of getting information which would facilitate the success of the unlawful undertaking. It is quite possible that Havana, under the circumstances, would have turned out to be, as was insisted in argument, a *locus penitentiæ;* but a place for repentance does not prove repentance before the place is reached. It is quite possible that the news which would have met the vessel at Havana would have induced the master and shippers to abandon their design to force the blockade by ascending the Mississippi; but future possibilities cannot change present conditions. Nor is it at all certain that the purpose to break the blockade would have been abandoned. On the contrary, it is quite possible that the "ulterior destination" mentioned in the bills of lading would have been changed to some other blockaded port. But this is not important. Neither possibilities nor probabilities could change the actual intention one way or another. At the time of capture, ship and cargo were on their way to New Orleans, under contract that the cargo should be discharged there and not elsewhere, and that the blockade should be forced in order to the fulfilment of that contract. This condition made ship and cargo then and there lawful prize.

There was some attempt, in argument, to distinguish that portion of the cargo shipped by William Burrows from the

remainder. We do not think it can be so distinguished. The bill of lading of the goods shipped by him is expressed in the same terms as the bills of goods shipped by others, and Burrows himself states that he received it from P. Desbordes & Co.,—the same Desbordes who sent "to the other parties" memorandums similar to that which was given to Bouvet, and which stipulated for breach of blockade. There is no indication in the bill of lading that any one except Burrows had any interest in these goods, and no testimony except his own to that effect. Against the strong circumstances which tend to prove that they were in equal fault with all the rest, his not very unequivocal statement, that they were destined for sale in Havana, cannot prevail.

The decree of the District Court, condemning the vessel and cargo as lawful prize, must be

AFFIRMED.

Mr. Justice NELSON, dissenting:

I am unable to concur in the judgment of the court in this case; and shall proceed to state briefly the grounds of my dissent, without entering upon the argument or discussion in support of them.

I think the proof sufficient to show, that the purpose of the master was to break the blockade of the port of New Orleans, and that it existed from the inception of the voyage: but, in my judgment, the defect in the case, on the part of the captors, is that no blockade existed at the port of New Orleans at the time the seizure was made. The city was reduced to possession by the naval forces of the United States, on the 25th of April preceding the seizure, and Forts Jackson and St. Philip on the 23d of the same month. They were situated on the opposite banks of the Mississippi River, about one-third of the way up to the city from its mouth. Admiral Farragut announced to the Government the capture and possession of the city on the day it took place, 25th of April, and General Butler, of the capture of the forts on the 29th. The latter announced, that the enemy had abandoned all their defensive works in and around New Orleans, including Forts Pike and Wood, on Lake Pontchartrain,

and Fort Livingston on Barataria Bay; and had abandoned everything up the river as far as Donaldsville, some seventy miles beyond New Orleans. The authority of the Government of the United States had been restored over the city and its inhabitants; and over the Mississippi River, and both of its banks and the inlets to the same, from the ocean or gulf, including, also, the passage for vessels by the way of Lakes Borgne and Pontchartrain, the usual channel for vessels engaged in the coasting trade to and from New Orleans. And on the 1st of May, General Butler announced by proclamation, that the city of New Orleans and its environs, with all its interior and exterior defences, having surrendered to the combined land and naval forces of the United States, and being now in the occupation of these forces, the Major-General commanding hereby proclaims the objects and purposes of the United States in thus taking possession, &c., and the rules and regulations by which the laws of the United States would be, for the present, and during the state of war, enforced and maintained. The seizure of the vessel and cargo was made between Matanzas and Havana, on the 4th of May, several days after the city and port of New Orleans were reduced, and full authority of the United States extended and held over them.

A blockade under the law of nations is a belligerent right, and its establishment an act of war upon the nation whose port is blockaded. One of the most important of the belligerent rights is that of blockading the enemy's ports, not merely to compel the surrender of the place actually attacked or invested, but, as a means, often the most effectual, of compelling the enemy, by the pressure upon his financial and commercial resources, to listen to terms of peace. The object of a blockade, says Chancellor Kent, is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port.

Now, the capture and possession of the port of the enemy by the blockading force, or by the forces of the belligerent, in the course of the prosecution of the war, puts an end to

the blockade and all the penal consequences growing out of this measure to neutral commerce. The altered condition of things, and state of the war between the two parties in respect to the besieged port or town, makes the continuance of the blockade inconsistent with the code of international law on the subject; as no right exists on the part of the belligerent as against the neutral powers to blockade his own ports. This principle was recognized and applied by Sir W. Scott in the case of *The Trende Soztre*, decided in 1807.* She was a Danish vessel and was on a voyage to the Cape of Good Hope, then the port of an enemy, with contraband articles on board, and was seized as a prize of war; but the vessel had arrived at the Cape after that settlement had surrendered to the British forces. The counsel for the captors insisted, that though the settlement had become British, the penalty would not be defeated, as the intention and the act continued the same; that there was no case in which such a distinction had been allowed on the question of contraband. "The distinction," it was remarked, "which had been admitted in blockade cases, stood altogether on particular grounds, as arising out of a class of cases depending on the blockade of neutral ports, in which the court had expressed a disposition to admit all favorable distinctions." The court, in delivering its opinion, observes: "If the port had continued Dutch, a person could not have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole of the guilt. Because, from the moment when the Cape became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement; and the consequence of any pre-emption that could be put upon them, would be British pre-emption." The court also observed: "It has been said, that this is a

* 6 Robinson, 390, n.

principle which the court has not applied to cases of contraband; and that the court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction; because the principle on which the court proceeded was, that there must be a *delictum* existing at the moment of the seizure to sustain the penalty." "I am of opinion, therefore," the judge says, in conclusion, "that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade." See also the case of *The Lisette*,* and of *The Abby*,† in which the same principle is declared, and one of them a case of blockade.

The cessation of the blockade necessarily resulted from the capture and possession of the port and town of New Orleans. They no longer belonged to the enemy, nor were under its dominion, but were a port and town of the United States. They had become emphatically so, for the capture was not that of the territory of a foreign nation to which we had obtained only the right and title of a conqueror; but the conquest was over our own territory, and over our own people, who had by illegal combinations, and mere force and violence, subverted the laws and usurped the authority of the General Government. The capture was but the restoration of the ancient possession, authority, and laws of the country, the continuance and permanency of which, so far as the right is involved, depend not on conquest, nor on the success or vicissitudes of armies; but upon the Constitution of the United States, which extends over every portion of the Union, and is the supreme law of the land. The doubt, therefore, that arose in the case of the *Thirty Hogsheads of Sugar* v. *Boile*,‡ and which was solved by Chief Justice Marshall, and related to the case of a foreign conquest, cannot arise in this case. The Chief Justice observed, "Some doubt has been suggested whether Santa Cruz, while in possession of Great Britain, could properly be considered a British

* 6 Robinson, 387. † 5 Id. 251. ‡ 9 Cranch, 191.

island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered permanent until confirmed by treaty; yet, to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them. The Island of Santa Cruz, after the capitulation, remained a British island until it was restored to Denmark." Now, as we have seen, it is not necessary to invoke this doctrine in a case where the capture is of territory previously belonging to the sovereign power acquiring it, and which is retaken and held under the organic law and authority of that power.

I have said, that the cessation of the blockade in question resulted from the capture and repossession of the port and town of New Orleans, and that there was no longer an enemy's port or town to be blockaded. In addition to this, the moment the capture took place, and the authority of the United States was established, the municipal laws of that government took the place of the international law upon which the blockade rested. The reason for its continuance no longer existed: it had accomplished its object as one of the coercive measures against the enemy to compel a surrender. So far as intercourse with the town became material, whether commercial or otherwise, after the capture and possession, it was subject to regulation by the municipal laws, and which is much more efficient and absolute and less expensive than the measure of blockade. It is true, these laws cannot operate extra-territorially; but within the limit of the jurisdiction, and which extends to a marine league from the coast, their control over all intercourse with the port or town is complete. Seizures of neutral vessels and cargo on the high seas are, indeed, not admissible, but blockades are not established for the purpose of these seizures; they are but incidental to the exercise of the belligerent right against the port of the enemy.

The proclamation of the President of the 12th of May, 1862, which announces that the blockade of the port of New Orleans shall cease after the 1st of June following, has been

referred to as evidence of its continuance to that period. But I think it will be difficult to maintain the position upon any principle of international law, that the belligerent may continue a blockading force at the port after it has not only ceased to be an enemy's, but has become a port of its own. It is not necessary that the belligerent should give notice of the capture of the town, in order to put in operation the municipal laws of the place against neutrals. The act is a public event of which foreign nations are bound to take notice, and conform their intercourse to the local laws. The same principle applies to the blockade, and the effect of the capture of the port upon it. The event is public and notorious, and the effect and consequences of the change in the state of war upon the blockading force well understood.

I have felt it a duty to state the grounds of my dissent in this case, not on account of the amount of property involved, though that is considerable, or from any particular interests connected with the case, but from a conviction that there is a tendency, on the part of the belligerent, to press the right of blockade beyond its proper limits, and thereby unwittingly aid in the establishment of rules that are often found inconvenient, and felt as a hardship, when, in the course of events, the belligerent has become a neutral. I think the application of the law of blockade, in the present case, is a step in that direction, and am, therefore, unwilling to give it my concurrence.

[See *infra*, p. 258, *The Venice;* a case, in some senses, suppletory or complemental to the present one.]

FREEBORN v. SMITH.

1. When Congress has passed an act admitting a Territory into the Union as a State, but omitting to provide, by such act, for the disposal of cases pending in this court on appeal or writ of error, it may constitutionally and properly pass a subsequent act making such provision for them.
2. This court will not hear, on writ of error, matters which are properly the subject of applications for new trial.

Statement of the case.

3. Parties cannot give private conversation or correspondence with each other to rebut evidence of partnership with a third person.

THIS was a writ of error to the Supreme Court of *Nevada Territory*.

Smith had obtained a judgment against Freeborn and Shelden in the Supreme Court of Nevada; Nevada being at the time a Territory only, not a State. To this judgment a writ of error went from this court, under the law organizing the Territory, and the record of the case was filed here, December Term, 1862. After the case was thus removed, the Territory of Nevada was admitted by act of Congress, March, 1864, into the Union as a State. The act admitting the Territory contained, however, no provision for the disposal of cases then pending in this court on writ of error or appeal from the Territorial courts. *Mr. Cope and Mr. Browning*, in behalf of *the defendants in error*, accordingly moved to dismiss the writ in this and other cases similarly situated, on the ground that the Territorial government having been extinguished by the formation of a State government in its stead, and the act of Congress which extinguished it having, in no way, saved the jurisdiction of the court as previously existing, nothing further could be done here. The Territorial judiciary, it was urged, had fallen with the government, of which it was part; and the jurisdiction of this court had ceased with the termination of the act conferring it. *Hunt* v. *Palao*,* and *Benner* v. *Porter*,† were relied on to show that the court had no power over cases thus situated.

It being suggested by *Mr. O'Connor and Mr. Carlisle on the other side*, or as interested in other cases from Nevada similarly situated, that a bill was now before Congress supplying the omissions of the act of March, 1864, the hearing of the motion for dismissal was suspended till it was seen what Congress might do. Congress finally acted, and on the 27th of February, 1865, passed "An Act providing for a District Court of the United States for the District of Nevada," &c.

* 4 Howard, 589.

† 9 Id. 235.

Statement of the case.

The eighth section of this enacts,—

"That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada, may be heard and determined by the Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the State of Nevada, as the nature of said appeal or writ of error may require; and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon."

The motion to dismiss the writ for want of jurisdiction was now renewed.

Assuming jurisdiction to exist, this case of *Smith* v. *Freeborn*, &c., was argued also on a question of merits. The judgment mentioned at the beginning of the case, which Smith had obtained against Freeborn and Shelden, he had obtained against them as secret surviving partners of a certain Shaw. One ground of the writ of error was that *no* evidence whatever had been offered of a partnership with Shaw between Freeborn *and* Shelden (a matter which was more or less patent on the record); and that judgment having gone against both (two jointly) and error as to one, the judgment would have to be reversed. A motion had been made and refused below for a new trial.

There was also another question of merits. To rebut the evidence of partnership, the defendants offered some letters between themselves and Shaw, and between themselves and one Eaton, an agent of theirs; which letters, though containing, as was urged, some admissions against their own interest, the court below refused to let go in evidence to disprove a partnership.

Its action on these two points was one matter argued, but the great question was that of jurisdiction, a matter affecting other cases as well as this.

Argument for the motion.

Messrs. Cope and Browning for the motion to dismiss, &c.:

1. As to the jurisdiction, our position is that *the act is a retrospective enactment interfering with vested rights.* Certainly it attempts to confer on this court jurisdiction to review judgments which, by law, at the time of its passage were final and absolute. The necessary result of maintaining it would be to disturb and impair these judgments, unsettle what had been previously settled, and compel the parties to litigate anew matters already definitively adjudicated. There is no higher evidence that rights have vested than a final judgment solemnly confirming them. Law is defined to be a rule of conduct; and to call an enactment which undertakes to deal with past transactions, and subject them to new requirements and conditions as tests of their legality, a rule of conduct, is to confound all rational ideas on the subject. *Ex post facto* laws are expressly prohibited by the Constitution, but the courts would hardly enforce enactments of this nature even in the absence of any constitutional prohibition; because, being retrospective, and providing for the punishment of acts not illegal when committed, they are not laws in the true sense of that term, and not, therefore, within the sphere of legislative authority. The principle is entirely applicable to civil causes, and prevents any injurious intermeddling with past transactions. Legislative power begins and ends with the power to enact laws, and in respect to the conduct of men in their dealings and obligations, and in the acquisition of property, no valid law can be enacted which undoes or unsettles that which was legally done or settled under a previous law.

The validity of enactments of this character has frequently been denied. In *Merrill* v. *Sherburne*,* Woodbury, J., says: "Acts of the legislature which look back upon interests already settled or events which have already happened, are retrospective, and our Constitution has in direct terms prohibited them, because highly injurious, oppressive, and unjust. But perhaps their invalidity results no more from this

* 1 New Hampshire, 213.

express prohibition, than from the circumstance that in their nature and effect, they are not within the legitimate exercise of legislative power." After speaking of *ex post facto* laws, he adds: "Laws for the decision of civil causes made after the facts on which they operate, *ex jure post facto*, are alike retrospective, and rest on reasons alike fallacious." In *Bates* v. *Kimball*,* Aikens, J., says: "The principle meant to be laid down is that an act not expressly permitted by the Constitution, which impairs or takes away rights vested under pre-existing laws, is unjust, unauthorized, and void." In *Staniford* v. *Barry*,† Prentiss, J., in referring to the decision in *Bates* v. *Kimball*, and the reasoning on which it was based, says: "The case appears to have been maturely considered, and was decided on principles and authorities which are conclusive of the question. We have only to add, that the principles adopted have become settled constitutional law, and are universally recognized and acted upon as such, by all judicial tribunals in this country. They are found in the doctrines of learned civilians, and the decisions of able judges, without a single decision, or even opinion or dictum to the contrary. They not only grow out of the letter and spirit of the Constitution, but are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty, and the equal and permanent security of rights." In *Lewis* v. *Webb*,‡ Mellen, C. J., lays it down as a settled rule, "that a law retrospective in its operation, acting on past transactions, and in its operation disturbing, impairing, defeating, or destroying vested rights, is void, and cannot and must not receive judicial sanction." In *McCabe* v. *Emerson*,§ Rogers, J., after stating that it could not be presumed that the legislature intended to give the act under consideration a retrospective effect, says: "But granting that intention to be clearly expressed, I have no hesitation in saying that the act is unconstitutional and void. The legislature has no power, as has been repeatedly held, to interfere with vested rights."

* 2 Chipman, 88.
† 1 Aikin, 314.
‡ 3 Greenleaf, 335.
§ 18 Pennsylvania State, 111.

We do not question the validity of retrospective statutes that are purely remedial, that give a remedy without disturbing or impairing rights. Whenever they attempt to interfere with a right, however, the legislature has passed the bounds of its authority, and the acts are void.

The court is here asked to review a judgment on which the law has already pronounced its final sentence. The act of Congress just obtained, concedes that the judgment has become final, but declares that it shall not remain so, and deprives the parties of any benefit from it until the matters settled by it are again adjudicated. If it be possible for a right to attach itself to a judgment, it has done so here, and there could not be a plainer case of an attempt to destroy it by legislative action. It is unimportant, of course, that the court ever had jurisdiction; if it proceed at all, it must proceed under the jurisdiction conferred by the act, and not under that which it formerly had. The case stands as if the judgment had been rendered by a court of last resort.

2. In passing the act Congress attempted to exercise power judicial in its nature, and not legislative. If this is so, it will follow as a necessary conclusion that the act is void.

What distinguishes judicial from legislative power? It is that the one is creative and the other administrative; the one creates or enacts laws by which the community is to be governed, and the other administers those laws as between the members of which the community is composed. Those matters of which the courts assume jurisdiction, and particularly those appertaining to the trial and determination of causes, are clearly and necessarily the subjects of judicial power. Such matters include all of the proceedings in a cause from its commencement to its termination, and it is certain that within these limits no other than judicial power can be exercised. Filing a complaint, summoning and empannelling a jury, rendering a verdict or judgment, granting or refusing a new trial, taking an appeal or suing out a writ of error, are all acts pertaining to the jurisdiction of the courts, and within the operation of this power. They must be done in pursuance of some law prescribed by legislative

authority, but considered merely as acts done, or to be done, in the progress of a cause, a legislative body has no power or control over them, either to command the doing of them, or to set them aside when done. No one will deny that rendering a judgment is strictly a judicial act, and it is evident that the power exercised in rendering it must also be exercised in setting it aside, for the act of setting a judgment aside, like the judgment itself, is simply a proceeding in the cause. And so as to every act that may be done in a cause, from its inception to its close; it is merely a proceeding in the cause, and is purely judicial in its nature. There is no difference in this respect between one act or one proceeding in a cause and another, they are alike judicial in their nature, and exclusively the subjects of judicial power. If one such act may be done or undone by legislative authority, there is no reason why the same authority may not be employed to do or undo every act throughout the proceedings. The question ceases to be a question of power, and becomes one of discretion only.

In *Merrill* v. *Sherburne*, the question was as to the validity of a statute granting a new trial after final judgment, and in *Bates* v. *Kimball*, and *Lewis* v. *Webb*, as to the validity of statutes granting an appeal where the judgments had also become final. It was held, in all the cases, that the statutes were unconstitutional and void, that their effect was to take away the legal force of the judgments to which they applied, and that in respect to these judgments they amounted to orders or decrees, which the courts alone were competent to make. These cases were decided not only on reasoning the most conclusive, but on authorities of the highest respectability and weight.

The act of Congress undertakes to grant an appeal or review in certain cases, in which there was no right of review at the time of its passage. The cases had been prosecuted as far as they could be under the law as it then stood; and if they may be prosecuted farther now, it is because Congress has the power to open the judgments, and direct the matters in controversy to be tried anew. The act

operates as a judicial order in each of the cases to which it applies.

Moreover, how can Congress authorize this court to issue its mandate to a State court in a matter which is of State jurisdiction? It would be plainly unconstitutional to do so. Perturbations of our whole judicial system would arise; and no one could calculate the extent of the disaster.

II. Respecting merits. The case is here short and easy.

1. As to the first point, this court cannot review the evidence on which a jury found.

2. As to the second, there was no error in refusing to let parties make proof in their favor out of correspondence between one another, and between themselves and their agent.

Messrs. O'Connor and Carlisle, with brief of Mr. Billings, contra.

I. *As respects jurisdiction.*

1. Independently of the act of Congress of 27th February, 1865, how does the case stand?

The Territorial government is said to have been extinguished by the formation and establishment of a State government in its stead. Admitting this, does it necessarily follow that all acts performed by any department of the Territorial government down to the last moment of its existence, must, by the annihilation of their author, become irreversibly enforceable forever? We think not.

If a tribunal, hastily gotten up in one of the newly created Territories, has given a judgment involving millions, in utter violation of law, equity, reason, and conscience, must that judgment stand irreversible, establishing the right forever, merely because the court that gave it was in *articulo mortis* at the time, and expired shortly afterwards? Again we think not.

The Territorial government has been superseded, not by a direct declaration of the legislative will to that effect, but merely as a necessary consequence of a new government having arisen in its stead. The Territorial judiciary fell

with the government of which it was a part; but the Supreme Court of the United States never was any part of the Territorial government. It did not cease to exist when the State of Nevada was admitted, nor did it lose its power, in fact or in law, to annul a definitive judgment of the Territorial court which was unlawful, and which, however unlawful, must, nevertheless, until reversed, form a bar to justice between the parties in any earthly tribunal.

It is said that no mandate can go to the Territorial court of Nevada announcing a reversal here because no such court exists. Granted; but is such a process indispensable to the existence of power here, or to the efficacy of this court's judgment in all courts and places? Surely not.

No further proceeding can be had in the Territorial courts by either plaintiffs or defendants; but the plaintiffs may bring a new action in the State courts. To such action the judgment, heretofore rendered in the now extinct courts of Nevada, would, indeed, be *primâ facie* a bar. But such bar would be at once raised, and every impediment to legal justice removed, if the plaintiffs should produce a record of this court showing that the judgment of the Territorial court was here reversed. It could not be said that the decision of this court was nugatory because it had failed to announce its reversal to the extinct tribunal whose judgment it reversed. "This reversal was not to depend on any act to be performed, or opinion to be given by the court below; but stood absolute by the judgment of this court."*

There is no repeal of the Territorial act. It remains a *law*, valid and operative for the purpose of giving efficiency and force to all things done under its authority. The assertion that it is superseded is only partly true. The Territorial government, with its departments, is, indeed, gone; but the power of vacating errors committed in those departments which, in a lawful and constitutional way, was vested in any still existing officers of the United States, is not necessarily superseded.

* Davis *v.* Packard, 8 Peters, 323; S. P., Webster *v.* Reid, 11 Howard, 457.

Argument against the motion.

We do not perceive any difficulty even in removing a judgment to this court after the admission of the State. The record remains a valid paper in the hands of an officer whose duties, except as custodian of the records, have ceased.* And it is settled that the writ of error to remove a record may go to the place where the record is lawfully deposited, and to the court or officer having lawful custody of it. There is no necessity that it should go to the tribunal which pronounced the judgment sought to be reversed.

We think it is not correct to say that the act creating Nevada Territory is repealed or abrogated. Nothing can be done under it which is inconsistent with the subsequent governmental action of the United States in admitting the State of Nevada; but this is the whole extent to which it has become inoperative. The jurisdiction of this court to reverse the judgments of the Territorial Supreme Court remains.

2. How does the case stand under the act of 27th February, 1865?

This act is in substantial conformity with former legislation of Congress, which has been passed upon and approved by this court. After the State of Florida was admitted into the Union on February 22d, 1847, an act was passed directing "that in all cases in which judgment or decrees have been rendered in the" late Territorial courts of Florida, "and from which writs of error have been sued out or appeals have been taken to the Supreme Court of the United States, the said Supreme Court shall be and is hereby authorized to hear and determine the same."† Under that act, this court exercised appellate jurisdiction in *Benner* v. *Porter*.‡ By a supplemental act, passed February 22d, 1848,§ it was enacted that the provisions of said act of 1847, "so far as may be, shall be, and they hereby are, made applicable to all cases which may be pending in the Supreme or other superior court of and for any Territory of the United States, which

* Benner v. Porter, 9 Howard, 246.
‡ 9 Howard, 246.
† 9 Stat. at Large, 129, § 3.
§ 9 Stat. at Large, 212, § 2.

may hereafter be admitted as a State into the Union, at the time of its admission, and to all cases in which judgments or decrees shall have been rendered in such Supreme or superior court at the time of such admission, *and not previously removed by writ of error or appeal.*" The first section of this same act of 1848 applied in terms the remedy thus contemplated to the like cases in the Territorial courts of Iowa. Under this first section of the act of 1848, this court took cognizance of a writ of error in an ordinary land case, not of peculiar Federal cognizance, issued after Iowa had been admitted as a State, and thereupon reversed the judgment of the Territorial court of Iowa in *Webster* v. *Reid.**

As a palliative of the consequences plainly resulting from the doctrines of the defendant, it is intimated that Congress might have done all that was necessary in the enabling act under which Nevada came in as a State; but having let slip that opportunity, no remedy can now be applied. But

1. This assumes the much debated and very disputable position that Congress, when admitting a State into the Union, may impose special conditions upon that favor, and place her in a position inferior to that of her elder sisters.

2. It also assumes that, in retaining or exercising authority to cause a review of judgments pronounced by its own judges in its own courts, the Federal Government would exercise a jurisdiction over matters and questions properly of State cognizance. Such is not the fact. It only reverses, if erroneous, and approves, if right, the acts of its own officers.

The authorities to the contrary of the doctrine thus set up are numerous. It is neither an exercise of judicial power nor an invasion of vested rights. It is merely a legislative regulation of judicial practice. There is no such thing as a vested right in a wrong-doer to evade the exercise of judicial power.† *Bull* v. *Calder*‡ is an early leading case. The

* 11 Howard, 437.

† Watkins *v.* Holman, 16 Peters, 60, 61; Schenley *v.* Commonwealth, 36 Pennsylvania State, 29; Rich *v.* Flanders, 39 New Hampshire, 317, 329–325.

‡ 3 Dallas, 386.

Reply for the motion.

United States v. *Sampeyrac*,* is a later one. It was held in this last case that Congress might confer jurisdiction, and at the same time might ratify and legitimate an action already commenced in a court which, until the act in question, had no jurisdiction of the matter. The doctrine of vested rights never restrains a legislature from advancing justice or remedying wrongs. It is intended to prevent oppression and injustice, not to afford them an impunity.

II. *As to merits.*

1. Is it shown upon the record that Freeborn *and* Shelden were partners with Shaw? Our objection is on this point, that there was absolutely *no* evidence *tending* to show that such a partnership existed. The court ought not to have submitted to the jury the question of fact whether such partnership existed. It follows that if the court can correct the error below upon the record, the judgment must be reversed. Because it is familiar law that where there has been judgment against *two* (jointly), and there is error as to *one*, the judgment must be reversed.

2. The remaining point arises upon the rejection of certain evidence offered by the defendants, to wit, letters and telegraphic messages from Shaw (the real debtor) to the parties charged as partners in this suit, and now plaintiffs in error. These letters contained admissions against interest, and should have been received.

Reply: Two cases in this court are cited as militating against the general principles we assert: *Calder* v. *Bull*† and the *United States* v. *Sampeyrac*.‡ But neither really does so.

Calder v. *Bull* arose on a statute of Connecticut allowing an appeal from a judgment rendered by a probate court of that State, the time for appealing under the law as it stood previously having expired. The statute was passed prior to the adoption of a State constitution, and it was shown to

* 7 Peters, 222. † 3 Dallas, 386. ‡ 7 Peters, 222.

have been the custom of the legislature from a very early period to enact laws of this nature, and exercise a general control over the judiciary in respect to new trials and appeals. The grounds urged against the statute were that it was a judicial and not a legislative act, and that it contravened the clause of the Federal Constitution prohibiting the passage of *ex post facto* laws. The decision of the court was in favor of its validity, but the judges wrote separate opinions, and assigned different reasons for their conclusion. As to the first ground, some of them held that it was immaterial, there being no provision in the Constitution preventing the legislature of a State from exercising judicial powers. Others held that whether the statute be regarded as judicial or legislative, it was justified by the ancient and uniform practice of the legislature, and should be maintained. It was unanimously agreed that the prohibition referred to only applied to criminal enactments, and that a State statute affecting civil rights merely was not within it. This was the whole case, and the decision certainly has no effect upon the principle contended for here.

The case of the *United States* v. *Sampeyrac* brought in question the validity of an act of Congress extending the provisions of a previous act, so as to enable the Territorial courts of Arkansas to entertain bills of review on the part of the United States in cases of forgery and fraud. No interference with vested rights was contemplated by the act, the effect of which was simply to invest certain tribunals with equitable powers not possessed by them before, to be exercised in a class of cases over which the ordinary jurisdiction of courts of equity has always extended. It is a part of the general jurisdiction of these courts to investigate matters of fraud, and grant relief to the parties injured by them; and it was, of course, competent for Congress to confer this jurisdiction on the courts of Arkansas. It did this, and nothing more, leaving those courts to proceed in accordance with the settled principles governing courts of equity in such cases. It was on this ground mainly that the court sustained the act, holding in respect to the merits of

the case that the judgment in question was fraudulent, and that no rights had vested under it. The decision, therefore, is not in point.

It may be that, in *Benner* v. *Porter*,* this court assumed jurisdiction of an appeal given by an act of this nature; but it seems to have done so without argument, and without any consideration of the question of the power of Congress to pass the act. Under such circumstances, the case should not be regarded as conclusive; and the question should be treated as an open one, and determined upon its merits.

Mr. Justice GRIER delivered the opinion of the court.

The most important question of this case is that of jurisdiction.

It is objected to the act of 27th February, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise. But we are of opinion that these objections are not well founded.

The extinction of the Territorial government, and conversion of the Territory into a State under our peculiar institutions, necessarily produce some anomalous results and questions which cannot be solved by precedents from without.

It cannot be disputed that Congress has the exclusive power of legislation in and over the Territories, and, consequently, that the Supreme Court has appellate jurisdiction over the courts established therein, "under such regulations as Congress may make."† In the case of *Benner* v. *Porter*,‡ it is said: "The Territorial courts were the courts of the General Government, and the records in the custody of their clerks were the records of that Government, and it would seem to follow necessarily from the premises that no one

* 9 Howard, 235. † Constitution, Art. 3. ‡ 9 Howard, 235.

could legally take possession or custody of the same without the assent, express or implied, of Congress." The act of 22d of February, 1848, chapter 12, which provides for cases pending in the Supreme or superior court of any Territory thereafter admitted as a State, made no provision for cases pending in this court on writ of error or appeal from a Territorial court. In the case just mentioned, we have decided that it required the concurrent legislation of Congress and the State legislature, in cases of appellate State jurisdiction, to transfer such cases from the old to the new government.

The act of Congress admitting the State of Nevada omitted to make such provision, although the Constitution of Nevada had provided for their reception. Now, it has not been and cannot be denied, that if the provisions of the act now under consideration had been inserted in that act, the jurisdiction of this court to decide this case could not have been questioned.

By this omission, cases like the present were left in a very anomalous situation. The State could not, *proprio vigore*, transfer to its courts the jurisdiction of a case whose record was removed to this court, without the concurrent action of Congress. Until such action was taken, the case was suspended, and the parties left to renew their litigation in the State tribunal. What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of

legal proceedings.* The passage of the act now in question was absolutely necessary to remove an impediment in the way of any legal proceeding in the case.

The omission to provide for this accidental impediment to the action of this court, did not necessarily amount to the affirmance of the judgment, and it is hard to perceive what vested right the defendant in error had in having this case suspended between two tribunals, neither of which could take jurisdiction of it; or the value of such a right, if he was vested with it. If either party could be said to have a vested right, it was plaintiff in error, who had legally brought his case to this court for review, and whose remedy had been suspended by an accident, or circumstance, over which he had no control. If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. "The truth is," says Chief Justice Parker, in *Foster* v. *Essex Bank*,† "there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority." Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power.

The constitutional difficulty attempted to be raised on the argument, that Congress cannot authorize this court to issue a mandate to a State court, in a mere matter of State jurisdiction, is factitious and imaginary. It is founded on the assumption, that all the questions which we have heretofore decided are contrary to law, and is but a repetition of the former objections which have been overruled by the court under another form of expression. For if it be true, as we

* See Hepburn *v.* Curts, 7 Watts, 300, and Shenly *v.* Commonwealth, 36 Pennsylvania State, 57.

† 16 Massachusetts, 245; and see Rich *v.* Flanders, 39 New Hampshire, 325.

have shown, that Congress alone had the power of disposing of the Territorial records, and providing for the further remedy in the newly organized courts—if it requires the concurrent legislation of both Congress and the State to dispose of the cases in the peculiar predicament in which this case was heard—if Congress had, as we have shown, the power to remove the impediments to its decision, and remit it to a State court authorized by the constitution of the State to take cognizance of it, they must necessarily regulate the conditions of its removal, so that the parties may have their just remedy respectively. If a State tribunal could not take possession of the record of a court removed legally to this court, nor exercise jurisdiction in the case without authority of Congress (as we have decided), without the legislation of Congress, they must necessarily accept and exercise it subject to the conditions imposed by the act which authorizes them to receive the record. This court would have the same right to issue its mandate as in cases where we have jurisdiction over the decisions of the State courts, under the 25th section of the Judiciary Act, and for the same reasons,—because we have jurisdiction to hear and decide the case.

II. Having disposed of the question of jurisdiction, the case presents no difficulty.

As to the case made on the motion for a new trial: our decision has always been, that the granting or refusing a new trial is a matter of discretion with the court below, which we cannot review on writ of error.

The single bill of exceptions in the case is to the refusal of the court to receive certain letters in evidence. The defendants were charged to have been partners of one George N. Shaw, or to have held themselves out to the public as such. This was the only issue in the case. To rebut the plaintiffs' proof, the defendants offered a correspondence between themselves, and some letters to them by one Eaton, their agent. It is hard to perceive on what grounds the parties should give their private conversations or correspondence with one another or their agent to establish their own case, or show that they had not held themselves out to the

public as partners of the deceased. Let judgment of affirmance be entered in the case, and a statement of this decision be certified to the Supreme Court of Nevada.*

AFFIRMANCE AND CERTIFICATE ACCORDINGLY.

SHEETS v. SELDEN'S LESSEE.

1. When a deed is executed on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed of the State, notwithstanding the officer may be described as one of the parties, and may have affixed his individual name and seal. In such case the State alone is bound by the deed, and can alone claim its benefits.

   Accordingly, where the legislature of Indiana passed two acts, one authorizing the Governor, and the other the Governor and Auditor of the State to sell certain property of the State, and to execute a deed of the same to the purchaser on behalf of and in the name of the State, and such property being sold, the Governor and Auditor executed to the purchaser a deed, naming themselves as parties of the first part, but referring therein to the acts of the legislature authorizing the sale, and to a joint resolution approving the same, and declaring that, by virtue of the power vested in them by the acts and joint resolution, they conveyed the property sold, "being all the right, title, interest, claim and demand which the State held or possessed," such deed was sufficient to pass the title of the State.

2. Land will often pass without any specific designation of it in the conveyance as land. Everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

   Accordingly, where the conveyance was of a division or branch of a canal, "including its *banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures*, and all the appurtenances thereunto belonging," certain adjoining parcels of land belonging to the grantor which were necessary to the use of the canal and water-power, and were used with it at the time, but which could not be included in any of the terms above, in Italics, passed by the conveyance.

3. At the common law the grantee of a reversion could not enter or bring ejectment for breach of the covenants of a lease; and the statute of 32 Henry VIII, giving the right of entry and of action to such grantee, is confined to leases under seal.

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* See Webster *v.* Reid, 11 Howard, 461.

Statement of the case.

4. The term "month," when used in contracts or deeds, must be construed, where the parties have not themselves given to it a definition, and there is no legislative provision on the subject, to mean calendar, and not lunar months. The term thus held in a lease of the State of Indiana.
5. In the interpretation of contracts, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, the general rule is to exclude the day thus designated, and to include the last day of the specified period.

   Accordingly, where leases provided that the rents should be paid semi-annually on the first days of May and November; and that if any instalment should remain unpaid *for one month from the time it should become due,* all the rights and privileges secured to the lessees should cease and determine, &c., the one month from the first day of May, within which the payment of the rent due on that day was to be made to prevent a forfeiture, expired on the first day of June following. In the computation of the time, the day upon which the rent became due was to be excluded.
6. Verbal authority is sufficient for a person to act as agent or a lessor in the collection of rent, or in demanding its payment.

THE State of Indiana, being owner of the Northern Division of the Central Canal, and of *certain adjacent lands*, authorized its Board of Internal Improvement, to cause any surplus water, of which there was some, along "*with such portions of ground* belonging to the State as *might be necessary to its use*, to be leased." Under this act leases were made in 1839–40,—one to Yandes & Sheets, another to Sheets; each for the term of thirty years.

The leases reserved certain rents, payable semi-annually on the first of May and November, and they provided that if any rent should "remain unpaid *for one month* from the time it shall become due," "all the rights and privileges" of the lessees "shall cease and determine, and any authorized agent of the State, or lessee under the State, shall have power to *enter upon and take possession of the premises*," &c. The first lease, that to Yandes & Sheets, in addition to the use of the water-power, in consideration of the rents reserved, leased, also, as necessary, "*for the use of the water-power hereby leased*," and for the same term and on the same conditions "the particular portion of ground belonging to the State at said point, included within the following boun-

Statement of the case.

daries, to wit, [here a particular piece of ground was described] containing a little more than half an acre." The second lease, that to Sheets, in consideration of the rent reserved, leased also for the same term, and on the same conditions as the water-power was leased, "such part of the *ground* belonging to the State as in the opinion of the engineer having charge may be *necessary to the use of the water-power* hereby leased," to wit [here, also, a particular piece of ground, as thus necessary, was described]. The lease to Yandes & Sheets was executed on the part of the State by the President of the Board of Internal Improvement, and by the lessees in this form:

D. H. MAXWELL, [SEAL.]
President of the Board of Internal Improvement.
DANIEL YANDES, [SEAL.]
WILLIAM SHEETS. [SEAL.]

The lease to Sheets was executed by N. Noble, Acting Canal Commissioner, and Sheets, in this form:

N. NOBLE,
Acting Commissioner for the Northern Division
of the Central Canal.
WILLIAM SHEETS.

The "seals" which appear to the lease to Yandes & Sheets were ink scrawls. No seals of any kind appeared on the second lease,—that to Sheets.

Some time subsequently to the making of these leases the State passed two statutes. By the first, entitled "An act to authorize the Governor of Indiana to compromise with, and to cause suit to be brought against lessees of the water-power of the Northern Division of the Canal," the *Governor* was authorized to sell "all the right, title, and interest of the State of Indiana, in and to the Northern Division of the Central Canal, and all the rents that shall become due after the sale of the said property, and the water-power and *appurtenances* thereunto belonging."

By the second, entitled "An act to authorize the sale of the Northern Division of the Central Canal," the *Governor*

and *Auditor of the State* were "authorized to make sale and dispose of all the right, title, interest, claim, and demand which the State holds in the Northern Division of the Central Canal, situate in the said State of Indiana, with all the *water-power* and *appurtenances* thereunto belonging," and authorizing those officers to convey the same to the purchaser, on *behalf of the State, in the name of the State of Indiana.*

The Governor accordingly made public sale of certain property, advertised for sale, as "being all the right, title, interest, claim, and demand which the State may hold or possess in the Northern Division of the Central Canal, and all the rents which may have become, or shall become, due after the sale of said property, and the water-power, and the *appurtenances thereunto* belonging, including its *banks, margins, tow-paths, side-cuts*, feeders, basins, right of way, dams, water-power, structures, and all the *appurtenances* thereunto belonging." And having reported the sale to the legislature, that body confirmed it, directing him to convey the said portion of the canal, with the rights, privileges, and *appurtenances*, to the purchaser in fee.

The Governor and Auditor of the State (J. A. Wright and E. W. H. Ellis) afterwards executed to F. A. Conwell, who held under the purchaser, an instrument, which made one of the questions in the case. It purported to be made "between *Joseph A. Wright*, Governor of the State of Indiana, and *Erastus W. H. Ellis*, Auditor of said State, of *the first part*, and *F. A. Conwell* of *the second part*," and recited the sale, and referred to the several acts under which the instrument professed to have been executed, which are those hereinbefore recited; and acknowledged the payment of the purchase-money.

It then makes known that, by *virtue of the power vested in them by the acts and joint resolution therein named*, "We, Joseph A. Wright, *Governor of the State of Indiana*, and Erastus W. H. Ellis, *Auditor of the said State*, do hereby convey to the said F. A. Conwell," &c., in fee, all the estate, &c., herein described; the description being just as the property was sold, and as the same is above described; nothing, how-

ever, being described by metes and bounds, or in any form more specific than that above given; and, as the reporter inferred from the argument, neither parcel falling within the specific designation of "bank, margin, tow-path, side-cut, feeder, basin, right of way, dam, or structure."

The deed was thus executed and tested:

"In testimony whereof, *we* have hereunto set *our* hands and affixed the seal of said State, at the city of Indianapolis, the day and year first above written.

"JOSEPH A. WRIGHT,
"Governor.

{SEAL OF THE STATE OF INDIANA.}

"ERASTUS W. H. ELLIS,
"Auditor of State.

"C. H. TEST,
"Secretary of State."

Selden became owner of the property thus sold by the State; and Sheets, being in possession under the leases which the State had made, and having refused to pay rent, an agent of Selden, authorized by parol, formally demanded, on the first day of May, 1860, and afterwards *on the first day of June*, a short time before sunset, upon the premises, the rents due *on* the first of May of the year just named. Payment not being made, Selden, regarding the lease as forfeited, brought ejectment against Sheets (the only tenant in possession). The premises for which the action was brought were the parcels of land described in the two above leases, executed in 1839–40 by the Board of Internal Improvement, as property belonging to the State, and leased in connection with the surplus water, because *necessary to the use of such water*. The defences in substance were:

I. To the deed of the Governor and Auditor.

1. As not executed in the name of the State.

2. As not embracing the premises in controversy.

II. That the leases not being under seal, Selden, as grantee of the reversionary interest of the State, could not maintain ejectment upon breach of the covenants to pay.

III. That the demand for rent, if authorized at all, should have been made on the 31st May, and having been made on

the 1st June, was too late; moreover, that the agent who made the demand was not authorized in writing.

The court below—the Circuit Court of the District of Indiana—held none of these defences sufficient; and judgment was given for the plaintiff. The same reasons urged against recovery there were taken for reversal in error here.

Mr. Dumont, for Sheets, plaintiff in error: The deed by the Governor and Auditor is not a deed made on behalf of the State in the name of the State; which the statute declares that it must be. It is by Mr. Wright, the Governor, and Mr. Ellis, the Auditor. These persons do not profess to act even as attorneys of the State; and if they did, the thing would be irregular, for the deed should have been made in the name of the principal; that is to say, of the State by its attorneys; and not in the name of the Governor and Auditor, even if they represented themselves as attorneys of the State, which with such a mode of presentation would not be a grantor at all. "It was resolved," says Lord Coke, in *Combe's case*,* "that when any has authority to do any act, he ought to do it in *his* name who gives the authority; for he appoints the attorney to be in his place and to represent his person, and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority." No rule in the law is better settled than this, and none has so uniformly received the sanction and approbation of the various judicial tribunals of the country.† In this case, however, as we have said, the attorneys do not even profess to act in the name of the State. They act in their own name; their official titles being added, just as the same titles might well have been added, and probably would have been added,—as descriptions of who the grantors were,—if the same individuals had been conveying lands belonging to themselves

* 9 Coke, 76, b.

† See Ewell *v.* Shaw, 1 American Leading Cases, 2d ed., 559, note; where authorities are collected.

Argument for the plaintiff in error.

personally. Indeed, it would be doubtful whether, *in any kind of contract*, titles thus appended would be held to be more than descriptive designation, or to relieve from personal liability; for Wright neither conveys nor signs *as* governor, nor Ellis *as* State auditor. In regard to a deed, however, the act of acts in the law, the case is stronger than the case of simple contracts, and, as we think, is quite plain. The statutes under which the sale was made have no such inherent force as to operate without regard to general law, as administered between private persons. They may or may not indicate what was *meant* to be sold; but they do not alter the ancient settled effect of those acts which *are* done. We concede that, in many cases of Government contracts, the intention to bind the Government and not the agent will prevail; as, for example, where, from the whole instrument, such intention is manifest; but this exception does not apply where the act of the agent, and the manner of its execution, are alike specifically pointed out by legislative direction; and especially does it not apply to a case like the present, where the effect of the act of the agent is to divest the State of title to a valuable freehold estate in lands, and important public franchises besides. Here the legislature has provided how that thing should be done, and by whom.

2. The State, no doubt, was owner of all the lands demised by the leases; but did the State authorize a sale of all *those* lands? The legislature describes specifically what should be sold. It is the "water-power" and the "appurtenances;" nothing else. Now, this ejectment is brought for certain pieces of land, meted and measured out; pieces of land which, confessedly, are not any one of the things either advertised for sale or sold, unless they are those "appurtenances" which, we admit, were sold. But "it seems now settled," says Tomlins,* citing authorities, "that lands will not pass by the word appurtenances." To insist that the particular tracts described in the leases are *appurtenant* to

* Law Dictionary, Tit. "Appurtenances;" citing the old reporters, Palmer, 375; Godbolt, 352; Hutton, 85; S. C. Littleton, 8.

some one or more of the things sold by the State, would be even more absurd than to maintain that *land* can be *appurtenant to land*. It would be maintaining that land can be appurtenant to a mere easement, a right of way, a water-power, or a stream of water, natural or artificial. The lands demised cannot be "*appurtenant*" to the *bed of the canal*, nor to its *banks*, nor its *margins*, nor its *tow-paths*, nor its *side-cuts*, nor its *feeders*, nor its *basins*, nor the *right of way*, nor the *dams*, nor the *water-power*, nor the *structures*, specified in the act. What the State meant to convey is not important. The question is, what has she conveyed? and that is to be determined by looking at the words of the statutes and deed, and interpreting them by the rules of law; rules which are of all time, and are the same whether the parties be States or subjects.

2. The leases are not under seal. Now, when a forfeiture is asserted, the party asserting it must prove the forfeiture strictly, for forfeitures are odious. Whence comes this right of re-entry at all? It comes from an English statute; a statute passed in the worst year of, perhaps, the worst of English kings,—in the 32d Henry VIII; but which, in common with most statutes of our mother country prior to the fourth year of James I, is confessedly in force by statute adoption of 1818* in Indiana. The language of the English statute is thus:

"The grantees or assignees shall have and enjoy the like advantages against the lessees, &c., by *entry for non-payment of rent, &c.*, and also shall and may have and enjoy all and every such like and the same advantage, benefits, and remedy, by action only, for not performing other conditions, covenants, and agreements, contained and expressed in *the indentures* of *their said leases, demises*, or *grants*, against all and every the said lessees, &c., as the said lessors or grantors themselves, &c., ought, should, or might have enjoyed, at any time or times, in like manner and form as if the reversion of such lands, &c., had not come to the hands of our said sovereign," &c.

* Revised Statutes of Indiana, 1818, p. 308.

This statute carries with it the construction which it has received in England, as well as with us. Now, in *Bickford* v. *Parson*,* Judges Wilde, Coltman, Maule, and Cresswell, severally gave opinions, each one of them assuming it to be settled law that to bring a case within this statute of 32 Henry VIII, 34, the *lease must be by deed;* Maule, J., saying, "*The demise not being by deed*, the right to sue is not transferred to the assignee of the reversion by force of the statute."

Doubtless, it will be said that the necessity for a seal in the true form is dispensed with by our Illinois statute of 1843. But is it? The statute provides† that an ink scrawl may be used, "except where any statute of this State shall require a *specific seal.*" Is it clear that, adopted by statute of Illinois as the statute of 32 Henry VIII will be conceded by all to have been, a "specific seal" is not necessary when you attempt to establish the forfeiture allowed by the English act; that forfeiture especially which there, as here, is odious, and in favor of which nothing will be intended nor benignantly construed? But even supposing that an ink scrawl, or even no seal, would be sufficient between private persons, yet certainly when the State is the lessor, the private ink scrawl of the State's agent is not sufficient.

3. *The demand was too late.* This court‡ has fully recognized the obligation of the common law requirements in regard to re-entry on the ground of forfeiture for non-payment of rent. One of these requirements is, that where, as in the present case, the agreement is, that "if the rent shall be behind and unpaid by the space of thirty or any other number of days after the days of payment, it shall be lawful for the lessor to re-enter; a demand must be made on the thirtieth *or other last day.*"§ The right to re-enter for breach here is by the terms of the lease suspended for one month from the time the rent became due. "The month, by the

* 5 Manning, Granger, and Scott (57 English Common Law), 920.

† Statutes of 1843, p. 592, § 25, chap. 33.

‡ Connor *v.* Bradley, 1 Howard, 217.

§ Duppa *v.* Mayo, 1 Saunders, 286, note 16.

common law," says Tomlins,* quoting good authorities, "is but 28 days, and in case of a condition for rent, the month shall be thus computed. So in the case of enrolment of deeds, and generally in all cases where a statute speaks of months." It is true that, by an Illinois "act in relation to the construction of *statutes* and the definition of terms," it is declared that the word "month" shall mean a calendar month; but this act relates only to the construction of statutes, and to the meaning of terms as used in *them*. So, too, the fact that in mercantile contracts, or in other contracts where there was, obviously, such an intention, the calendar month is assumed, is not important; for this business of forfeiture is a very strict proceeding under ancient common law. Admitting, however, that a calendar month was meant, and that the court will so construe the leases, yet then the authority is, that the demand must be *on the last day of the month.*† Here it was on the first of the succeeding.

Mr. Hendricks, contra.

Mr. Justice FIELD delivered the opinion of the court.

The objections taken by the defendant in the court below against a recovery, and urged in this court for a reversal of the judgment, which require consideration, relate, 1st, to the validity of the deed executed by the Governor and Auditor of Indiana to pass the title of the State to the premises in controversy; 2d, to the claim by the lessors of the plaintiff of a right to maintain ejectment for the premises upon a breach of the covenants to pay rent contained in the leases of the State; and 3d, to the proceedings taken to effect a forfeiture of the leases.

1. The objection to the deed of the Governor and Auditor is, that it is not executed in the name of the State, and does not cover the premises in controversy.

It is true that the form of the deed is not in literal com-

* Law Dictionary, tit. "Month;" and citing 1 Institutes, 135; 6 Reports, 62; Croke James, 167; 6 Term, 224.

† Duppa *v.* Mayo, 7 Saunders, 286, note 16.

pliance with the language of either of the acts of Indiana; it is not in terms between the State, of the one part and the assignee of the purchasers of the property of the other part; but it shows a completed transaction between the State and the grantee named. It refers to the acts of the legislature authorizing the sale; it sets forth a sale made pursuant to their provisions; it mentions the joint resolution affirming the sale; and it declares that the Governor and Auditor in virtue of the power vested in them by the acts and joint resolution convey the property sold, "being all the right, title, interest, claim and demand which the State" held or possessed therein.

In the execution of this instrument the Governor and Auditor acted officially and not personally, and in our judgment the deed was sufficient to pass the title of the State they represented. And it may be stated generally that when a deed is executed, or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties, and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract, and can alone claim its benefits.*

The objection that the deed does not cover the premises in controversy rests upon the fact that it does not convey the parcels of land for which the action is brought, by specific designation and description. Such designation and desciption, though usual, are not always essential. Land will often pass by other terms. Thus a grant of a messuage or a messuage with the appurtenances will carry the dwelling-house and adjoining buildings, and also its orchard, garden, and curtilage.† The true rule on the subject is this, that everything essential to the beneficial use and enjoyment

* Hodgson *v.* Dexter, 1 Cranch, 345; Stinchfield *v.* Little, 1 Greenleaf, 231; The State *v.* McCauley, 15 California, 456.

† Shepherd's Touchstone, 94.

of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.* Thus the devise of a mill and its appurtenances was held by Mr. Justice Story to pass to the devisee not merely the building but all the land under the mill and necessary for its use, and commonly used with it.† So a conveyance "of a certain tenement, being one-half of a corn-mill situated," on a designated lot "with all the privileges and appurtenances" was held by the Supreme Court of New Hampshire to pass not only the mill, but the land on which it was situated, together with such portion of the water privilege as was essential to its use.‡ And the exception of a factory from a mortgage deed was held by the Supreme Court of Massachusetts to extend to the land under the factory, and the water privilege appurtenant thereto.§

In the deed from the Governor and Auditor the property conveyed is designated as "all the right, title, interest, claim, and demand, which the State may hold or possess in the Northern Division of the Central Canal, &c., and all the rents which may have become, or shall become due after the sale of said property, and the water-power, and the appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging."

This language is comprehensive enough to carry the several parcels of land described in the declaration. These parcels are described in almost identical language in the leases executed by the Board of Internal Improvement on behalf of the State. The law providing for leasing the surplus water, authorized at the same time the leasing of "such portions of ground belonging to the State as might be necessary to its use;" and the leases specify those particular

* Sparks v. Hess, 15 California, 196. † Whitney v. Olney, 3 Mason, 280.

‡ Gilson v. Brockway, 8 New Hampshire, 465.

§ See, also, to the same effect, Wise v. Wheeler, 6 Iredell, 196; and Blaine's Lessees v. Chambers, 1 Sergeant & Rawle, 169.

parcels as being necessary to the beneficial use and enjoyment of the water.

2. The objection that the lessors of the plaintiff, as grantees of the reversionary interest of the State, cannot maintain ejectment for the premises upon breach of the covenants to pay rent contained in the leases of the State, rests upon the supposition that the leases are not under seal.

It is conceded that at the common law the grantee of a reversion could not enter or bring ejectment for breach of the covenants of a lease; and that the statute of 32 Henry VIII, giving the right of entry and of action to such grantee, was confined to leases under seal. The statute speaks of conditions, covenants, and agreements, contained in *indentures* of leases, demises, and grants; language only applicable to sealed instruments. That statute was adopted in Indiana as early as 1818, but a law of the State passed in 1843 alters its rule, and extends its remedies to all leases.

3. The objection taken to the proceedings for the forfeiture of the leases is that the demand for the rent was not made on the proper day, nor by properly authorized agents.

The demand was made on the first day of May, and also on the first day of June. The first demand was premature; the question is as to the demand on the latter day. The leases provided that the rents should be paid semi-annually on the first days of May and November; and that if any instalment should remain unpaid *for one month from the time it should become due*, all the rights and privileges secured to the lessees should cease and determine, and any authorized agent or lessee of the State should have power to enter and take possession of the premises.

By the term "month" as here used is meant a calendar, and not a lunar month. The legislature of Indiana has attached this meaning to the term when it is used in the statutes of the State, but has not defined its meaning in contracts or deeds, and it is contended by the plaintiff in error that in the absence of any legislative provision on the subject, the term must be construed in these instruments to mean lunar and not calendar months. But this view cannot

be sustained. The term is not technical, and when the parties have not themselves given to it a definition, it must be construed in its ordinary and general sense, and there can be no doubt that in this sense calendar months are always understood. The reasons upon which a different rule rests in England with reference to other than mercantile contracts, do not outweigh this consideration.*

The rent becoming due on the first day of May, the one month from that time within which the payment was required to be made to prevent a forfeiture, expired on the first day of June following. In the computation of the time, the day upon which the rent became due was to be excluded. The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation."†

The parties who made the demand for rent were duly authorized by the lessors of the plaintiff. Authority in writing was not essential; verbal authority was sufficient for the purpose.

JUDGMENT AFFIRMED.

* Gross *v.* Fowler, 21 California, 392; Strong *v.* Birchard, 5 Connecticut, 361; Brown *v.* Harris, 5 Grattan, 298.

† Cornell *v.* Moulton, 3 Denio, 16; see also Bigelow *v.* Wilson, 1 Pickering, 485.

Statement of the case.

CHITTENDEN ET AL. *v.* BREWSTER ET AL.

1. It is the duty of assignees, for the benefit of creditors, who have once accepted the trust, not only to appear, but so far as the nature of the transaction, and the facts and circumstances of the case will admit or warrant, to defend the suit. And if a Federal court is already seized of the question of the validity of the trust, they should set up such pending proceeding against any attempt by parties in a *State* court to bring a decision of the case within its cognizance. If, when the Federal court has acquired previous jurisdiction, they submit with a mere appearance, and without any opposition to the jurisdiction of the State court, and pass over to a receiver appointed by *it* the assets of the trust, they will be held personally liable for them all in the Federal court.
2. A party *not* appealing from a decree cannot take advantage of an error committed against himself; as for example, that the appellant had omitted to prove certain formal facts averred in his bill, and which were prerequisite of his case. But where—assuming the fact averred, but not proved to be true—a decree given against a party in the face of such want of proof is reversed in his favor, it may be reversed with liberty given to the other side to require him to prove that same fact which the appellee, *when seeking here to maintain the decree*, was not allowed to object that the appellant had failed, below, to prove.

THIS was an appeal from a decree of the Circuit Court for the Northern District of Illinois.

The suit was a creditor's bill filed against a judgment debtor and his assignees, the defendants in the case, to set aside an assignment made by the debtor to hinder and delay creditors. The assignment was made on the 4th of November, 1857, to Brewster and Clark, two of the defendants, and purported to convey to them all the property, real and personal, of the debtor, in trust, to convert the same into money, either at public or private sale, and pay certain preferred creditors named. The judgment debtor made no defence. The assignees put in a joint answer, and *after requiring the complainants to make proof of their judgments and executions as charged in their bill*, set forth, among other grounds of defence, that, after the filing of the bill below, a bill in chancery had been filed against them in one of the State courts, in behalf of *other* creditors of the judgment debtor.

praying for the appointment of a receiver to take possession and charge of the property conveyed by the assignment, and that the trusts therein created be carried into effect; and that, upon the filing of the bill in the State court, and after hearing the motion for a receiver, the motion was granted; and that they had afterwards, in pursuance of the order of the State court, transferred and set over to the said receiver, one Mitchell, all the property, real and personal, that had come to their hands.

To this answer a replication was filed, and the parties went to their proofs. There was no evidence that, on the application in the State court for a receiver, which was made on the alleged ground of faithless execution of the trust, the assignees had made opposition. They had done nothing but acknowledge service on themselves of the notice of the intended motion for a receiver; employ a solicitor to enter an appearance for them, and to give their assent to the hearing of the motion at the February Term of the court, then at hand. The State court accordingly granted the prayer of the bill before it, and appointed a receiver, one Mitchell, in the case. But no fraud was proved nor specifically alleged on the part of the assignees in any part of the proceeding.

The bill below was taken, as confessed, by Brewster, the debtor, and dismissed as to two other defendants; and the court, after hearing the case on the pleadings and proofs, declared the assignment fraudulent, and set it aside, and appointed a *receiver*, one Moulton, and directed the judgment debtor to assign and transfer in writing to him all his property, real and personal; and further, that Brewster and Clark, the assignees, should assign and transfer in writing to him all the property and effects of every description that came into their hands by the assignment of the 4th of November, 1857, *except such property and effects so assigned to them, which have, since the service of process in this suit, been transferred to Mitchell, the receiver, under the proceedings had in the State court*, and which was set forth in the answer filed by them. From this decree the complainants appealed to this court, the ground being essentially that the proceeding in

the State court should have been treated as an interference with the Federal jurisdiction previously acquired.

In order to understand this question of priority, it is necessary here to say that the bill in *the Circuit Court* was filed on the *4th of January*, 1858; the subpœna served on the defendants on the next day; and their appearance entered on the 1st of February following. The bill in the *State* court was filed on the *1st of February*, 1858, and the subpœna served on the 20th of the same month. The receiver was appointed afterwards on notice. The evidence did not show that the defendants conveyed the effects of the judgment debtor in their hands to the receiver, but the fact was apparently assumed both by the counsel and the court below, and no point upon it was made by the court here.

Mr. E. S. Smith for Chittenden et al., appellants: The law is settled, that courts of different but of co-ordinate jurisdiction, cannot interfere with each other, either in process, person, or property, to prevent the first jurisdiction, which attaches or takes cognizance of the subject-matter in dispute, from determining the case conclusively. Now the law of *lis pendens* we assume to be equally settled. We assume that filing a bill in a court of equity and service of process is notice to the world of all the rights claimed by the complainant as set up in his bill. It was thus decided so long ago as in decisions reported by Vernon,* and it has been confirmed by many since.

Consider the action of the parties to the proceeding in the State court. Soon after the service of process in this case, the parties appear in the State court, on the first day of February, 1858, and a bill is filed by somebody, charging the assignees with neglect of duty. The assignees receive service, submit to the charge, and in fact, though not in form, confess a decree. They deliver without resistance to Mitchell the property and effects, to be taken to himself, under the assignment. When the assignees did this, they

* 1 Vernon, 318.

knew the fact of the proceedings by the appellants in the Federal court, to set aside the assignment, and subject the property to the payment of other judgments. If property, situated as the estate in this case was, can, by a proceeding in another jurisdiction, after right and lien had attached, be taken absolutely from the court, then proceedings by judgment creditors in the Federal court, after exhausting their remedy at law, are valueless. It will be impossible for a man to suggest a case, where the debtor, with the aid of a friendly creditor, could not concoct a proceeding to defeat every action by judgment creditors in courts of equity. Before a receiver could be appointed and take possession of the effects, such a proceeding, as the record in this case shows, could defeat the justice of the court. Notice for an injunction can be postponed; time will elapse before a receiver can be appointed. Assignees refuse or neglect to deliver over, and before that is done, an order comes from another jurisdiction, requiring the assignees to deliver the effects to another, who is appointed ostensibly to carry out the trusts. This order the assignees comply with, and thereby arrest the proceedings, because the property could not be reached; leaving the creditor powerless and his debt lost. Such proceedings cannot be tolerated by courts of justice. The rights of parties should not be subjected to schemes which might defeat the ends of justice, nor should parties, who use a court of justice in such a manner as these defendants stand under suspicion of having used one of those of the State of Illinois, go unpunished.

Mr. Washburne, contra, for the assignees: There is no evidence in the record showing that appellants acquired a prior lien. It does not appear they ever sued out executions upon their judgments or placed such executions in the hands of the marshal, or had any return made thereon. The obtaining of a judgment, suing out of execution, and a return of *nulla bona* are indispensable prerequisites to the establishment of a prior equitable lien.*

* Jones v. Green, 1 Wallace, 330.

Opinion of the court.

If the appellants acquired a prior equitable lien by the filing of their bill of complaint, they lost the same by the superior diligence of the complainants in the State court. The lien obtained by the filing of a creditor's bill is an inchoate one, which may be perfected by the appointment of a receiver, and may be displaced by the superior diligence of other creditors in perfecting similar liens. It is urged that the court below should have treated the proceedings of the State court as fraudulent and void; but it will be noticed that there was neither allegation nor proof of fraud in the case.

If the appellants had a superior lien upon the property in the hands of the receiver appointed by the State court, the proper mode of enforcing that lien was for the receiver of the court below to intervene in the State court by petition, *pro interesse suo*, where the lien, when established, would have been recognized and duly enforced. Upon establishing the right of the receiver of the court below to the property in the hands of the receiver of the State court, in the mode indicated, the State court would have ordered its officer to deliver the property over to the officer of the United States court. The court below declared the assignment void, appointed a receiver, and compelled the defendant, Brewster, to assign all his interest in the property. This was all the court could do; it could not order the assignees to deliver over property not in their hands, and which they had already delivered to the officer of the State court under its order.

Mr. Justice NELSON delivered the opinion of the court.

It does not appear from the proofs in the case, that executions had been issued, and returned unsatisfied, as averred in the bill, and for the proof of which the answer of defendants called; and it is objected by the counsel for the appellees that this defect is fatal to the right of the complainants to maintain their bill. This would be so, if the appellees, against whom the decree was rendered, had appealed from

the same, as in the case of *Jones* v. *Green*.* See also, *Day et al.* v. *Washburn et al.*† But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing.‡ If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing.

This brings the case down to the question as to the effect to be given to the suit in the State court; and to the order of that court appointing a receiver, and directing the defendants to assign and set over to him all the effects of the judgment debtor in their hands, under his assignment of the 4th of November, 1857.

The bill in the Circuit Court of the United States, to set aside the assignment to these defendants as fraudulent against creditors, was first filed, and consequently operated as the first lien upon the effects of Brewster, the judgment debtor.

We agree that the defendants, as bailees and trustees of the property intrusted to their care and management for the benefit of the creditors of Brewster, were responsible only for common or ordinary diligence, such as prudent men exercise in respect to their own private affairs. But this degree of diligence the law exacts, and the courts of justice are bound to enforce. When, therefore, the bill was filed against them by the judgment creditors in the Circuit Court of the United States, to set aside the assignment as fraudulent, it was their duty, arising out of their acceptance of the trust, to appear and defend the suit, as they have done, and

* 1 Wallace, 330.

† 24 Howard, 355, 356.

‡ Kelsey *v.* Weston, 2 Comstock, 505; Norbury *v.* Meade, 3 Bligh, 261; Mapes *v.* Coffin, 5 Paige, 296; Idley *v.* Bowen, 11 Wendell, 227.

protect their title to the fund in controversy, so far as the nature of the transaction and the facts and circumstances of the case would admit or warrant. Their whole duty appears to have been discharged in this respect, and we perceive no ground of complaint against them. But, this duty was equally incumbent upon them in respect to the suit in the State court. They should have appeared and defended that suit; and, in addition to the defence on the merits, that is of their faithful execution of the trust, which was impeached by the bill, they should have set up the pending proceedings against them in the Federal court, which tribunal had first acquired jurisdiction over them, and over the fund in dispute, and were entitled to deal with it, and with all questions growing out of the relations existing of debtor and creditor of the parties concerned. Instead, however, of pursuing this course, no defence, as appears, was set up by the defendants to the suit; no answer filed, nor even opposition made to the motion for the appointment of a receiver. The only part they seem to have taken in the proceedings is, besides acknowledging service of the notice of the motion for a receiver, the solicitors entered their appearance in the cause, and gave consent that the motion might be made at the then February Term of the court. It was at once made, and the receiver appointed and gave the requisite security.

Now, we think, here was a clear omission of duty on the part of the defendants, as trustees and bailees of the property in question, and for which they should have been held personally responsible. They should have appeared and defended the suit in the State court, and set up the pending proceedings in the Federal court, which was a complete answer to the jurisdiction of the former; and if this defence had been overruled, a remedy existed by a writ of error to this court, under the 25th section of the Judiciary Act.

The court below, therefore, erred in excepting from the transfer of the effects of the judgment creditors in the hands of the defendants to Moulton, the receiver, the property and effects transferred to Mitchell, under the order of the State court. For this error, the decree of the court below must

Statement of the case.

be reversed, and the cause remanded to the court below, with directions to proceed on the same in conformity with this opinion; but liberty is given to the defendants to require proof before the court of the issuing of executions and return unsatisfied, as averred in the bill of complaint.*

DECREE, ETC., ACCORDINGLY.

CAMPBELL *v.* READ.

A question involving the construction of a statute regulating intestacies within the District of Columbia, is not a question of law of "such extensive interest and operation," as that if the matter involved is not of the value of $1000 or upwards, this court will assume jurisdiction under the act of Congress of April 2d, 1816.

THE act of Congress of April 2d, 1816,† regulating appeals and writs of error from the Circuit Court of the District of Columbia to this court, limits them to cases in which the matter in dispute is of the value of $1000 or upwards. It provides, however, that if "any questions of law of *such extensive interest and operation* as to render the final decision of them by the Supreme Court desirable" are involved in the alleged errors of the Circuit Court, the case may be heard here, even though the matter in dispute is of less value than $1000; and any judge of the court, if he is of opinion that the questions are of such a character, may allow the writ or appeal accordingly.

With this statute in force, Campbell, by will, left legacies to his widow and several illegitimate children; but, after paying them all, a fund of $141 remained in the hands of the executor undisposed of; there being no residuary legatee named in the will, and no parents, &c., legitimate children,

* Levy *v.* Arredondo, 12 Peters, 218; Marine Insurance Company *v.* Hodgson, 6 Cranch, 206; Mandeville *v.* Burt, 8 Peters, 256–7.

† 3 Stat. at Large, 261.

or collateral relations, who had the right to claim it as next of kin in preference to the widow.

The widow accordingly claimed it under statute. Her claim was opposed by the executor in virtue of an act regulating such matters in the District, and which declares that "every bequest of personal estate to the wife of a testator *shall be construed to be intended in bar* of her *share of the personal estate*, unless it be otherwise expressed in the will."* Her right depended, therefore, upon a construction of this statute, and the point before this court was, whether this question was a question of law of such extensive interest and operation as to render the final decision of it, in a case like the present one, by this court, desirable. Under the impression that it might be, or under some misunderstanding, an *allocatur* had been allowed in vacation by one of the justices of this court. The printed copy of the record showed no certificate that the papers it contained were a transcript of the record, though counsel put nothing on that ground, which was supposed to be an accident only.

Mr. Eames, for the appellant, argued that the question was of such a character as the act of Congress contemplated. It concerned the whole subject of testaments and intestacies in a large and important territory, constantly increasing in population and wealth, the seat of the Federal Government itself. The amount here, indeed, was not large, but the principle, and therefore the "question of law," was the same as if the amount was millions.

Mr. Stone, contra.

At a subsequent day, the CHIEF JUSTICE announced briefly the court's opinion, that independently of the record's not showing a proper certificate,—this itself being a sufficient ground for dismissal,—the amount in controversy was insignificant, and that the court was satisfied, on an inspection of the papers, that the *allocatur* was inadvertently

* Act of Maryland, 1798; Dorsey's Laws, 406.

sanctioned. There was, he said, no principle involved of such extensive application as to bring the case within the act of Congress giving jurisdiction on a judge's *allocatur* when the amount in controversy is less than $1000. Notwithstanding the *allocatur*, therefore, the case was

DISMISSED.

BANK TAX CASE.

A tax laid by a State on banks, "on a *valuation* equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the institution; and when that property consists of stocks of the Federal Government, the law laying the tax is void.

A STATUTE of the State of New York, passed in 1857, making some modifications of previous acts of 1823, 1825, and 1830, enacted that the *capital stock of the banks of the State should be* "*assessed at its actual value*, and taxed in the same manner as other personal and real estate of the country." After the passage of this act, several of the banks became owners of large amounts of the bonds of the United States, in regard to which Congress enacts* that "whether held by individuals or *corporations*, they shall be exempt from taxation by or under *State* authority." On a question between several banks of New York, formed under the general banking law of 1838 in that State, and the tax commissioners of New York, this court decided, in March, 1863 (*Bank of Commerce* v. *New York City*, reported in 2 Black, 620), that the tax referred to was a tax upon the *stock;* and that being so, it was by the settled law of this court illegally imposed. In April, 1863, just after this decision, the legislature of New York passed *another* statute,† which enacted that "all banks, banking associations, &c., shall be liable to taxation on a *valuation equal to the amount of their capital stock paid in or secured to be paid in*, and their surplus earnings, &c., in the manner now provided by law," &c. On a tax laid, under

* Act of February 25, 1862. † Act of 29th April, 1863.

this act, by the commissioners, upon the different banks of New York City, some of which had invested their whole capital in the securities of the Federal Government, and others of which had largely done so, the question was whether this second act did or did not also impose a tax upon these *stocks*. The Court of Appeals of New York decided that it did not; and from this decision the case came here. It is proper to say that by the general banking law of New York, under which all these banks were created, it is enacted that the legislature may at any time alter or repeal the act. Between twenty and thirty banks being now here as plaintiffs in error, and the question being one of magnitude both in amount and in principle,* as many of the corporations as wished to be heard were heard, though the principle involved was much the same in the case of each.

Messrs. Devlin, Brady, and Kernan, for the tax commissioners: These corporations are created by the State, and endowed by it with valuable franchises. That the corporations should pay the State for these is obvious. To make them pay is the purpose of the act. The tax is imposed upon corporations directly and specifically. It is not imposed upon their property. The thing is the same in substance as though the State required the corporation to pay annually into the State treasury a specified sum for the privileges and franchises granted. It is to be paid irrespective of the character of the securities held by the bank. Instead, for example, of requiring a specified sum to be paid annually, the law requires the corporation to pay to the State annually an amount equal to the tax which would be levied, for State purposes, "on a valuation equal to the amount" of the nominal capital stock of the bank. This is more just than to exact a fixed sum annually. The reference in the statute to "a valuation equal to the amount of their capital stock, paid in or secured

* It was stated by one of the counsel in the case, Mr. Marshall Spring Bidwell, that to the banks of New York City alone the tax made a difference of $1,500,000.

to be paid in, and their surplus earnings," is only for the purpose of fixing the amount which the corporations are annually to pay for their franchises. It has no regard to the actual capital owned by the bank, or to the securities, or the value of the securities held by it.

Concede, for the sake of argument, that the burden imposed by the act of 1863 upon the banks *indirectly* affects the United States securities by diminishing the inducements to the banks to invest in them, how does this render the act invalid? The State was under no obligation to create these corporations to aid directly or indirectly the Federal Government in exercising its powers. Without violating the Constitution of the United States, the State might, by the original act creating them, have required these banks to make *State* stocks or mortgages the basis of and security for the redemption of the notes they were authorized to issue, and to invest all their capital and funds in these securities, to the exclusion of United States stocks. The State is not bound to continue the existence of the banks because they aid the Federal Government. They are created by power of the *State*, and by the express provisions of their charter exist only during its pleasure. They were created for the benefit of the people of the State, and whenever, in the judgment of the legislature, the good of the State requires it, they may be abolished, notwithstanding they were beneficial to the Federal Government in the exercise of its power to borrow money. Hence, while the State cannot tax the bonds issued by the United States held by these institutions, it can compel them to contribute to State burdens, as the price of their existence, the same amount as though they did not hold such bonds. The fact, if it be so, that this action of the State will tend to prevent these institutions from investing in United States bonds, does not render the same unconstitutional any more than their non-creation would be a failure by the State to perform its constitutional duty, or the repeal of their charters would be a violation of the constitution. Being the creatures of State power, the State may legitimately so create and burden them that they shall subserve

the interest of the State, rather than the interest of the Federal Government. It is to be observed that in this action the State does not, in any just sense, obstruct the exercise of its legitimate power by the Federal Government. It simply fails to give it incidental aid. It so legislates that the State, rather than the Federal Government, derives advantages from an institution created and continued by legitimate State authority. What is there unpatriotic or unconstitutional in this? The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.

Messrs. Daniel Lord, A. W. Bradford, B. D. Silliman, Marshall Spring Bidwell, Benedict, Bonney, Van Winkle, and others, contra, for different Banks: It is of no consequence whether a tax be levied on a person natural or artificial in respect to property, or on the property itself. Under any system where property is the criterion of taxation, and affords the basis of a rate or assessment, the tax may be said to be a tax upon the property, or a tax upon the person or institution, owning it, in respect to such property. It is only a different mode of announcing the same proposition. "In New York, all taxation is upon property. It is the same thing in substance, to say that it is upon the owner in respect to property."* There may be a difference in the mode of assessing and valuing the property of a person and the property of a corporation; but supposing the mode the same in each case, viz., that of *actual valuation*, then as to exemptions under the Constitution of the United States, the position of a bank "is the same as that of an individual tax-payer. It is, as a general rule, assessed and taxed for all its property of every kind; but there is an exception as to such part of its property, as the Constitution and laws of the Union, and of the States, have upon special reasons of policy, declared shall be exempted. Whether such exempt property is found in the hands of an individual, or in the possession of a corporation

* Comstock, J., in People *v.* The Commissioners, 23 New York, 192.

taxed upon the actual value of its capital, the *rule is the same*, the exempt property is to be deducted from the aggregate valuation, and the tax is to be imposed on the residue."* The privilege of exemption from taxation on so much property as may have been lent to the Government of the United States, cannot be made to depend on the *mode of valuation*, either of the property of an individual, or of a corporation. If so dependent, it is obvious that the immunity of the Government from taxation upon its means of borrowing money amounts to nothing. Such a method of taxing is equivalent to saying, property shall be taxed without reference to its mode of investment. Thus, exemption would be avoided by simply refusing to consider what constitutes the basis of exemption. And this can be done as well with reference to individuals as corporations. Individuals may be taxed on "*a valuation*" equal to the cost-price of their property, "paid, or secured to be paid." This would be just as definite and invariable as the assessment of corporations on a "valuation" equivalent to the amount of capital stock paid in, or secured to be paid in, and so exemption from taxing Government stock be avoided altogether.

The immunity from taxation arises from the fact of having lent money to the Government, and taken evidences of debt in lieu thereof. Exemption, in other words, arises from having parted with capital, and being the *present* owner of Government securities.

The State cannot tax the security in any way; but instead of taxing what the bank has now, it taxes what the bank had, *i. e.*, what it had when it commenced business; or else it taxes what it has now, at a valuation of what it had when it commenced business. It is quite clear, therefore, that one who has lent his money to the Government, though he is not taxable on United States securities, is really taxed on the sum which he has lent to the Government. It is manifestly the same thing to tax the security and to tax the

* Denio, C. J., in People *v.* The Commissioners, 23 New York, 192.

money which produced the security. In either case alike, the power of the Government to borrow money is taxed by the State. But this power cannot be taxed. By the Constitution of the United States, Congress has power "*to borrow money on the credit of the United States.*" This is one of the constitutional means which the Government of the United States is authorized to employ for its national purposes. As such, it is entirely beyond the interference, legislation, and dominion of the States. This is not a concurrent power with *taxation*, but a concurrent power with the right to *borrow*. Powers to be concurrent must be *in pari materiâ*. The principle of the exemption is based upon the National Sovereignty and the *supremacy* of the Constitution, and all acts of the Government lawfully performed under it. The National Sovereignty being conceded, "it is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in the subordinate governments, as to *exempt* its own operations from their *influence*."*

These principles have been determined by this court, and must be conceded. Hence, it is sought to argue that the State does not tax the power to borrow money, nor the credit of the Government, nor the evidence of debt in the hands of the lender; but only taxes the lender upon a fixed valuation, without regard to the manner in which his property has been invested; in other words, that the mode of investment is indifferent. The answer to this suggestion is, that the tax necessarily falls on the Government, in whatever way it is effected. The tax affects the value of the stock. The Government which borrows money, subject to taxation, will receive as much less per centum from the lender as would nearly equal a capital sufficient to raise an interest equivalent to the rate of taxation. Stock which at par would pay six per cent. interest without taxation, would only be worth sixty-six, if the lender be obliged to pay a tax of two per cent. The tax is evidently a direct and immediate im-

* Marshall, C. J.; McCulloch *v.* The State of Maryland, 4 Wheaton, 316.

pediment to the power of borrowing money. If it reached six per cent., it would exclude the Government from the market, and annihilate a constitutional power essential to the existence of the Government. "To tax the contract when made must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract." All taxes upon the transfer of property from lender to borrower fall finally, as well as immediately, upon the party to whom the property is transferred or lent. The lender looks to his *net income*.

It being obvious that the burden of the tax, in whatever mode levied, falls upon the National Government, the converse is equally true, that the privilege of exemption inures to the benefit of the Government. It is not individuals—not the lenders—who are benefited, but the United States. If the lender is exempted, the Government has the advantage. And this privilege is one which appertains to all the functions of the Government, arising as it does from the supremacy of the Government.

It follows, that any method of State taxation which bears upon the power of the United States to borrow money is invalid.

Mr. Justice NELSON delivered the opinion of the court.

The question involved is, whether or not the stock of the United States, in which the capital of the Bank of the Commonwealth is invested, is liable to taxation by the State of New York, under an act passed by its legislature 29th of April, 1863, or, to state the question more directly, whether or not that act imposes a tax upon these stocks thus invested in the capital of the bank?

It will be remembered that the previous act, the act of 1857, directed that the capital stock of the banks should be assessed and taxed *at its actual value*. By the present act, as is seen, the tax is imposed on a *valuation equal to the amount of their capital paid in or secured to be paid in, &c.*

Looking at the two acts, and endeavoring to ascertain the alteration or change in the law from the language used, the

intent of the law-makers would seem to be quite plain, namely, a change simply in the mode of ascertaining or fixing the amount of the capital of the banks, which is made the basis of taxation. By the former, the *actual value* of the capital, as assessed by the commissioners, is prescribed. By the latter, the capital paid in, or secured to be paid in, in the aggregate, is the valuation prescribed. By the former, the commissioners were bound to look into the financial condition of the banks, into the investments of their capital, losses, and gains, and ascertain the best way they can the sum of present value as the basis of taxation. By the latter, they need only look into the condition of the banks in order to ascertain the amount of the capital stock paid in, or secured to be paid in; and this sum, in the aggregate, will constitute the basis. The rule of the present law is certainly more simple and fixed than that of the former, and much less burdensome to the commissioners or assessors, and in its practical operation is, perhaps, as just. The former mode involved an inquiry into the whole of the financial operations of the bank, its several liabilities, and its available resources; often a complicated and difficult undertaking, and, at best, of uncertain results.

In order more fully to comprehend the meaning of the language used in the act of 1863, it may be well to refer, for a moment, to the system of the general banking law of 1838, and the amendments of the same, under which these institutions have been organized.

Any number of persons may associate to establish a bank under this law, but the aggregate amount of capital stock shall not be less than $100,000. The instrument of association must specify, among other things, the amount of the capital stock of the association, and the number of shares into which the same shall be divided. It may also provide for an increase of their capital and of the number of the associates, from time to time, as may be thought proper. The association is required to deposit with the superintendent of the bank department stocks of the State of New York or of the United States, or bonds and mortgages upon

real estate, at a prescribed valuation, before any bills or notes shall be issued to it for circulation as currency. Nor can it commence the business of banking until these securities have been deposited to the amount of $100,000. The public debt and bonds and mortgages are to be held by the superintendent exclusively for the redemption of the bills and notes put in circulation as money until the same are paid. And it is made the duty of the superintendent not to countersign any bills or notes for an association to an amount, in the aggregate, exceeding the public debt, or public debt and bonds and mortgages so pledged. It is true, the associations are not obliged to invest more of their capital paid in in stocks, or stocks and bonds and mortgages, than is required as security, with the superintendent, for the bills and notes delivered for circulation as currency. The investment, however, cannot be for a less amount than $100,000. It may exceed that limit. But this reference to the system shows that however large the amount of the capital of the association, fixed by its articles and paid in, the whole or any part of it may be lawfully invested in these stocks. The whole need not be used as a pledge for the redemption of the bills or notes as currency, as the issuing of these for circulation is only one branch of the business of banking. The banks, therefore, were but obeying the injunction of the law in investing the capital paid in in these stocks.

Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation

of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law.

We will add, that we have looked with some care through the statutes of New York relating to the taxation of moneyed corporations, including the act of 1823, in which the first material change was made in the system, the act of 1825, the revision of 1830, the acts of 1857 and of 1863; and it will be seen in all of them that the tax is imposed on the property of the institutions, as contradistinguished from a tax upon their privileges or franchises. Since the act of 1825, the capital has been adopted as the basis of taxation, as furnishing the best criterion of the value of the property of which these institutions were possessed. Under their charters or articles of association, this amount was paid in, or secured to be paid in, by the stockholders or associates to the corporate body, or ideal person, constituting the capital stock, to be managed and disposed of by directors or trustees in furtherance of the objects and purposes for which the institutions were created. It constituted the fund raised by the corporators, with which the institutions began and carried on the particular business in which they were engaged. The injunction of the charters, which required this capital to be paid in, made it necessarily substantial property. The amount might fluctuate according to the good or ill fortune of the enterprise. It might become enhanced by gains in business, or diminished by losses; but, whether the one or the other, the tax in contemplation of the legislature and of the charters was imposed on the property of the institution

consisting of its capital. In case of a permanent loss, a remedy against grievous taxation was always at hand by a reduction of the capital.

Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution, and which consists of the stocks of the United States, we do not perceive how the case can be distinguished from that of the *Bank of Commerce* v. *New York City*, 2 Black, 620, heretofore before this court.

JUDGMENT REVERSED, and the cause remitted, with directions to enter judgment in conformity with this opinion.

FLORENTINE *v.* BARTON.

A State legislature may, constitutionally, pass a private act authorizing a court to decree, on the petition of an administrator, *private* sale of the real estate of an intestate to pay his debts, even though the act should not require notice to heirs or to any one, and although the same general subject is regulated by general statute much more full and provident in its nature.

In making the order of sale under such private act, the court is presumed to have adjudged every question necessary to justify such order or decree, viz.: The death of the owners; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of deceased; that the private acts of Assembly, as to the manner of sale, were within the constitutional power of the legislature, and that all the provisions of the law as to notices which are directory to the administrators have been complied with. Nor need it enter upon the record the evidence on which any fact is decided. Especially does all this apply after long lapse of time.

A GENERAL statute of Illinois, passed at an early day, enacted that, when any administrator whose intestate had died leaving real estate, should discover that the personal estate was insufficient to pay his debts, such administrator should make and deliver to the Circuit Court of the county, an account of the debts and personal estate of such his intestate,

with a petition requesting aid of said court by its order of sale of a part of the real property.

The act was full, minute, and stringent in its requirements of notice to the heirs of the intestate, with "a copy of the account and petition." It directed "due examination" by the court of all objections made by any one, and that sale of so much of the realty as would pay the debts should, from time to time, be ordered, or the whole, if requisite, only in case the court should find that the personalty was insufficient to do so. But the act directed that no sale not a public one, made in open hours of day, and upon full public notice, and with a description, to "common certainty," of the land, should be made at all.

With this *general* statute in existence and force, the legislature of Illinois passed, in 1821, a private act, reciting that Beck and O'Harra, administrators of Aaron Crane, had, by petition to it, set forth that the said Crane, late of Missouri, had died intestate, not leaving sufficient personal estate to pay his debts, but leaving real estate; and enacting that the said Beck and O'Harra should have power to sell such part of his real estate as they might at any time be ordered to do by the proper court, for the payment of his debts; and that such sales "may be made at *private* sale instead of public sale," notwithstanding the above recited general act. It was provided, however, that before any sale was completed, it should be reported to one of the judges of the court allowing it, and be approved by him.

The administrators accordingly made a petition to the State Circuit Court. Neither the petition, however, nor any other proceeding except the record *of court*, now appeared. This record recited a petition setting forth that the personal estate was not sufficient to pay debts, and praying an order to sell certain parts of the real estate, for the purpose of paying them, agreeably to the private act of legislature already referred to, and concluding with an order that the administrators should sell an item described. *But there was no mention whatever in the record, that any notice had been given to heirs or to anybody, or that the estate was in any way indebted.*

Argument for title through the heirs.

Ten days after order made, the administrators sold the property, and their sale was reported by them to one of the judges of the court, which allowed it, and by him was approved. This was in A. D. 1823.

Ejectment for the land thus sold was now brought, A. D. 1857, in the Federal court for the Northern Circuit of Illinois, by Florentine, who had purchased, in 1856, from the heirs of Crane, against Barton, claiming under the vendee of the administrators. Judgment was given for the defendant, which was the error assigned.

Grimshaw, for the plaintiff in error: Men can be deprived of their property only by law. Law is a rule of civil conduct. A rule is general and universal. The act under consideration is not a rule, but an edict or decree limited to an individual case; hence it is not a law, and not within the legislative power. It is not intended to deny altogether the power of the legislature to pass private or special acts. There are many transactions of agency or negotiation which may be done by special act. But the legislature has no power to pass a special act, or, which is the same thing, make an edict, by which an individual is to be deprived of his property, *in violation of the general laws of the State.* This is undeniably true in principle, and the only obstacle in the way of its universal recognition is legislative usage. It is admitted that Colonial and State legislatures have frequently passed acts in violation of this principle, and that such acts have, in a few instances, been sanctioned by judicial decisions; but since the adoption of our American constitutions, their validity has always been questioned, and the weight of legislative, as well as judicial authority, is against their validity. When they have been sanctioned, it has been under the pressure of expediency, at the sacrifice of principle.

In a Kentucky case,* Judge Underwood, after deciding an act of the Kentucky legislature, which forfeited lands to the commonwealth, and then gave them to the occupant, unless

* Gaines et al. *v.* Buford, 1 Dana, 499.

Argument for title through the heirs.

the owner, in a given time after the passage of the act, should make certain improvements on them, to be unconstitutional, says: "I do not admit that there is any *sovereign power*, in the literal meaning of the terms, to be found anywhere in our system of government. The people possess, as it regards their governments, a *revolutionary sovereign* power: but so long as the governments remain, which they have instituted to establish justice, and to secure the enjoyment of the right of life, liberty, and property, and of pursuing happiness, *sovereign power*, or, which I take to be the same thing, *power without limitation*, is nowhere to be found in any branch or department of the Government, either State or National; nor, indeed, in all of them put together."

In Massachusetts,* the court held, in one case, that a resolve of the State legislature, authorizing an individual, whose claim was barred by the statute of limitations, to bring a suit for its recovery, was void. They say it is "clear that the court in which the action may be pending, must determine it according to law. If any other rule should be adopted in deciding the case, one party or the other would be deprived of that protection which is guaranteed by our constitution to every citizen, in the enjoyment of his life, liberty, and property, according to standing laws."

In another case,† the same court refers to and approves this decision, and upon the same general reasoning, with additional illustrations, decides that a resolve of the legislature, directing a judge of probate to take an administration bond in a particular case, in a mode different from that prescribed by the general laws of the State, was void.

In Maine,‡ the case just cited is referred to and approved, and, upon the same general reasoning, the court decided that an act granting an appeal in a certain case, was void. The general doctrine is asserted, that the legislature has no authority, under the constitution, to pass any act or resolve,

* Holden *v.* Jarvis, 11 Massachusetts, 400.
† Picquet's Appeal, 5 Pickering, 65.
‡ Lewis *v.* Webb, 3 Maine, 326.

granting an appeal or a new trial in any case, between private citizens, or dispensing with any general law in favor of a particular case.

In *Ex parte Bedford*,* Hickey, J., touching upon our exact cases, says: "The legislature have not the power, as is supposed, to pass a law for the sale of a man's property, because he is indebted. They have the power to subject the lands of a debtor to sale for the satisfaction of the judgments and decrees of the judicial tribunal; but they have not the power to direct by statute, that the land, or any estate of any man, shall be sold for the satisfaction of any debt, which they may be informed or believe he owes. The creditor must appeal to the proper judicial tribunal, and there establish his claim; and, after he has a judgment or decree, the law then prescribes what estate is liable for the satisfaction of such judgment or decree."

In New Hampshire it has been declared by their Supreme Court that the legislature of that State could not, by a special act or resolve, authorize the guardian of minors to make a valid conveyance of the real estate of his wards.†

Other States, except Pennsylvania, where, from want of a court of chancery, their legislature, from early days, exercised anomalous powers, would furnish similar precedents.

But, supposing the statute to have been legal, there is no evidence that its requisitions were complied with. All *ex parte* proceedings being liable to abuse, must be strictly confined to the ground covered by the law.

This principle is nowhere more exactly declared than in Illinois. In *Smith* v. *Hileman*,‡ their court say: "A special power, granted by statute, affecting rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and should appear to be so on the *face* of the proceedings." In the same book, though in another case,§ it says: "As the proceedings under the statute are summary, it should be

* Jurist and Law Magazine for October, 1853, p. 301.

† 4 New Hampshire, 572, 574. Opinion of the judges in reply to the House of Representatives

‡ 1 Scammon, 325.

§ Day v. Eaton, 1 Id. 476.

strictly complied with." In both cases the court did but declare what Lord Mansfield says in *Rex* v. *Coke*:* "This is a special authority, delegated by act of Parliament to particular persons, to take away a man's property and estate against his will; therefore it must be strictly pursued, and must appear to be so upon the face of the order."

Now, the power conferred by the private act of the Illinois legislature was a power to sell for the payment of debts. The existence of debts was, therefore, a condition upon which the power depended, and which the defendant was bound to prove. And this could only be proved by the record of the Probate Court.

The mere order of sale made by the State Circuit Court does not prove the existence of debts. It might, indeed, prove it inferentially, if the order had been made by the State Circuit Court in the exercise of its general jurisdiction, after it had acquired jurisdiction of the persons of the heirs of Crane, by notice served on them or by publication. But as the Circuit Court made that order in the exercise of a special jurisdiction conferred by a private act without any notice whatever, the order can have no such effect. There can be no presumptions of facts not directly asserted by the order, particularly not of facts which, by law, must be established by another court, and which could only be proved in the Circuit Court by the record of that other court.

Mr. Justice GRIER delivered the opinion of the court.

The land in dispute, in this case, was sold by order of a court some forty years ago, to pay the debts of its deceased owner. The heirs seem to have acquiesced in the regularity and justice of this proceeding till the plaintiff in error, a few years ago, obtained from them a release of their title, doubtless for the purpose of this litigation.

By the law of Illinois, the lands of one deceased are liable for the payment of his debts. The Circuit Court of the county in which the administration is granted has jurisdic-

* 1 Cowper, 26.

tion to order their sale for that purpose. The petition of the administrator, setting forth that the personal property of the deceased is insufficient to pay such debts, and praying the court for an order of sale, brought the case fully within the jurisdiction of the court. It became a case of judicial cognizance, and the proceedings are judicial. The court has power over the subject-matter and the parties. It is true, in such proceedings, there are no adversary parties, because the proceeding is in the nature of a proceeding *in rem*, in which the estate is represented by the administrators, and, as in a proceeding *in rem* in admiralty, all the world are parties. In making the order of sale, the court are presumed to have adjudged every question necessary to justify such order or decree, viz., the death of the owner; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of the deceased; that the private act of Assembly, as to the manner of sale, was within the constitutional power of the legislature; and that all the provisions of the law, as to notices which are directory to the administrators, have been complied with. "The court having a right to decide every question which occurs in a cause, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court." The purchaser, under such a sale, is not bound to look further back than the order of the court, or to inquire as to its mistakes. The court is not bound to enter on record the evidence on which any fact was decided. The proceedings on which the action of the court is grounded, are usually kept on separate papers, which are often mislaid or lost. A different doctrine would (especially after a lapse of over thirty years) render titles under a judicial sale worthless, and a "mere trap for the unwary." These propositions will be found discussed at length and fully decided by us in *Grignon's Lessee* v. *Astor*.* Any further argument in vindication of them would be superfluous.

The question raised as to the constitutional power of the

* 2 Howard, 319.

legislature of Illinois to pass the private acts modifying the general course of proceedings in similar cases, was necessarily decided by the Circuit Court of the State, under whose order and supervision this sale was made. The State court is the proper tribunal to construe and determine the validity of the enactments of their own legislature.

But assuming the question to be open for our decision, we see no reason to doubt the authority of the legislature to pass such acts as are now complained of, without infringing the Constitution of the State or of the United States. Such legislation is remedial, not judicial. It infringes no contract; it is not *ex post facto*, nor even retrospective; it is not the usurpation of judicial powers; it authorizes the administrators to sell at private sale, and not at public auction, as by the general law, but not till ordered by the proper court. Every question of a judicial nature was left to the judgment of the court. *It* must order the sale, and approve it when made. There may have been many reasons why it would be for the benefit of the estate and the creditors that the land should be sold at private and not at public sale. The legislature, by this private act, direct only the manner of sale; the courts are to judge of its necessity. Statutes are to be found in almost every State in the Union giving authority to guardians to sell the real estate of their wards, and usually requiring the supervision and approbation of a court. The power of the legislature to grant such special authority to guardians has been generally admitted. In a case in Illlnois,* it is said by their Supreme Court that, "to deny this power to the legislature in this view of its action, would almost annihilate its powers." Yet there was an assumption of power in that case far exceeding anything to be found in the present.

Let the judgment of the Circuit Court be

AFFIRMED.

* Mason *v.* Wait, 4 Scammon, 134.

COOKE *v.* UNITED STATES.

1. The mere fact that an act of Congress authorizes a judgment obtained by the Government against a party, to be discharged by the payment of a sum less than $2000, is no ground to ask a dismissal of a case of which the court had properly obtained jurisdiction before the act passed. The party may not choose thus to settle the judgment, but prefer to try to reverse it altogether.
2. When the sum in controversy is large enough to give the court jurisdiction of a case, such jurisdiction once properly obtained, is not taken away by a subsequent reduction of the sum below the amount requisite.

IN this case the United States had obtained a judgment for $3796.80 against Cooke, who to the same took a writ of error.

The Attorney-General now moved the court to dismiss the cause for want of jurisdiction, and assigned for reason that since the issuing and serving of the writ of error, an act of Congress had reduced the amount in controversy below the sum of $2000.

On referring to the act, it appeared to authorize a remission of $2500 from the $3796.80, for which judgment had been obtained; but the remission was offered on condition of payment of the remaining $1296.80: *and nothing was put before the court to show that Cooke had availed himself of the offer made.*

The CHIEF JUSTICE: It does not appear that the proposition has been accepted; and if not, the amount in controversy remains unaffected. But had the alleged reduction been made by an actual payment, the jurisdiction of the court would not be taken away. The jurisdictional facts existed at the time of issuing and serving the writ of error. By its issue and service the court obtained jurisdiction over the cause, and this jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy.

MOTION OVERRULED AND CASE RETAINED.

SMITH ET AL. *v.* UNITED STATES.

1. Where several persons sign a bond to the Government as surety for a Government officer, which bond, statute requires shall be approved by a judge, before the officer enters on the duties of his office, an erasure by one of the sureties of his name from the bond—though such erasure be made *before the instrument is submitted to the judge for approval*, and, therefore, while it is uncertain whether it will be accepted by the Government, or ever take effect,—avoids the bond, after approval, as respects a surety who had not been informed that the name was thus erased; the case being one where, as the court assumed, the tendency of the evidence was, that the person whose name was erased signed the bond before or at the same time with the other party, the defendant.
2. Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him.

AN act of Congress, relating to marshals of the United States,* provides, that "*before*" the marshal enters on the duties of his office, he shall become "bound" for the faithful performance of the same, before the judge of the District Court of the United States, jointly and severally, with sufficient sureties, "*to be approved by the district judge.*"

With this act in force, Pine was appointed marshal, and gave bond on which the name of *Smith* and others had been signed, and appeared as sureties. Suit having been brought against the marshal, *Smith*, and the others, his sureties, in the Circuit Court for the Northern District of Illinois, upon this bond, Smith pleaded that the bond was not *his* deed.

On the trial the United States offered the bond in evidence. The instrument showed on the face that it *had* been signed by a certain Hoyne as one of the sureties; but that his name was now erased. The defendants, accordingly, objected to the admission of the bond in evidence, on the ground that there was an erasure and alteration thereon, which it was the duty of the plaintiff to explain. The plaintiff then called the district judge, who had approved the bond. The learned justice testified that when it was brought

* Act of 24th of September, 1789; 1 Stat. at Large, 87.

to him for approval, it presented the same appearance exactly as it did now at the trial, except that the names of the sureties were inserted by him in the first part of it; that it was brought either by one McGill or by the defendant, Pine; that Pine had difficulty in getting sureties, and had, some time before, told him, the witness, that Hoyne had objections to having his name on the bond, and Hoyne afterwards told him the same thing. The judge had not then seen it. Afterwards it was brought to him, with Hoyne's name erased. Not knowing the signatures of all the parties, he held the bond several days, and all the sureties came in and acknowledged the execution of it before him, *except the defendant, Smith.* He then approved the bond, and being personally acquainted with Smith's writing, certified to the genuineness of the signatures. The bond was then admitted in evidence, under objection.

At a subsequent stage of the trial the defendant, Smith, called the district judge as a witness, when he testified that some time before the approval of the bond by him, Hoyne stated to him that he had signed the bond, with others, for Pine, but that he had become dissatisfied, and that McGill and Pine had both agreed that his name should be taken off;—that he wanted it off, and was not willing it should remain on the bond. The witness said, further, that when the sureties who acknowledged the execution of the bond appeared before him, he might have called their attention to the erasure of the name of Hoyne, but was not positive; was inclined to think he did; thought he handed it to each one of them, and asked them if they signed it; he didn't know that they read it.

Hoyne himself testified that "he signed the bond,—*which was circulated for signatures*,—with others;" but that soon after, and before its approval, he became dissatisfied, and requested McGill and Pine to have his name erased; and that they promised to do this. Not being able himself to get the bond to do it, and knowing that it would have to be approved by the district judge, he went to that officer and informed *him* of his wish; said he had signed it, and wanted

to have his name erased, &c. The judge told him, that in justice to *the other signers*, he should tell them that he wanted his name off; that accordingly, in a very short time, he, the witness, spoke to *all* the parties who had signed, *except Smith*, who was absent, and told them that he wanted his name off. A few days after, in response to his inquiry, the judge told him that his name had been erased. When it was done, and by whom, he did not know.

On this state of facts, the counsel of the defendant, Smith, requested the court below to charge, among other things, as follows:

1. That if the jury believed, from the evidence, that the name of Hoyne was erased from the bond in suit, without the knowledge or consent of him, the defendant, Smith, and that he, Smith, did not acknowledge the bond as his, subsequently to such erasure, the jury should find in his favor.

2. That the law places the burden of proving such consent upon the plaintiffs, and if they have failed to make such proof, they are not entitled to a verdict.

The court refused so to charge, and the defendants excepted. Verdict and judgment having gone for the United States, the defendants took this writ of error.

Mr. Coffey, special counsel for the United States, defendant in error: There is no evidence in this case that Smith, or any of the signers of Marshal Pine's bond, made any condition when signing as to what persons, or what number of persons, should unite with them. Indeed, it is quite evident not only that there was no agreement or condition made by any of them on signing, but that each signed independently of the others, and without knowing, except so far as they had signed, who their co-sureties were to be. For Hoyne testifies that he "signed the bond, which was *circulated for signatures*, with others;" and the district judge testifies that when he approved the bond he inserted the names of the sureties in the first part of it. It was the common case of

a person carrying around an official bond, and getting any persons whatever who are willing to oblige, to a certain extent, the principal. When, therefore, the sureties signed, they must have done so without knowing who were to be their co-sureties, and, of course, without any agreement as to who or how many were to sign. This, then, we think may be assumed as part of our case.

The erasure of Hoyne's name, of which Smith now seeks to avail himself,—the first point, and one which, if decided as we think it ought to be, will render the others unimportant on the proofs,—was made, not only before the delivery of the bond to the plaintiff, but before the essential preliminary to its execution of approval by the United States district judge; and it was evidently made by Marshal Pine himself, or at his instance, and before the plaintiff had any connection with it. Certainly it was not made by or at the instance of the plaintiff. The explicit direction of the act of Congress relating to marshals, that the marshal shall "become bound" before the judge of the District Court, with "sureties to be *approved* by the district judge," shows that the bond is in no manner executed until it is brought to the judge and approved by him. That approval is as essential to its valid execution as is the acknowledgment made in court to a valid recognizance. Before it is given, the signatures do not bind the sureties, for one important element to a good contract is wanting, viz., the agreement of the United States to accept them; that agreement being, by the law, expressed by the judicial approval. When, therefore, Hoyne's name was stricken off the bond, the erasure left him, as to the obligation which the sureties were about to assume, precisely where he would have stood if he had only promised to sign it, and had not done so. And surely if, having promised to sign it, he had never done so, it could not be pretended that his failure to sign would discharge the sureties who had signed and been approved, even though he and they had previously agreed that unless all signed, none should be bound; unless, indeed, the United States had been a party to that agreement. Such an agreement might bind all the sure-

ties who made it, but could not affect the obligee, who was not a party to it, nor furnish any of them with a good defence to the bond, whatever right of action, in the event of loss, it might give to the sureties who signed, against one who did not sign. If, then, the erasure of Hoyne's name before approval, and without the connivance of the United States, no more affected the obligation of the other sureties than his failure to keep a verbal promise to sign would have done, it follows that it cannot relieve Smith from the bond. And this result follows, if Smith, when his name was approved, had no knowledge of the erasure, as it would follow if he had had a special agreement with Hoyne that one was not to sign without the other.

But even if the erasure be treated as a material alteration of the bond, after it was so far executed as to bind the signers, still, if it was made by or at the instance of Marshal Pine, without the knowledge or consent of the United States, it does not discharge Smith from liability. In such case the alteration must have been made by or with the knowledge or consent of the obligee. And, however, in the absence of evidence, that knowledge or consent might be inferred, where the bond had been delivered and was in his possession, in a case like this, where the alteration was made before it was delivered or came into possession of the United States, the knowledge or consent of the obligee to the alteration must be affirmatively proved by the party alleging and availing himself of it. To this effect is *United States* v. *Linn et al.*, in this court,* an action on Linn's official bond. Duncan, a surety, pleaded as special matter in bar that he had signed and delivered it to Linn to be transmitted to the plaintiff, and *after* the sureties had been approved by the district judge, it was, without the consent or authority of Duncan, materially altered in this, that scrawls by way of seals were affixed to the signatures of Duncan and the other signers, whereby the instrument was materially changed and vitiated, &c. In considering this plea, the court said:

* 1 Howard, 104.

"The plea does not indicate in any manner by whom the alteration was made. It does not allege that it was done with the knowledge or by the authority or direction of the plaintiff, nor does it even deny that it was done with the knowledge of the defendant, Duncan. The plea does not contain any allegation inconsistent with the conclusion *that it was altered by a stranger, without the knowledge or consent of the plaintiff; and if so, it would not have affected the validity of the instrument.* The demurrer admits nothing more than that the seals were affixed after the instrument had been signed by the parties and delivered to Linn, to be transmitted to the plaintiff, and that this was done without the consent, direction, or authority of him, the said Joseph Duncan. Is this enough to avoid the instrument and bar the recovery? It certainly is not, *for the seals might have been affixed by a stranger, without the knowledge or authority of the plaintiff, and would not have affected the validity of the instrument.*"

If this principle be true of an alteration made *after* the bond is judicially approved, it certainly is true where the alteration is made by the principal co-obligor *before* the judicial approval, which, as we have seen, is the legal method of expressing the consent of the United States to the contract, and before which the obligation involved in signing does not begin.

But it is settled that even where the face of a joint and several bond shows that it was intended to have been executed by others, in addition to those whose names are appended to it, and those others have not united in signing it, still it is the valid and binding deed of those who do sign, unless they show an express reservation or condition at the time that it was not to be binding on them, without being also executed by the others.

In *Pawling* v. *United States*, in this court,* where the sureties in an official bond *proved expressly* that they signed on condition that others should sign, who did not sign, this court held that it was evidence for a jury to infer a delivery as an escrow. It is evident that without proof of that condition they would have been held bound.

* 4 Cranch, 219.

Argument for the surety.

To relieve the defendant, Smith, under these circumstances, would enable the obligors, in an official bond like this, to practice an easy fraud upon the Government. For it would only be necessary for those who sign such a bond to make a collusive arrangement with some one who did not sign, and, when sued on the bond, prove that arrangement in discharge of themselves.

Mr. E. S. Smith, contra: The assumption that Smith signed without knowing who else was to sign is not according to the evidence. It is obvious that each party in signing expected certain others would sign. Their names, we can hardly, in the nature of things, doubt, were stated. Any man in signing such a bond would naturally ask who else was to sign it, and according as responsible or irresponsible persons were named, might consent or refuse. This is plain. Hoyne may have signed with Smith. There is nothing to disprove that theory. At all events, the direction of the district judge to Hoyne, that he must notify to all the others his wish to have his own name erased, makes it obvious that all the others did know that his name was there, and did rely, as the condition of their putting their own there, on the fact.

Smith never personally appeared before the district judge and acknowledged his signature at all. The spirit of the statute requires the sureties to acknowledge the bond before the judge; to do under his eye, or else to acknowledge before him that they have done, whatever they ought to do. Signing and sealing alone does not bind them. Acknowledgment before the judge, and his approval after that, are superadded requisites to give efficacy to the sureties' act. This position is, in reality, taken by the other side to show that Hoyne's signature was a nullity, and, therefore, its erasure no alteration of a deed. But it is an argument that cuts two ways. It operates quite independently of Hoyne, and goes to destroy the whole ground of suit against Smith.

The taking away of Hoyne's name, therefore, was a material alteration; one going to the foundation of the obligation. It is said that the alteration was made without the know-

ledge of the United States, without the knowledge of the obligee, therefore; that the alteration accordingly does not affect the validity of the instrument. But the district judge was the representative of the United States. It was made with his knowledge. His acts and consents are those of the Government.

These principles would decide the case against the Government in any case; but in this one it is to be observed that Smith and others were but sureties. The rule of law in regard to this class of persons is settled. Standing in no equity to the plaintiff, a surety will be bound only to the extent and in the manner set out in the words of his contract. No implication can be made against him. The case, therefore, is to be decided with special reference to this fact.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the Northern District of Illinois. Suit was instituted by the United States, and the record shows that it was an action of debt on the official bond of Charles N. Pine, late marshal of the United States for the district where the suit was brought. Service was not made on the principal in the bond, nor on four of the sureties as named in the declaration. Of those served, three were defaulted, and the remaining three, Thomas Hoyne, William B. Snowhook, and Ezekiel S. Smith, appeared and made defence. First two pleaded,—1, non est factum; 2, performance by principal. Smith filed separate pleas,—1, Nil debit; 2, non est factum. Issue was joined upon those several pleas, and the parties went to trial. Verdict and judgment were for the plaintiffs, and the defendants excepted and sued out this writ of error.

I. Record shows that the plaintiffs, at the trial, offered the bond described in the declaration in evidence, to prove the issue on their part, but the defendants objected to the reading of the same as inadmissible, because, as they alleged, it had been altered by the erasure of the name of one of the sureties. Yielding to that objection, the plaintiffs called the

district judge, and examined him as a witness. He testified to the effect that the bond, when it was brought to him for approval, was precisely as it appeared when offered in evidence, except that the names of the sureties were inserted by him in the introductory part of the instrument. His statement was, that it was brought to him for approval either by the marshal or his principal deputy, and that the erasure as described was there, just as it appeared at the time the witness was examined. Witness did not see the bond till it was brought to him for approval with the name erased; but he had previously been informed, both by the marshal and the person whose name was erased, that the latter had objections to having his name remain on the bond. Signatures of some of the parties not being known to the witness, he held the bond for several days after it was presented, and during that time all of the sureties, except the defendant, Smith, came in and acknowledged its execution. Whereupon the witness approved the bond agreeably to the certificate in the record, which is under his signature. Substance of the certificate is that all of the parties to the instrument, except the defendant, Smith, acknowledged the genuineness of their signatures; and that the district judge, being satisfied from his own knowledge and from evidence that the signature of Smith also was genuine, approved the bond. Being asked by the defendants if Smith had ever consented to the erasure, the witness answered that he had no knowledge upon the subject. Relying on the explanations given by the witness, the plaintiffs again offered the bond in evidence, and the court, overruling the objections of the defendants, admitted the same to be read to the jury, which constitutes the first exception of the defendants.

Certain treasury transcripts were also produced by the plaintiffs, exhibiting the official settlement of the accounts of the marshal at the Treasury Department, together with the statement of certain treasury warrants and drafts in his favor, showing a balance due to the plaintiffs. Evidence was then offered by the defendants tending to show that the settlement of the marshal's account as stated in the treasury

transcripts, was not correct. Most of the documents offered for that purpose were objected to by the plaintiffs, and were excluded by the court. Defendants excepted to the rulings in that behalf, but in the view taken of the case it will not be necessary to examine the questions which the exceptions present.

Having offered evidence upon the merits, they recalled the district judge, and examined him again as to the erasure. Among other things, he testified that before he approved the bond, the person whose name was erased told him that he had signed it with others for the marshal, and that he had become dissatisfied, and wanted his name taken off; that the marshal and his deputy had both agreed that his name should be erased, and that he was not willing that it should remain.

Same parties also called and examined Philip A. Hoyne, whose name was erased from the bond. Material statements of the witness are that the bond was circulated for signatures by the principal deputy of the marshal, and that the witness signed it with others at that time; that he, the witness, became dissatisfied some days before it was approved, and requested to have his name erased, and that the marshal and his deputy promised to do it; that not being able to get hold of the bond, he mentioned the subject to the district judge, and explained to him that he "could not consent to have it there at all." Suggestion of the judge was that he, the witness, in justice to the other signers of the bond, should see them and tell them what he wanted, and the witness stated that in a short time he spoke to all of them except defendant, Smith, who was then absent, and told them that he wanted his name erased, and that he was not willing to let it remain there as one of the sureties. Erasure was made before the bond was approved, but when, or by whom, the witness did not know.

II. Theory of the defendant, Smith, was, that he was discharged from all liability on the bond in consequence of the erasure, and he accordingly wished the court to instruct the jury in substance and effect as follows: 1. That if the jury

believed from the evidence that the name of P. A. Hoyne was erased from the bond in suit, without the knowledge or consent of the defendant, and that he did not acknowledge the bond as his, subsequent to such erasure, the jury should find the issue in his favor. 2. That the law places the burden of proving such consent upon the plaintiffs, and if they have failed to make such proof they are not entitled to a verdict. 3. That notice of the erasure to the district judge who approved the bond was notice to the Government. But the court refused so to instruct the jury, and the defendant excepted.

III. Principal question for decision arises upon the exception of the defendant to the refusal of the court to instruct the jury as requested in the first prayer presented by the defendant.

Tendency of the evidence plainly was to show that the person, whose name was erased, signed the bond before or at the same time with the defendant. Nothing else can be inferred from his own testimony, in which he states that he signed with others at the time the bond was circulated for signatures; and his ready acquiescence in the suggestion of the district judge, that in justice to the other signers he ought to see them and tell them what he wanted, strongly favors the same view. Testimony of the district judge also confirms that theory, and makes it certain that all had signed before the erasure and before any interview had taken place between him and the person whose name was erased. Record does not show who made the erasure, but the proof is satisfactory that the marshal and his deputy agreed to do it, and that it remained in the possession of one of them, until it was presented to the district judge for approval.

Defendant insists that the erasure from the bond of the name of one of the sureties after Smith had signed it, and without his knowledge or consent, and before the approval of the bond, was sufficient to discharge him from all liability.

On the other hand the plaintiffs, although they concede

that the erasure was after the defendant had signed the bond, and that it was done without his knowledge or consent, yet insist, that inasmuch as the erasure was made before the bond was approved by the district judge, it left the liability of all concerned precisely as it would have stood, if the person whose name was erased had only promised to sign and had not fulfilled his engagement.

Proposition as stated may be correct as applied to all the sureties who subsequently appeared before the district judge, and acknowledged the bond as altered to be their deed, and it certainly is correct as to the person whose name was erased. Liability cannot attach to the person whose name was erased before the instrument was approved, and all those who subsequently consented to remain liable, notwithstanding the alteration, are estopped under the circumstances to interpose any such objection. They have waived the effect which the alteration in the instrument would otherwise have had, and consented to be bound, and therefore have suffered no injury. *Volenti non fit injuria.* Granting all this, still it must be borne in mind, that the alteration in this case was made without the knowledge or consent of the defendant, and the case shows that he never appeared before the district judge and acknowledged his signature, or in any manner ever waived the right to insist that the instrument was not his deed. Materiality of the alteration is not denied, and the plaintiffs admit that it is apparent on the face of the instrument, but still they insist that inasmuch as the marshal, before he enters on the duties of his office, is required by law to become bound before the district judge with sufficient sureties for the performance of the conditions, it is clear that the bond is in no manner executed, until it is presented to the district judge and is by him approved.* Approval, say the counsel, is as essential to its execution, as is the acknowledgment made in court to a recognizance, and the argument is that no alteration made in the instrument before such approval, can have the effect to

* 1 Stat. at Large, 87.

discharge any one of the sureties, unless it be shown that it was made with the knowledge or consent of the obligees. Reason for the conclusion, as suggested by the plaintiffs, is that, where the alteration precedes the approval, the presumption is, that it was made by a stranger, and not by the party seeking to enforce the obligation.

Support to the proposition, as stated, is attempted to be drawn from the case of *United States* v. *Linn et al.*,* and it must be confessed that there are expressions in the opinion of the majority of the court which give some countenance to that view of the law. Question in that case arose upon the demurrer of the plaintiffs to the plea of the defendants, and the judgment of the court was in fact based upon the ground that the allegations of the plea were insufficient to establish the defence. Alteration charged in that case was that the seals had been attached to the signatures after the instrument was signed and before it was delivered, and the allegations of the plea were, that the alteration was made without the consent, direction, or authority of the surety, but it was not alleged that it was done *without his knowledge*, or by whom it was done.

Referring to those omissions in the plea, the court say, that in view of those circumstances, it was not an unreasonable inference, that if the plea had disclosed by whom the alteration was made, it would have appeared that it did not affect the validity of the instrument. Much stress also was laid upon the fact, that there was nothing upon the face of the instrument indicating that it had been altered, or casting a suspicion upon its validity, and the court held, that the burden of proving when and by whom the alteration was made under the state of facts alleged in the plea, was properly cast upon the defendants. But the court admitted that a party claiming under an instrument, which appears on its face to have been altered, was bound to explain the alteration, and show that it had not been improperly made. Reference was also made by the court, at the same time, to

* 1 Howard, 112.

two decided cases as asserting that doctrine, and it is clear that both the cases cited* fully sustain the position.

General rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or is made so by extraneous evidence, the party producing the instrument and claiming under it, is bound to remove the suspicion by accounting for the alteration.† Exceptions to the rule undoubtedly arise, as where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title under the instrument; but the case under consideration obviously falls under the general rule.‡ Every material alteration of a written instrument, according to the old decisions, whether made by a party or by a stranger, was fatal to its validity if made after execution, and while the instrument was in the possession and under the control of the party seeking to enforce it, and without the privity of the party to be affected by the alteration.§ Grounds of the doctrine, as explained in the early cases and by text writers, were twofold. First. That of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without running any risk of losing by the event in case of detection. Secondly. To insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned.‖ Courts of justice have not always adhered to that rule, but the decisions of recent date in the parent country, show that her courts have returned to the old rule in all its vigor.¶ Judge Story, in *United States* v. *Spalding*,** condemned so much of the rule

* Henman *v.* Dickinson, 5 Bingham, 183; Taylor *v.* Mosely, 6 Carrington & Payne, 273.

† 1 Greenleaf on Evidence, 564.

‡ Knight *v.* Clements, 8 Adolphus & Ellis, 215; Newcomb *v.* Presbrey, 8 Metcalf, 406.

§ Pigot's Case, 11 Coke, 27; Master *v.* Miller, 4 Term, 330.

‖ 2 Taylor on Evidence, § 1618.

¶ Davidson *v.* Cooper, 11 Meeson & Welsby, 778; Same *v.* Same, 13 Id. 343; 2 Taylor on Evidence, § 1624.

** 2 Mason, 482.

as holds that a material alteration of a deed by a stranger, without the privity of the obligor or obligee, avoids the deed, and the weight of authority in this country is decidedly the other way. He objected to the rule as repugnant to common sense and justice, because it inflicted on an innocent party all the losses occasioned by mistake or accident, or by the wrongful acts of third persons.*

IV. Present case, however, does not depend upon that rule; nor, indeed, is it necessary to express any opinion as to what is the true rule upon the subject, except to say that where the alteration is apparent on the face of the instrument, the party offering it in evidence and claiming under it is bound to show that the alteration was made under such circumstances that it does not affect his right to recover.†

Defence in this case, as exhibited in the prayer for instruction, was based not only upon the ground that there was a material alteration in the bond, but also upon the ground that the defendant was a surety, and, consequently, both considerations must be kept in view at the same time. True inquiry, therefore, is, what is the rule to be applied in a case where it appears that the contract of a surety has been altered without his knowledge or consent, and where it appears that the effect of the alteration is to augment his liability? Mr. Burge says, that an alteration in the obligation or contract, in respect to which a person becomes surety, extinguishes the obligation, and discharges the surety, unless he has become, by a subsequent stipulation, a surety for, or has consented to the contract as altered.‡ Same author says, if there be any variation in the contract made without the consent of the surety, and which is, in effect, a substitution of a new agreement, although the original agreement

* 2 Parsons on Bills, 574; 1 Greenleaf on Evidence (10th ed.), § 567, p. 749.

† Parsons on Bills, 577; Greenleaf on Evidence (10th ed.), § 564; Knight *v.* Clements, 8 Adolphus & Ellis, 215; Clifford *v.* Parker, 2 Manning & Granger, 909; Wilde *v.* Armsby, 6 Cushing, 314.

‡ Burge on Suretyship, p. 214.

may, notwithstanding such variation, be substantially performed, the surety is discharged.*

Authorities are not necessary to show that the alteration, in this case, was a material one, as it obviously increased the liability of the defendant; and in case of the default of the principal and payment by the defendant, diminished his means of protection by the way of contribution; and the rule is universal that the alteration of an instrument in a material point by the party claiming under it, as by inserting or striking out names without the authority or consent of the other parties concerned, renders the instrument void, unless subsequently approved or ratified.†

Responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority, it becomes a new contract, and is invalid, because it is deficient in the essential element of consent. Where, after the execution of a bond by the principal and the surety, conditioned for the performance by the former of his duty as collector in certain townships, the name of another township was added with the consent of the principal, but without that of the surety, this court held, in *Miller* v. *Stewart*,‡ that the latter was discharged from all obligation, because the duties imposed by the instrument in its altered state were not those for the performance of which he had made himself responsible, and that the defect could not be cured by declaring on the condition as it originally stood. Opinion of the court was given in that case by Judge Story, and his remarks upon the subject are decisive of the question under consideration. Indeed, nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. He has

* Evans *v.* Whyte, 5 Bingham, 485; Archer *v.* Hale, 4 Id. 464; Eyre *v.* Bartrop, 3 Maddock, 221; Bonser *v.* Cox, 6 Beavan, 110; Archer *v.* Hudson, 7 Id. 551.

† Boston *v.* Benson, 12 Cushing, 61.

‡ 9 Wheaton, 702.

a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal.

When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle, says Chancellor Kent, is well settled, that the case must be brought strictly within the guaranty, and the liability of the surety cannot be extended by implication.* Liability of a surety, say the court, in *McClusky* v. *Cromwell*,† is always *strictissimi juris*, and cannot be extended by construction; and this court, in the case of *Leggett et al.* v. *Humphrey*,‡ adopted the same rule, and explicitly decided that a surety can never be bound beyond the scope of his engagement.§

Argument is unnecessary to show that a variation of the contract was made in this case, because it is admitted, and it is equally certain, that the person whose name was erased is fully discharged, and, consequently, that the plaintiffs cannot declare upon the original obligation as it stood before the alteration was made. Neither a court of law or equity, said this court, in *McMicken* v. *Webb et al.*,‖ will lend its aid to affect sureties beyond the plain and necessary import of their undertaking, nor add a new term or condition to what they have stipulated. Sureties must be permitted to remain in precisely the situation they have placed themselves; and it is no justification or excuse with another for attempting to change their situation to allege or show that they would be benefited by such change. Such, say the court, in that case, is the doctrine in England, in this court, and in the State courts, and the authorities cited fully justify the remark. Whenever the contract is varied, whether by giving time to the principal or by an alteration of the contract, it presents

* 3 Commentaries (10th ed.), 183; Birkhead *v.* Brown, 5 Hill, 635.
† 1 Kernan, 598.
‡ 21 Howard, 76.
§ United States *v.* Boyd et al., 15 Peters, 208; Kellog *v.* Stockton, 29 Pennsylvania State, 460.
‖ 6 Howard, 296.

a new cause of action, to which the surety has never given his assent, and with which, therefore, he has nothing to do.*

Evidence shows that the alteration was made without the knowledge of the defendant, and there is neither fact nor circumstance in the case from which to infer any subsequent assent. Undoubtedly, he knew when he signed the bond that the law required that it should be approved by the district judge; but his knowledge of the law in that behalf furnishes no ground of inference that he authorized the alteration, or that he consented to be bound in any other manner, or to any greater extent, or under any other circumstances than what was expressed in the instrument. Supreme Court of Massachusetts held, in the case of the *Agawam Bank* v. *Sears*,† that a surety did not authorize the principal to make a material alteration in the note, by permitting him to take it to the bank for discount, and that such an unauthorized alteration discharged the surety; and where two sureties signed a probate bond, subject to the approval of the judge of probate, and it was subsequently altered by the judge of probate by increasing the penal sum, with the consent of the principal, but without the knowledge of the sureties, and was then signed by two additional sureties, who did not know of the alteration, and then was approved by the judge of probate, the same court held that the bond, though binding on the principal, was void as to all the sureties. See, also, *Howe* v. *Peabody*, 2 Gray, 556; *Burchfield* v. *Moore*, 25 English Law and Equity, 123. Analogous as those cases are, however, they are not as directly in point as that of *Martin et al.* v. *Thomas et al.*,‡ which is the latest decision upon the subject pronounced by this court. Suit in the court below, in that case, was against the sureties in a replevin bond. Statement of the case shows that the bond was given by the defendant in replevin with sureties, to obtain the return of the property which was the subject of the replevin suit. Defendant subsequently erased his name from the bond with the consent of the marshal, but without the knowledge or

* Gass *v.* Stinson, 3 Story, 452. † 4 Gray, 95. ‡ 24 Howard, 315.

consent of the sureties; and this court held, that the bond was thereby rendered invalid against the sureties. Principle of these decisions is, that the alteration varies the terms of the obligation, and that the contract thereby ceases to be the contract for the due performance of which the party became surety, and wherever that appears to be the fact, and the surety is without fault, he is discharged.

Correct rule, we think, is stated by Lord Brougham in *Bonar* v. *Macdonald*,* and which is substantially the same as that adopted by Mr. Burge in his treatise on surety. Substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni.* Intentional error cannot be imputed to the district judge, but the undisputed facts show that the erasure was made after the defendant signed the instrument, and before its approval, and without the knowledge or consent of the defendant.

For these reasons, we are of the opinion that the first prayer for instruction, presented by the defendant, should have been given.

JUDGMENT of the Circuit Court, therefore, is REVERSED, and the cause remanded, with direction to issue a new *venire.*

MILLER *v.* SHERRY.

1. A creditor's bill, to be a *lis pendens*, and to operate as a notice against real estate, must be so definite in the description of the estate, as that any one reading it can learn thereby what property is the subject of the litigation. If it is not so, it will be postponed to a junior bill, which is.
2. A party entitled to a homestead reservation under the laws of Illinois,—

* 1 English Law & Equity, 1.

whose property, in which it is, a court of chancery has ordered in general terms to be sold, to satisfy a creditor whom he had attempted to defraud by a secret conveyance of it,—must set up his right, if at all, before the property is thus sold. He cannot set it up collaterally after the sale, and so defeat an ejectment brought by a purchaser to put him out of possession.

3. When chancery has full jurisdiction as to both persons and property, and decrees that a *master* of the court sell and convey real estate, the subject of a bill before it, a sale and conveyance in conformity to such decree, is as effectual to convey the title as the deed of a sheriff, made pursuant to execution on a judgment at law. The defendant whose property is sold need not join in the deed.

SHERRY had obtained a judgment in ejectment for some lots and a house on them, in Illinois, against Miller, in the Circuit Court for the Northern District of that State, and this was a writ of error to reverse it.

It appeared, on the trial below, that W. & W. Lyon had obtained a judgment against Miller in October, 1858, and sued out a *fi. fa.;* on which *nulla bona* was returned. In February, 1859, they filed a *creditor's* bill against the same Miller, his wife, and one Williams (son-in-law of Miller), charging that Miller had, on the 6th of April, 1857, conveyed the premises now in controversy—describing them, and describing them, moreover, as lots, which at the time of the conveyance, and at the time of the bill filed, *Miller occupied, and, with his family, resided* on—to this Williams, to defraud creditors; and praying that the deed should be set aside, the premises sold, and his debt paid out of the proceeds. Miller and Williams answered the bill. In June, 1860, the cause was heard, the deed set aside as fraudulent, and the *master in chancery* for the court ordered to sell the premises, and to execute to the purchaser *good and sufficient* deeds of conveyance, and that the sale *so* made shall bar and divest *all, and all manner of interest or right*, which the said Miller or any of the defendants might have in the property, or in any part of it. The master accordingly did sell, for $1867, and by deed convey, in September, 1860, the premises to one Bushnell, who conveyed to Sherry, plaintiff below.

It further appeared that a firm named Mills & Bliss had

also obtained a judgment against Miller in the same court, in October, 1857,—that is to say, a year before the judgment of W. & W. Lyon, — and that on a *fi. fa.* issued upon it, *nulla bona* was also returned. In April, 1858, Mills & Bliss filed a *creditor's bill* against Miller and a certain Richardson; Williams, the son-in-law of Miller, and person to whom, by deed of 6th of April, 1857, he had conveyed the house and lots in controversy, *not* being made a party. This bill—which, it will be noted, was filed several months before the bill of W. & W. Lyon,—charged a variety of frauds in *general terms*, against Miller, and particularly, that he had "made a sale of his stock of goods and merchandise, notes and accounts, at Ottawa aforesaid, and of great value, to this defendant, Richardson." It also charged that Miller was, at the time when the judgment was obtained, "and now is, the owner, or in some way or manner beneficially interested *in some real estate in this, or some other State or Territory*, or some chattels real of some name or kind, or some contract or agreement relating to some real estate, or the rents, issues, and profits of *some* real estate." But the bill, unlike that of W. & W. Lyon, contained no reference to the specific property, the subject of the ejectment. And there was no *reference to real estate* in the charging part of the bill, other than the general one of "some real estate," &c., as above given. There was a special prayer that the sale to Richardson should be declared void, and that the property or its avails should be applied to the payment of the judgment of Mills & Bliss.

The matter being referred to a master, Miller was examined before him. *He, Miller, then disclosed* the fact of the conveyance of the house and lots to Williams, his son-in-law, by the deed of April, 1857. In March, 1860, the master filed his report containing the evidence just stated. Upon this, Mills & Bliss (December, 1860), filed an amendment to their original bill, making Williams a party; process being issued against him, but the process not being served. This amendment charged that the deed of Miller to Williams, of April, 1857, was fraudulent and void. Williams did not

answer, and the bill as to him was dismissed. A receiver was appointed July 13th, 1861, and *Miller* was ordered to convey *to him*, which he did on the 26th of that same month. The deed embraced, by description, the premises in controversy, but they were conveyed, *subject to the rights which Miller might have in them "under the homestead law of Illinois."*

Pursuant to an order of court, the receiver, on the 23d of August, 1861, sold and conveyed the property for $500 to one Benedict; the deed, like Miller's own to the receiver, being subject to the reservation of the "homestead right."

In reference to this reservation, it is necessary here to state, that a statute of Illinois enacts that "the lot of ground and the buildings thereon, occupied as a residence, and owned by a debtor being a householder, and having a family," to the value of one thousand dollars, "shall be exempt from levy and forced sale, under any process or *order* from any court of law or *equity* in this State;" and it further declares, that "no release or waiver of such exemption shall be valid, unless the same shall be in writing, subscribed by such householder, and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged, it being the object of this act to require, in all cases, the signature and acknowledgment of the wife as conditions to the alienation of the homestead."

At the time of the ejectment below, Miller was living with his wife and children in a house on the premises sold; which were worth about $2700.

Upon these facts, the counsel of the plaintiff below asked the court to charge the jury:

1. That Mills & Bliss, by filing their bill against Miller, and service of process, obtained a lien upon all the property and effects of Miller; which lien had, by the decree and sale of the receiver, passed into a title in Benedict, which title related back to the service of process, and had become paramount to the title of the plaintiff.

2. That the defendant was entitled to a homestead right under the laws of the State of Illinois, in such cases made

and provided, which he could set up as a defence in this case.

The court gave neither instruction, but gave instructions in substance the reverse of them. Its action herein was the question before this court.

Mr. E. S. Smith, for the plaintiff in error:

1. A plaintiff in ejectment recovers, of course, on the strength of his own title, and that title, in the Federal court, must be a legal one. Now was the legal title in Sherry, assignee of Bushnell, under the proceeding of the Lyons?

The sale by the master, under the bill of the Lyons, did not convey the legal title to Bushnell. *Miller* did not join in that deed. He was not even ordered or asked to. It is a deed by the *master*. Now, a court of equity can only compel the *party* to convey the legal title, and upon a sale thereby give it to the purchaser. The power of such a court to set aside a legal title for fraud, does not confer power to decree the legal title in another by operation of the decree. The title must be conveyed, and if the party refuse, the court can order that a commissioner convey the legal title for the obstinate party, so that the title will be perfected on the sale by the receiver or master. In the great case of *Penn* v. *Lord Baltimore*,* it is said, that courts of equity act upon the parties by decrees, and not upon the property, except through the party; that is, in all suits in equity the primary decree is *in personam*, and not *in rem*. In our own country we have often declared the same thing. In a Mississippi case,† the court says: "The chancery court cannot, by its decree, divest the legal title to land out of one party and vest it in another. It is necessary, in such cases, to appoint a commissioner to convey." So in Kentucky,‡ the court held that "the chancellor may decide on the equitable right to have a transfer of the legal right of entry, and may enforce a compliance with the decree by compelling a conveyance; but until the

* 1 Vesey, 444.

† Willis *v.* Wilson, 34 Miss. 357.

‡ Mummy *v.* Johnson, 3 Kentucky, 220.

conveyance is actually made, the right of entry remains as it was before the decree."* So in North Carolina, the court says, that a decree in equity cannot, of itself, divest a title at law to land, but can only compel the person who has the title and who is mentioned in the decree, to convey. So in Ohio,† it was held that a decree does not, of itself, pass a title, but that a deed has to be actually made conveying the title, so that a sale, by order of the court, would convey the legal title. The same principle is enunciated in a New York case,‡ where Gardner, J., says: "In all cases of fraudulent trusts, the court may, in its discretion, direct a sale by a master, and *compel the debtor and trustee to unite* in the conveyance to the purchaser, or it may order an *assignment to a receiver*, as was done in this case, to the end that the property may be disposed of under the special instructions of the chancellor; *or the fraudulent conveyance may be annulled*, and the creditor permitted to proceed to a sale upon his execution." We need not cite additional authorities. Independently of merits, therefore, there is an outstanding legal title, which technically barred the right to sue in ejectment below.

But, on merits, the plaintiff in the ejectment had no case. Benedict was actual owner. The bill of Mills & Bliss, under which he claims, was filed in April, 1858; that of the Lyons some months afterwards, to wit, in the month of February, 1859. Both bills were what are called *creditors'* bills; that is to say, bills in equity after judgment for a sum certain had been obtained at law, after execution had issued on such judgment, and after a return of *nulla bona* had been made on that judgment. Now, of *such* bills in chancery,—though, of course, not of ordinary chancery bills,—it is a property that on service of process they operate as liens from the time of their being filed. And well they may. They rest on and recite a prior solemn judgment

* Proctor *v.* Ferebec, 1 Iredell Eq. 143.

† Shepherd *v.* Ross Co. Com., 7 Ohio, 271.

‡ Chatauque Co. Bank *v.* White, 2 Selden, 252.

Argument for the plaintiff in error.

at law unsatisfied. They declare a previous debt, of which the party stands "convict" of public record. They are, in fact, but a prolongation and extension of the judgment, making it apply, *by* the bill, to equitable rights, as without them it will to legal. In *Chittenden* v. *Brewster*, at this term,* Nelson, J., speaking for this court, and referring to a contract upon "creditors' bills," says: "The bill in the Circuit Court . . . . was first filed, and, consequently, operated as the first lien." The fact that such bills will operate as liens, and in the order of their being filed, is here assumed as of course. Now a creditor's bill will operate on every species of property. *Le Roy* v. *Rogers*, in the Chancery of New York,† thus declares. That was a creditor's bill, filed on the return of an execution unsatisfied. The bill stated the judgment and return of execution, and charged that the defendant was entitled, or interested in, or possessed of, personal property, money, bank stock, insurance stock, choses in action, &c. The bill further charged that the defendant, since making the covenant on which the judgment was recovered, had made some assignment, or transfer of his property, upon some secret trust, or other trust, for the benefit of himself, &c.; and it prayed a discovery of the property and effects of the defendant, &c. The case was heard on demurrer to the bill, and the chancellor says: "The complainant was entitled to a discovery of all the real estate of the defendant which he had within the city of New York at the time of the docketing of the judgment, although such property may have been fairly disposed of since that time."

It may be said that because the bill in the case of the Lyons contained the description of the real estate conveyed more definitely than the bill of Mills & Bliss, therefore that such a description gave the bill and proceedings greater efficacy. But the case of Mills & Bliss being, like that of the Lyons, what is called a creditor's bill,—a bill filed upon the return of an execution unsatisfied,—praying for discovery

* *Supra*, p. 196.

† 3 Paige, 236.

and relief—there was no necessity of describing the land asserted to have been fraudulently conveyed. If, indeed, the creditor levies his execution upon the real estate fraudulently conveyed, and then asks the aid of a court of chancery to give to his execution levy full form and effect, to enable him to sell the legal title, and give the purchaser a title free from obstruction, then the property must be described, and the facts of the levy and fraudulent obstruction must be stated, as it is that which gives the court jurisdiction of the case. But that is not this case. The court, here, had jurisdiction because of the allegations in the bill that the property was beyond the reach of an execution at law; that the defendant had an interest in real estate fraudulently disposed of, and that the complainant had no definite knowledge as to the property and its condition and the interest of Miller in it. When discovery was obtained, and the description of the property and condition of the title ascertained, then the court had power to subject the property to the payment of the debts in the manner best calculated to reach the object at the least expense. If a creditor had all the knowledge as to the situation of the property and title which discovery would give them, there would be no need of asking discovery, and he could proceed to effect a specific lien at once upon the property.

In *Conrad* v. *Atlantic Insurance Company*,* in this court, Story, J., says: "Now, it is not understood that a general lien, by judgment on lands, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to judgment; and when the levy is actually made on the same, *the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances.*" We submit that the title or right acquired by the filing of the bill and service of process, is as perfect and absolute as the right of a judgment lien given by statute; and when the title is obtained, under the decree, it relates

* 1 Peters, 443

back to the time of filing the bill, the same as a levy and execution does to the date of the lien of the judgment. Under the rule, thus interpreted, all parties can obtain their rights, when fixed, without conflict, and in a manner least expensive, and according to sound principles of equity.

2. *As respects the homestead reservation.* The law which thus protects a man and his wife and children from a *cruel and remorseless* creditor, and gives to them at least a humble home,—one peaceful shelter from the misfortunes of the world,—is a law which does infinite honor to the refinement of America. Such a law was quite above the civilization of our British ancestors; they have never yet reached it; though they have before them in ancient Rome record of the honor that was given to the "*domus in quâ pater decessit; in quâ minores creverunt.*" It is a law worthy of honest support from every court in the land. It will receive it from this, the highest of them all.

This statute prohibits a forced sale of the homestead upon any process or order from any court of law or equity. Now, Miller was a householder, and had a family, and resided upon the property. The act states that no release or waiver of the exemption shall be valid, unless the same shall be in writing, subscribed by such householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged. Without this requirement of law being complied with, the conveyance is invalid, and cannot become a valid conveyance of the property even after the homestead right ceases to exist. The legislature put the same construction upon the law, in declaring the intention to be to require, in all cases, the signature of the wife as a condition to the alienation of the homestead. If the homestead exemption given by law has direct reference to the land and building thereon, then the householder can control the fee of the property, and no lien can attach, unless made as provided by law; nor can any sale by the debtor, or by order of court, be made, except as provided by law. A forced sale would be as invalid as a sale by the debtor. The law gives the right and bestows

the benefit, and no act of the parties, either voluntary or otherwise, can have the effect to defeat the right, except in the manner prescribed by law. In cases where the householder and his wife are made parties to suits, as in the Lyons case, and they make default, a decree cannot divest them of the rights conferred by the law. It follows, as a matter of law, that the conveyance by Miller to Williams was invalid, and conveyed nothing; and, also, the decree and sale, in the case. On the other hand, the conveyance by Miller to the receiver is not invalid, nor is the deed of the receiver to Benedict, as the homestead right was reserved in both deeds.* The receiver's deed to Benedict, under the proceeding of Mills & Bliss, differs from that made by the master in the Lyons case, which did not convey subject to this right; although, on the bill being filed by the Lyons, they state that the place which they sought to get was the home of Miller and his family; a statement which proves as well a knowledge of the law which secured it to them.

Messrs. Browning and Ewing, contra:

1. Under the bill filed by the Lyons,—a true "*creditor's* bill,"—the conveyance to Williams was found to be fraudulent, and the master in chancery of the court was directed to sell the lots in question, and to execute deeds to the purchasers, "which shall bar and divest all, and all manner of interest or right, or right of redemption, which the said Miller, or any of said defendants, may have in and to the said property, or any part thereof."

The master sold, pursuant to decree, and conveyed to Bushnell, the purchaser, whose title Sherry holds. Under *such* an order, we submit that a legal title did pass.

The lien of the elder judgment, the one in favor of Mills & Bliss, if still subsisting, does not affect the transfer of title by the master's sale in the Lyons case. The bill in equity of Mills & Bliss is not a general creditor's bill. Its end is the satisfaction of their own judgment. They ask to

* Patterson *v.* Kreig, 29 Illinois, 514.

set aside transfers which they allege to be fraudulent as to *them* and *their judgment*, not as to any other judgment creditors. They designate such property as they choose to go against to satisfy their judgment, and they bring in such fraudulent assignees as they choose to charge. Their original bill could have no effect on persons and property not named in it. For example: the lots in controversy might have been conveyed by Williams to an innocent third person for a full and fair consideration, without *actual notice*, and the *lis pendens*, such as it was, would have been no notice. The averment in the bill that Miller was, at the time of the judgment entered, and is now the owner of or in some way or manner beneficially interested in *some real estate* in this or some other State or Territory, amounts to nothing; it is notice to *nobody* and of no *thing*. Neither Williams nor the lots were parties to the bill of Mills & Bliss. The principle of *lis pendens* is, that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril.*

3. *As to the homestead.* Proof of a homestead in a large property, many times the value of the homestead reservation, cannot, in ejectment, bar the recovery of the whole property. The lots here were worth about $2700. The exemption is for $1000. Some judicial mode must be resorted to of determining the extent of the reservation, and he who sets up the special and indefinite defence ought to define it. Perhaps, if the homestead be worth no more than is reserved, the presentation by evidence of the fact were enough, but if worth more, it should be set up by some appropriate form of motion or petition, so that the issue could be tried, and the value of the homestead set out, so that the jury could find defendant *not guilty* of the homestead, and guilty of the excess. But with this the court could do nothing of their own mere motion. The defendant, who relied upon the defence, should by some kind of petition or plea, or special

* Lewis *v.* Mew, 1 Strobhart's Equity, 180; Griffith *v.* Griffith, 1 Hoffman's Chancery R. 153; Price *v.* White, Bailey's Equity, 244.

motion for instructions, have placed the case in such position that the court could give its charge without making pleading or representations for him, or otherwise shaping his case.

If the homestead exemption had been set up in the chancery proceeding by the Lyons, as it should have been, if intended to be relied upon at all, it would not have been a full defence to the action, but a defence *pro tanto* only. It would not have prevented a decree, but have produced a modification of it only,—either that the property be divided, and the excess sold, or all sold, and the excess over $1000 applied on the judgment. But here it is insisted upon as a defence to the entire action. It would be a fraud upon judicial proceedings for a party to withhold what would be only a partial defence, if presented at the proper time, in a direct proceeding, and set it up collaterally to defeat the entire action.

Mr. Justice SWAYNE delivered the opinion of the court.

The proceedings under the bill filed by the Lyons appear to have been, in all respects, regular. W. & W. Lyons had obtained a judgment at law and issued an execution, upon which the return of *nulla bona* was made. This laid the foundation for a creditor's bill, and such a bill was filed. The necessary parties were brought before the court and answered.

The court had full jurisdiction, both as to the parties and the property. The decree was regularly entered, and the sale and conveyance by the master to Bushnell were made in pursuance of it. The only objection taken to the proceedings is, that Williams, in whom was vested the legal title, was not ordered to convey, and did not convey. A conveyance by him was not necessary.

Where a court of equity has jurisdiction, as in this case, a sale and conveyance in obedience to a decree is as effectual to convey the title as the deed of a sheriff, made pursuant to a sale under an execution issued upon a judgment at law. When the object of the suit is to compel the conveyance of the

legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed,—unless it be provided, as has been done in some of the States, by statute, that the decree itself shall operate as a conveyance. In all such cases, the court has power to compel the defendant to convey. When the property is beyond the local jurisdiction of the court, and the defendant is before it, the court can compel him to convey, as it may direct, for any purpose within the sphere of its authority. This is an ordinary exercise of the remedial jurisdiction of those courts, and the power is one of the most valuable attributes of the equity system. The principle of those cases has no application here. The title derived by Bushnell from these proceedings must be deemed perfect, unless it be invalidated by that derived to Benedict from the sale and conveyance under the bill of Mills & Bliss.

The judgment obtained by Mills & Bliss, was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law. The questions to be considered arise wholly out of the chancery proceedings.

The filing of a creditor's bill and the service of process creates a lien in equity upon the effects of the judgment debtor.* It has been aptly termed an "equitable levy."†

The original bill was in the form of a creditor's bill, as found in the appendix to Barbour's Chancery Practice. It contained nothing specific, except as to the transactions between Miller and Richardson. There was no other part of the bill upon which issue could have been taken as to any particular property. It was effectual for the purpose of creating a general lien upon the assets of Miller,—as the

* Bayard *v.* Hoffman, 4 Johnson's Chancery, 450; Beck *v.* Burdett, 1 Paige, 308; Slorm *v.* Waddel, 2 Johnson's Chancery, 494; Corning *v.* White, 2 Paige, 567; Edgell *v.* Haywood, 3 Atkyns, 352; 1 Kent, 263.

† Tilford et al. *v.* Burnham et al., 7 Dana, 110.

means of discovery, and as the foundation for an injunction,—and for an order that he should convey to a receiver. If it became necessary to litigate as to any specific claim, other than that against Richardson, an amendment to the bill would have been indispensable. It did not create a *lis pendens*, operating as notice, as to any real estate. To have that effect, a bill must be so definite in the description, that any one reading it can learn thereby what property is intended to be made the subject of litigation. In *Griffith* v. *Griffith*,* it is said:

"To have made such a bill constructive notice to a purchaser from the defendant therein, it would have been necessary to allege therein that these particular lots, or that all the real estate of the defendant in the city of New York, had been purchased and paid for, either wholly or in part, with the funds of the infant complainant. Or some other charge of a similar nature should have been inserted in the bill, to enable purchasers, by an examination of the bill itself, to see that the complainant claimed the right to, or some equitable interest in, or lien on, the premises."

It is evident that the premises in controversy were not in the mind of the pleader when this bill was drawn.

There is another reason why the bill could not operate as constructive notice. Williams, who held the legal title, was not a party. "We apprehend that to affect a party as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside."† The principle applies only to those who acquire an interest from a defendant *pendente lite*.‡ The title passed from Williams to Bushnell.

The amended bill was undoubtedly sufficient, and it made Williams a party. But he was not served with process, and if he had been, this bill could have operated only from the time of the service. Where the question of *lis pendens* arises

* 9 Paige, 317.

† Carr *v.* Callaghan, 3 Littell, 371.

‡ Stuyvesant *v.* Hall, 2 Barbour's Chancery Rep. 151; Fenwick's Admr. *v.* Macey, 2 B. Monroe, 470; Parks *v.* Jackson, 11 Wendell, 442.

upon an amended bill, it is regarded as an original bill for that purpose.* It was a gross irregularity to take a decree against Miller without Williams being before the court, and if the attention of the court had been called to the subject, the amended bill must have been dismissed. The decree against Miller as to the premises in controversy is a legal anomaly. But it is unnecessary to consider this subject, because before the amended bill was filed, the proceedings under the bill of the Lyons had been brought to a close, and the title of Bushnell consummated. His rights could not be affected by anything that occurred subsequently. He had no *constructive notice* of the proceedings in the case of Mills & Bliss. Had he and his alienee actual notice? This, also, is a material inquiry.† We have looked carefully through the record and find no evidence on the subject. Had the suit below been in equity, it would have been necessary for the defendant in error to deny notice to himself or to his grantor. The want of notice to either would have been sufficient. The form of the action rendered a denial unnecessary. The plaintiff having exhibited a title, apparently perfect, the burden was cast upon the defendant of proving everything upon which he relied to defeat it. As the case was developed on the trial in the court below, the title of the defendant in error properly prevailed.

2. In regard to the homestead right claimed by the plaintiff in error, there is no difficulty. The decree under which the sale was made to Bushnell expressly divested the defendant of all right and interest in the premises. It cannot be collaterally questioned. Until reversed, it is conclusive upon the parties, and the reversal would not affect a title acquired under it while it was in force.

We think that the learned judge who tried the case below, was correct in refusing to give the instructions submitted by the plaintiff in error, and in giving those to which exception was taken.

JUDGMENT AFFIRMED WITH COSTS.

* Clarkson et al. *v.* Morgan's devisees and others, 6 B. Monroe, 441.

† Parks *v.* Jackson, 11 Wendell, 442; Roberts *v.* Jackson, 1 Id. 478.

MARINE BANK *v.* FULTON BANK.

1. Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds, and credited to the transmitting bank in account, becomes the money of the former. Hence, any depreciation in the specific bank bills received by the collecting bank, which may happen between the date of the collecting banks' receiving them and the other banks' drawing for the amount collected, falls upon the former.
2. In a case where the trial has proceeded on merits, and the error has not been pointed out below, judgment will not be reversed, even though the form of action have been wholly misconceived, and to the case made by *it* a defence plainly exists.

IN the spring of 1861, the Fulton Bank, of New York, sent for collection to the Marine Bank, Chicago, two notes, one of Cooley & Co., for $2000, and one of Hunt & Co., for $1037; both due May 1–4, in that year. The currency at Chicago had become at that time somewhat deranged, and consisted exclusively of bills of the Illinois banks. The Marine Bank, just afterwards, addressed a circular to its correspondents, informing them that, in the disturbed state of the currency, it would be impossible to continue remittances with the usual regularity, and that until further notice it would be compelled to place all funds received in payment of collections to the credit of its correspondents in such currency as was received in Chicago,—bills of the Illinois Stock Banks,—to be drawn for only in like bills.

On the 1st May, the cashier of the Fulton Bank thus addressed the cashier of the Marine Bank:

"Please hold the avails of the collections I have sent you, subject to my order, and advise amount credited."

The two notes were collected by the Marine Bank, in Illinois currency, at that time *from five to ten per cent. below par*. Immediately after the notes were collected, the Chicago bank, in reply to an inquiry from the Fulton Bank how the account stood, advised the latter bank thus:

"May 1. You have credit as follows: Cooley & Co., . . . $2000."
"May 6. Your account has credit as follows: Hunt & Co., . . 1037."

Argument for the plaintiff in error.

On the 21st April, 1862, that is to say, about a year after the collection made, the New York bank made a demand of payment from the Chicago bank, which was refused, unless the former bank would accept Illinois currency, *now* sunk *fifty* per cent. below par.

The Marine Bank was a bank engaged, like other banks, in receiving deposits, lending money, buying and selling exchange, and the money collected on the two notes in question was not retained in any separate or specific form.

On suit brought in the Northern Circuit for Illinois by the Fulton Bank, the court charged that the said bank was entitled to recover the value of the Illinois currency *at the time the money was received by the defendant*, and judgment went accordingly. The question in this court was, whether this was right, and whether the court below ought not to have charged, as it was requested but refused to do, that the Fulton Bank was "only entitled to recover of the defendant the value, in coin, of such currency so received by the defendant at the *time of demand* made by plaintiff for payment with interest, and from that date,"—the only instruction asked for by the defendant's counsel.

A question was also raised in this court as to the form of action below,—trespass on the case for having wrongfully received the depreciated paper; but this point had not been raised in the court below.

Mr. Fuller, for the Marine Bank, plaintiff in error, contended that this bank, in receiving the money and passing it to the credit of the Fulton Bank, was acting as the plaintiff's agent. If this was so, and it obeyed instructions and acted in good faith, it could not be held responsible for the depreciation of the currency while in its hands; a position for which the counsel relied on the American Leading Cases.* The Marine Bank had of course mixed the currency it received with other like currency, and perhaps used a part or the whole in its ordinary banking business. In this, however, it did but follow the only course possible among banks. No de-

* Second edition, p. 691; note to Burril *v.* Phillips, &c.

positor, correspondent, or customer, when dealing with a bank, ever expects that anything else will be done. This being the settled and only practicable course of business, the plaintiff understood that when the notes were collected and the proceeds placed to his credit, they would pass into the general funds of the bank, and be used till drawn for. This intermixture, having been made in the usual course of business, the counsel contended was proper, and did no wrong to the principal. The ordinary rules of law, with regard to confusion of goods, applied, and the proprietors had an interest in common in the entire fund, in proportion to their respective shares.

The counsel also called attention to the form of action,—case for negligence in receiving the depreciated paper. In such form of action nothing was before the court but the question, whether the Marine Bank was liable for having received the paper; and to that question the bank's circular was a complete reply. The question, whether the Chicago bank was liable for one rate or for another did not arise on the pleadings; judgment had been given below on a thing not at all in issue; and was, accordingly, to be reversed.

Mr. E. S. Smith, contra.

Mr. Justice MILLER delivered the opinion of the court.

The Chicago bank was unquestionably the agent of the Fulton County Bank, up to and including the receipt of the money from the makers of the notes. If no change was made in their relation subsequent to that time, then the former bank, having obeyed instructions, should not be held liable to the latter for the depreciation of its money. The agent, however, in this case was a bank engaged in the usual banking business of discounting notes, buying and selling exchange, and receiving deposits from its customers, and some confusion may grow out of the peculiar character of the agent.

If any person not a banker had received this sum of money for an Eastern correspondent, with instructions to hold it sub-

ject to order, he would probably have locked it up in his own safe, or that of some one else, until called for; and when demanded, he would have delivered the identical money which he had received, thus discharging his whole duty as agent. If, however, instead of this prudent and safe course, he had the same day that he received it bought with it a bill on New York at thirty days, which, when matured, was worth in Chicago one-half per cent. premium, it will hardly be contended that when the principal demanded his money the agent could pay him by buying in the market other bills of Illinois banks fifty per cent. below par.

This, however, is substantially what the Chicago bank did, and what it claims the right to do. It is true that it is not in evidence what precise use was made by it of the money received for these collections. But it is proved that it was placed with other money of defendant, and used in its daily business as its own. That business was to buy such drafts, to pay its own debts to its depositors, to discount notes and bills. If it was defendant's money it was all right, because he could do as he pleased with his own. But if it was plaintiff's money, held by defendant as its agent, then this use of it by defendant would seem to be a conversion.

But here we are reminded of the banking character of the agent, who insists that it was impossible to keep plaintiff's money separate from its own, and that plaintiff knew this fact; and, secondly, that from the course of business it was understood that, when the money was collected and placed to the credit of plaintiff's account, the defendant would use it.

As to the first proposition, it cannot be admitted that there was any impossibility in keeping plaintiff's money separate from defendant's. It is every day business for bankers, who have vaults and safes, to receive on special deposit small packages of valuables, and even money, until the owners call for them. There is not only no impossibility in this, but there is no serious difficulty in it. It is simply an inconvenience, and but a slight one, as a small slip of paper around the bills, labelled with the owner's

name, would have marked their identity and their separation, without occupying any additional space. Even this inconvenience the defendant could have avoided at any time by refusing longer to hold the deposit. But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers; and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation.

All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter. The parties seem to have taken this view of it, as is shown by the reply made by the Chicago bank, May 1st and 6th, to the New York bank, when inquiring how the account stood.

The counsel have argued as to the effect of mixing the money of plaintiff with that of defendant. In the view we take of the matter, there was no such admixture. It being understood between the parties that, when the money was received, it was to be held as an ordinary bank deposit, it became by virtue of that understanding the money of the defendant the moment it was received.

But let us look for a moment at the equity of defendant's

position. It receives this money when it is worth ninety cents on the dollar. It places it with its other money; and, perhaps, in the course of a week, all the specific bank bills it then had on hand are paid out by it. It uses it in paying the checks of its depositors, in other words, its debts at par. It buys with it bills on New York, which it converts into exchange worth a premium. But it continues to receive of other parties this class of paper, though constantly depreciating. There is no legal necessity that it should do this. It only does so with a view to its own advantage. When, however, it proves to be a loss instead of a profit, the bank says to the man whose money it had used profitably months before, "I claim to impose this loss on you. I insist on the right to pay the debt I owe you, not in the specific bank bills I received from you, nor in those of the same value which I received from you; but in bills of that general class, although, while I have been using the money, they have depreciated forty per cent."

If we are correct in these views, it would seem that the relation of principal and agent was changed the moment the money received was placed in the general fund of the bank, and the plaintiff credited on its book with the amount.

Does the notice of the Marine Bank to its customers, taken in connection with the other facts of the case, change the relative rights of the parties as thus stated? The obvious intent of the circular is to convey to correspondents the fact of the great depreciation in value of the Illinois currency; and to request them, if they are not willing to have their notes paid in such currency, to withdraw their collections. This was just and fair between the parties, and was what the collecting bank had a right to require. We think that it justified that bank in receiving the Illinois currency, in all cases where the notice had reached their correspondents and no contrary orders had been received. If the Marine Bank had thus received depreciated money, and kept it without using it until called for, or had sent it by express to plaintiff, it would have been relieved from further liability. In other words, as long as the defendant retained strictly the charac-

ter of agent, and acted within the principle laid down in the circular, it was protected. But, as we have already shown, the defendant changed that relation by using the money as its own, and became the debtor of the plaintiff for the sum collected.

The counsel for plaintiff in error raises the point, that the action was trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defence to such a count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point in the court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. All the testimony was received without objection. No instruction was asked of the court by either party as to the effect of the testimony in sustaining plaintiff's case, or as to the effect of the notice in making good defendant's receipt of depreciated paper. On the contrary, the only instruction prayed by defendant's counsel recognizes the right to recover something with interest, and only raises the question of the measure of damages.* On that subject we think the instruction asked was erroneous, and properly refused. It is too late now to object for the first time to the particular form of the action.

JUDGMENT AFFIRMED WITH COSTS.

THE VENICE.

1. The military occupation of the city of New Orleans by the forces of the United States, after the dispossession of the rebels from that immediate region in May, 1862, may be considered as having been substantially complete from the publication of General Butler's proclamation of the 6*th* (dated on the 1*st*) of that month; and all the rights and obligations resulting from such occupation, or from the terms of the proclamation, existed from the date of that publication.
2. This proclamation, in announcing, as it did, that "all rights of property" would be held "inviolate, subject only to the laws of the United

* See *supra*, p. 253.

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States;" and that "all foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States," would be "protected in their persons and property as heretofore under the laws of the United States," did but reiterate the rules established by the legislative and executive action of the national Government, and which may also be inferred from the policy of the war, in respect to the portions of the States in insurrection occupied and controlled by the troops of the Union. It was the manifestation of a general purpose, which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any view of subjugation by conquest.

3. Substantial, complete, and permanent military occupation and control, as distinguished from one that is illusory, imperfect, and transitory, works the exception made in the act of July 13th, 1861 (§ 5), which excepts from the rebellious condition those parts of rebellious States "from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents;" and such military occupation draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government.
4. The President's proclamation of 31st of March, 1863, affected in no respect the general principles of protection to rights and property under temporary government, established after the restoration of national authority.
5. Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there and not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected after the publication of General Butler's proclamation, dated May 1st, 1862, and published on the 6th; though such persons, by being identified by long voluntary residence and by relations of active business with the enemy, may have themselves been "enemies" within the meaning of the expression as used in public law.

THE schooner Venice, with a cargo of cotton, was captured in Lake Pontchartrain, Louisiana, by the United States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key West, libelled as a prize of war in the District Court, but was restored, with her cargo, to the claimant, Cooke, by its decree. The United States appealed.

The case, as appearing from the proofs,* and from the public history of the country, was in substance thus:

* These consisted of the papers found on board at the time of capture, the depositions of the master and of the claimant, taken on the standing interrogatories, and a special affidavit.

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The claimant, Cooke, was a native British subject, and had resided, and been engaged in business, in New Orleans, without being naturalized as a citizen of the United States, for nearly ten years previously to the capture. About the 1st of April, 1862, he purchased, in the interior of the State of Mississippi, two hundred and five bales of cotton. This cotton, as he alleged, was bought as an investment for "Confederate notes," which he had become possessed of in previous employments in New Orleans; his intention being to let the cotton remain in the interior, away from the seaboard, until the rebellion should be over, and the cotton could be shipped and sold for gold or its equivalent. To prevent the threatened destruction of it under rebel order in Mississippi, he shipped it to New Orleans, where it arrived about the 7th of April. The same danger awaited it there. General Lovell, the rebel commanding general, gave him notice that his cotton must be immediately removed, or prepared for complete destruction in the event of the capture of the city. The schooner Venice was then lying near New Orleans, in the basin of the Pontchartrain Canal. This vessel the claimant purchased from her New Orleans owner, and about the 12th of April stowed the cotton, purchased as above stated, on board of her, together with twenty other bales of the same article, which were purchased in New Orleans, and put on board to complete the lading of the vessel, in order that it might be out of danger of burning in case of the capture of New Orleans by the United States forces. After being thus loaded, the Venice, on the 17th April, was towed out into Lake Pontchartrain.

During all this time, New Orleans and the surrounding region was in open rebellion and war against the United States, and the port of New Orleans and Lake Pontchartrain under blockade.

The Venice remained at anchor in the lake from the time she was taken there, April 17th, 1862, till her capture, on May 15th, 1862, being unfit for service; and though undergoing repairs, having had no intention of breaking the blockade.

Between these two dates, however, important naval and military events took place at New Orleans. The Government fleet, under Flag-officer Farragut, reached New Orleans on the 25th April; and on the 26th, the flag-officer sent one of his commanders to demand of the mayor the surrender of the city. The reply of the mayor was "that the city was under martial law, and that he would consult General Lovell." General Lovell declared in turn that "he would surrender nothing," but at the same time that he would retire and leave the mayor unembarrassed. On the 26th, the flag-officer sent a letter, No. 2, to the mayor, in which he says:

"I came here to reduce New Orleans to obedience to the laws, and to vindicate the offended majesty of the Government. The rights of persons and property shall be secured. I therefore demand the unqualified surrender of the city, and that the emblem of sovereignty of the United States be hoisted upon the City Hall, Mint, and Custom House, by meridian of this day. And all emblems of sovereignty other than those of the United States must be removed from all public buildings from that hour."

To this the mayor transmitted, on the same day, an answer, which he says "is the *universal sense of my constituents*, no less than the prompting of my own heart." After announcing that "out of regard for the lives of the women and children who crowd this metropolis," General Lovell had evacuated it with his troops, and "restored to *me* the custody of its power," he continues:

"The city is without the means of defence. To surrender such a place were an idle and an unmeaning ceremony. The place is yours by the power of brutal force, not by any choice or consent of its inhabitants. *As to hoisting any flag other than the flag of our own adoption and allegiance, let me say to you that the man lives not in our midst whose hand and heart would not be paralyzed at the mere thought of such an act; nor can I find in my entire constituency so wretched and desperate a renegade as would dare to profane with his hand the sacred emblem of our aspirations. . . . . Your occupying the city does not transfer allegiance from the govern-*

ment of their choice to one which they have deliberately repudiated, and they yield the obedience which the conqueror is entitled to extort from the conquered."

At 6 A. M. of the 27th, the National flag was hoisted, under directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A. M. of the same day an attempt to hoist it on the Custom House was abandoned; "the excitement of the crowd was so great that the mayor and councilmen thought that it would produce a conflict and cause great loss of life."

On the 29th, General Butler reports that he finds the city under the dominion of the mob. "They have insulted," he says, "our flag; torn it down with indignity. . . . . I send a marked copy of a New Orleans paper containing an *applauding* account of the outrage."

On the same day that General reported thus:

"The rebels have abandoned all their defensive works *in* and *around* New Orleans, including Forts Pike and Wood on Lake Pontchartrain, and Fort Livingston on Barataria Bay. They have retired in the direction of Corinth, beyond Manchac Pass, and abandoned everything in the river as far as Donaldsonville, some seventy miles beyond New Orleans."

Transports conveying troops under General Butler reached New Orleans on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but there were constant exhibitions of a malignant spirit and temper both by the people and the authorities. On the 2d of May, the landing of troops was completed, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and printed on the 2d by some soldiers, in an office seized for the purpose, was published in the newspapers of the city. Some copies of the proclamation

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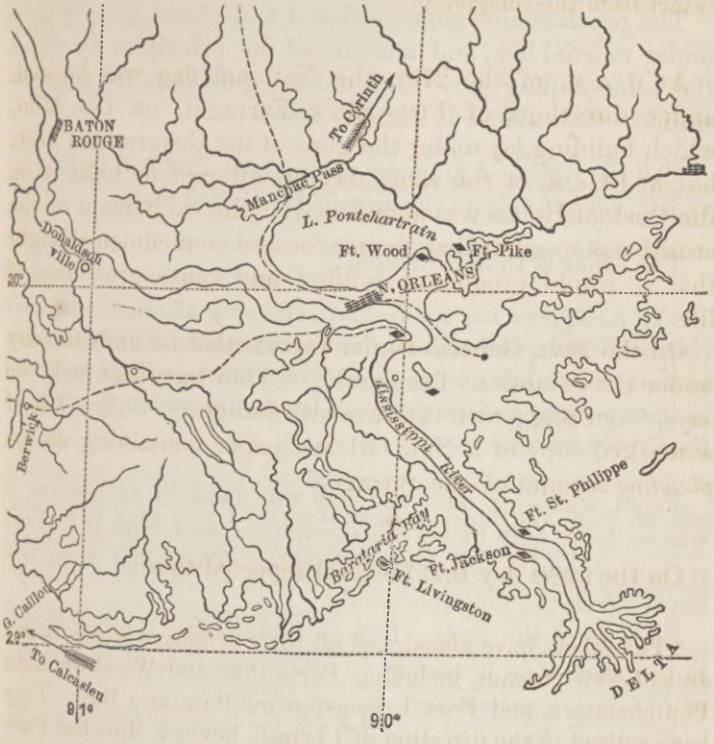
had been previously distributed to individuals, but it was not made known generally until thus published.*



On this same 6th of May, Flag-officer Farragut made a report to the Government confirming a previous account of his, and stating the arrival of General Butler, on the 29th of April, at New Orleans; the recital of events terminating with the hauling down of the Louisiana State flag from the City Hall, and the hoisting of the American flag on the Custom House on that day, the report closing with this statement:

"Thus, sir, I have endeavored to give you an account of my attack upon New Orleans from our first movement to the sur-

* See the work entitled "General Butler in New Orleans," by Parton: New York, 1864; pp. 182–3.

render of the *city* to General Butler, *whose troops are* NOW *in full occupation.*"

The proclamation above referred to declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. One clause is in these words:

"All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States."

The other is thus expressed:

"All foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States."

From whatever date the city was held in subjection, it was so held only by severe discipline; and both it and the region around it was largely hostile. The rebel army was hovering in the neighborhood.

Such were the *facts*. But to understand the arguments in the case, it is necessary to make mention of certain *acts of Congress, proclamations*, &c., as follows:

Congress, by act of July 13, 1861,* made it lawful for the President, by proclamation, to declare the inhabitants of any State, or section of it, where insurrection existed, in a state of insurrection against the United States: and "thereupon," the statute proceeds:

"All commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease, and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section by land or water, shall, together with the vessel or

* § 5; 12 Stat. at Large, 257.

vehicle conveying the same, be forfeited to the United States. *Provided*, that the President may in his discretion license and permit commercial intercourse, &c., as he in his discretion may think most conducive to the public welfare," &c.

The statute enacts also:*

"That . . . any ship or vessel belonging in whole or in part to any citizen or inhabitant of said State, or part of a State, whose inhabitants are so declared in a state of insurrection, found at sea or in any part of the United States, shall be forfeited to the United States."

In pursuance of the authority given by this act, the President, by proclamation of 16th August, 1862,† did declare "Louisiana"—along with several other Southern States—in a state of insurrection against the United States, with interdiction of commerce; excepting, however, the inhabitants of such States "as may maintain a legal adhesion to the Union and the Constitution, *or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the said insurgents.*"

By a subsequent proclamation,‡ reciting that experience had shown that the exceptions made as above, embarrassed the execution of the act of July 13, 1861 (already mentioned), they were revoked, and the inhabitants of several States, including "Louisiana," "except the ports of New Orleans, &c.," were declared "in a state of insurrection," &c., and all commercial intercourse not licensed, &c., declared unlawful, "until such insurrection shall cease or be suppressed, and notice thereof has been duly given by proclamation."

On the 12th May, 1862,—that is to say two days before the capture,—the President issued his proclamation, reciting that "as the blockade of the same ports may *now* safely be relaxed with advantage to the interests of commerce," therefore he declared that the blockade of the port of New

* § 6; 12 Stat. at Large, 257.

† Id. 1262.

‡ 31 March, 1863; 13 Stat. at Large.

Orleans, shall so far cease and determine *from and after the 1st day of June*, 1862, that commercial intercourse with it might be carried on except as to persons, things, and information contraband of war.

The question now before this court, on the appeal, was, whether upon the state of facts above presented, the cotton had been properly restored.

Mr. Assistant Attorney-General Ashton, and Mr. Eames, for the appellant:

I. Cooke having been permanently established in New Orleans, and having had uninterrupted commercial and personal domicile there, for ten years previous to the capture, without having either property or residence, actual or constructive, anywhere else, or even any purpose of abandoning his domicile or business at that city, was an enemy, and his property was liable to confiscation if *New Orleans*, when the capture of the property was effected, was enemy territory.*

II. Was New Orleans then enemies' territory? Were her people enemies of the United States? That is the question now for this court.

1. In adjudicating the public status, at any particular point of time, of territory within a State once involved in the general hostile relation, the court will follow the acts and declarations, touching and respecting such territory, of the political department of the Government. It *can* do nothing else. The Government is waging war against organized hostile bodies of men, who assert that they act under the authority of the government of "sovereign States," and who are contending for an alleged right of exclusive jurisdiction and control over the whole extent of territory embraced by such States. The duty of the political power is to pursue the struggle until the rebel organization is destroyed, and the supremacy of the Government is everywhere re-established. But who is to judge where and when the power of

* The Indian Chief, 3 Robinson, 18; The Gerasimo, 11 Moore's P. C. 96; The Venus, 8 Cranch, 280.

the enemy has been so broken as that, with safety to the whole cause, the people and property once subject to hostile control may be released from the law of war, and restored to their rights under the Government? The "*line of insurgent bayonets*," as Grier, J., denominates it,* forced back to-day, may advance to-morrow. Who but the President, whose duty it is to plant the standard of the nation on this hostile soil, can know what measures of war may serve to keep that standard fixed where it may once be planted?

Now, on the 14th of May, the date of this capture, New Orleans was, indeed, in the possession of the United States, but the claim of the *de facto* power, which had been dispossessed, was still actively asserted. Every part of the case,—the language of the chief municipal officer of New Orleans, who declared that he would surrender nothing; that the people would not transfer their allegiance "from the government of their choice to one which they have deliberately repudiated;" the "applauded" insult to the flag of the Union; in short, the whole history,—shows defiance and malignity. There is nothing like it in the history of any conquered city whatever. Among our own cities, most, like Savannah, have submitted with grace. In the city was the whole of the late city corporation, hundreds of so-called "citizens,"—foreign adventurers, many of them, who had risked all that they had or hoped for in the success of their own rebellion,—all ready to consign the city to the traitor Lovell and his army. That army, on the day of this capture, was still in array at the gates of the city, and was there asserting its right to exclude the United States from that soil. Indeed, the enemy's army has never, to this day, been driven from Louisiana. There was no certainty that General Butler could hold possession even if he had it firmly; which, on the day of this capture, he had not. General Banks, in the same State, at a later day, after having been fully in possession on the Red River, was compelled to retire, and the district went right back to the enemy's control. This is matter of history; a history

* 2 Black, 647.

which will make the basis of a decision at this term in this court.*

The right of maritime capture was exercisable by the United States after the occupation of the city, not only to promote the complete establishment of its power there, but also with reference to the contingency of its forces being driven from their position, and the city again being subjected to the enemy's power. The duty of the President, in view of this possible event, was to destroy the trade, and diminish the wealth of the place in every way sanctioned by the law of nations.

2. This view of the relations of the executive department to the judicial, or of the judicial to it, in these hostilities, would be well founded and conclusive, even if the President stood upon his ordinary constitutional power. But during this rebellion he wields as well the power conferred by a great national ordinance. The statute of July 13, 1861, authorizes him to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States; to subject vessels and cargo to capture and condemnation; and to direct the capture of any vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are in insurrection.

Under this statute, also, the Executive alone has power to determine whether the condition of hostility, which Congress has imposed upon certain States, has or has not in any place ceased to exist; and that determination of the Executive, it must, in every case, be the constitutional duty of the judiciary to carry by its judgments into legal effect.

3. Now, the President's proclamation of the 12th of May, 1862, declares that the *blockade* of New Orleans should thereafter continue to be maintained in full force until the first of the ensuing *June*. This was but two days before the capture of the Venice. The President's proclamation of a blockade, said Grier, J., speaking in the Prize Cases for this court, is "*official and conclusive* evidence to the court that a *state of war*

* See *infra*, Mrs. Alexander's cotton, p.

existed at its date, which demanded and authorized a recourse to such a measure, under the circumstances, peculiar to the case."* His Honor was speaking, it is true, of the proclamation of a general blockade made by the President at the outbreak of the war; but both the terms and spirit of his observation apply to the blockade specially at New Orleans. This proclamation, then, on the 12th of May, 1862, declares to all the world that the President, while fulfilling his duties as Commander-in-chief in suppressing rebellion in New Orleans, *after military occupation of the city was achieved*, had continued to meet with such measure of hostile resistance, that until the 1st of June he should continue to need a blockade to aid him in the work wherewith he was intrusted by the Constitution; that the crisis demanded, till *that* date, such force as the *law of war* justifies and sanctions only when employed against enemies and the territory of enemies.

4. But independently of arguments peculiar to the present rebellion, what is the effect, by PUBLIC LAW, of the reduction and occupation during war of a portion of the enemy's territory, under circumstances similar to those that attended the reduction and occupation of New Orleans?

Elphinstone v. *Bedreechund*, in the British Privy Council,† is in point. In that case, a British Provisional Government in the East had seized, on the 17th of July, 1818, at Poonah, then recently captured from the natives by the British, a large amount of treasure of an Eastern prince. *At the time of the seizure, the city had been eight months in the undisturbed possession of the municipal government;* and even courts of justice, under the authority of that government, were sitting in it for the administration of justice. No disturbance had taken place in Poonah itself after it was captured, nor were any actual hostilities carried on in its immediate neighborhood; the headquarters of the British major-general had been, in fact, forty-two miles away. The whole country, however, was in a disturbed state. Poonah was greatly disaffected. "The enemy were dispersed, but not subdued."

* 2 Black, 670.

† 1 Knapp, 316.

Poonah was kept in order only by letting every one see that there was an overwhelming force on account of their being a disaffected population, and the fact of one government having been overturned and another set up, and the character of the people being turbulent. Proclamations, too, had been issued at Poonah as at New Orleans. The case was much like ours. The question in the suit was one of jurisdiction, *i. e.* whether the case belonged to the civil or to the military courts? This depended on the nature of the seizure, whether it was what is technically called a "hostile" seizure, or not. Very able counsel, Sir Thomas Denman and others, contended, as the other side would contend here. Speaking of the nature of the war, and the proclamation which had been made, they say:

"It is a war of conquest and annexation, and its sole and avowed object was to place the principality under the dominion of the East India Company. From the moment the proclamation was issued, every part of the country that was conquered became, at the time of its conquest, part and parcel of its dominion and of the crown. On the 16th of November, 1817, the capital was taken possession of by us, and has ever since remained in our possession. It is said that the country was unsettled, or in a state of passage from one settlement to another. Such a state is unknown to our laws. A country must either be in a state of war or a state of peace; although it is sometimes difficult to define the actual boundaries between them. The distinction between the day and the night is perfectly clear, but who can ascertain the exact point where one ends and the other begins. It cannot be disputed that in point of fact, at least, Poonah was perfectly subdued and tranquil."

But Sir Edward Sugden, then solicitor-general, arguing in support of the seizure, thus gives the answer:

"No country can ever be thoroughly brought under subjection if it is to be held that where there has been a conquest and no capitulation, the mere publication of a proclamation desiring the people to be quiet, and telling them what means would be re-

sorted to if they did not, so far reduces the country under the civil rule that the *army* loses its control, and the municipal courts acquire altogether jurisdiction."

Of this view was the Privy Council, which, through Lord Tenterden, declared that "the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*," and judgment went accordingly.

The result of the British prize adjudications on this point is, that where the question is as to the national character of a place in an enemy's country, it is not sufficient to show, that possession or occupation of the place was taken, and that, at the time in question, the captor was in control. It must be shown, either that the possession was given in pursuance of a capitulation, the terms of which contemplated a change of national character, or that the possession was subsequently confirmed by a formal cession or by a long lapse of time.*

III. Is the property, then, relieved from liability to confiscation by General Butler's proclamation?

It will be contended that this proclamation is, in effect, a *convention* between the Government and the rebels.

1. But General Butler was without authority to make any such convention. "To exempt the property of enemies from the effects of hostilities," says Lord Stowell,† "is a very high act of sovereign authority. If at any time delegated to persons in a subordinate station, it must be exercised either by those who have *special commissions* granted to them for the particular business, or by persons in whom such a power is vested by virtue of any situation to which it may be considered incidental." The office of General Butler, after the

* The Negotie en Zeevaart, in the House of Lords, July 18, 1782; cited in The Danckebar, C. Robinson, 111; The Boletta, Edwards, 174; The Edel Catharina, 1 Dobson, 56; The Dart and Happy Couple, in the House of Lords, 17 March, 1805; cited in The Manilla, Edwards, 3; The Gerasimo, 11 Moore's Privy Council, 101.

† The Hope, 1 Dodson, 227; see also the Elsebee, 5 Robinson, 173; or 155 American edition of 1807.

reduction of the city, was to devise and execute measures for the *preservation of the peace* in the city. The power of setting aside the law of war, of defeating the right of capture given by that law, as well as by statute, to the naval vessels of the nation, and of repealing, in effect, all grants of prize interest, were not powers incidental to the situation and office of a commander of land forces in occupation of an enemy's city.

2. Even if General Butler possessed sufficient authority to give the exemption claimed, he did not by the proclamation, rightly interpreted, attempt to exercise it as respected ships and cargo afloat. Ships and cargo afloat do not come under such expressions as he used. This is settled law. The case of the *Ships taken at Genoa* is in point.* In that case one of the articles gave the inhabitants permission "to withdraw themselves, their money, *merchandise*, *movables*, or *effects*, by *sea* or land," and another stipulated for "freedom of trade." On a question of seizure, it was contended that on these articles the intention of the parties was plain to exempt the *shipping* from seizure, and that it would be nugatory to grant "freedom of trade," and at the same time seize the vehicles in which trade was carried on. Sir William Scott, however, says:

"If the court was to abstract itself from the consideration of what has usually been understood and done, the terms—'themselves, their money, movables, and effects'—are perhaps large enough to admit this interpretation; although it is an acknowledged rule, that ships—themselves being property of a peculiar species—do not necessarily pass under such a description. It is impossible not to refer to the practice of commanders of other fortunate expeditions, by whom a broad distinction has usually been taken between property afloat and property on land."

And with respect to the argument made from the expression "freedom of trade," he remarks:

"To this observation I can only say that nugatory as such a clause might be, it is every day's practice to seize all property

* 4 Robinson, 388.

afloat, and yet to allow a general 'freedom of trade,' exclusive of such particular seizure."

3. General Butler's proclamation did, in fact, but express an intention to protect the persons named from the *army of the United States*, for which alone he had authority to speak.

4. The idea of protection, considered with reference to a vessel in the situation of the Venice, involves nothing, if not ability to sail on the seas without molestation. But up to the 12th of May, 1862, the blockade of New Orleans was in full force and effectually maintained. It so remained, in fact, till June. General Butler possessed no power to *license* any vessel to violate the blockade; and yet, what avail was a guaranty of *protection* to this vessel and cargo, unless they would have been permitted to sail on any destination out of the port of New Orleans?

The Government, therefore, has not only not ratified or confirmed in any way the supposed action of General Butler, but it has, by the proclamation of May 12, 1862, repudiated whatever act of his is susceptible of the interpretation contended for by the claimant.

IV. Even if the neutral character of the claimant be sustained, the vessel and cargo must be condemned. In a blockaded port, Cooke bought from the enemy an enemy commercial vessel, and then loaded her during the blockade, with property purchased from the enemy, in the enemy country.*

Messrs. Reverdy Johnson and Gillet, contra, for the claimant Cooke.

The CHIEF JUSTICE delivered the opinion of the court.

This cause comes before us upon appeal from a decree of the District Court of the United States for the Southern District of Florida.

The schooner Venice, with a cargo of two hundred and

* The General Hamilton, 6 Robinson, 61; The Vigilantia, 6 id. 124; The Potsdam, 4 id. 89; The Negotie en Zeevaart, 1 id. 111, *et cas. cit.*

twenty-five bales of cotton, was captured in Lake Pontchartrain by the United States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key West; was libelled as prize of war in the District Court; and was restored with her cargo, to the claimant, David G. Cooke, by its decree. The United States appealed. The claimant, Cooke, was a British subject, but had resided in New Orleans nearly all the time for ten years preceding the capture. He was a clerk in a large mercantile establishment until June, 1861, when the firm closed its affairs, and he turned his attention to other business, particularly to the collection of planters' acceptances which he had purchased, and to the investment of their proceeds in cotton. Early in April, 1862, he bought two hundred and five bales in Mississippi; and had them brought to New Orleans, where he purchased the Venice on the 9th of April. Finding that the two hundred and five bales would not fully complete the lading of the schooner, Cooke bought twenty bales more about the 12th of April. The whole was put on board with as little delay as possible, and on the 17th of April, the schooner was towed out into Lake Pontchartrain, and taken to the head of the lake, where she was anchored, and remained, with only such change of position as was necessary to obtain a supply of water, until the capture. In the meantime the vessel was undergoing repairs.

While these transactions were in progress, the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each State were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars.* Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application.

* Prize Cases, 2 Black, 666; concurred in by dissenting Justices, Id. 687–8.

Opinion of the court.

The vessel and the cotton at the time of purchase belonged to citizens either of Mississippi or Louisiana, and was therefore enemies' property.

Did the transfer to Cooke change the character in this respect of both or either?

Cooke was a British subject, but was identified with the people of Louisiana by long voluntary residence and by the relations of active business.* Upon the breaking out of the war, he might have left the State and withdrawn his means; but he did not think fit to do so. He remained more than a year, engaged in commercial transactions. Like many others, he seems to have thought that, as a neutral, he could share the business of the enemies of the nation, and enjoy its profits, without incurring the responsibilities of an enemy. He was mistaken. He chose his relations, and must abide their results. The ship and cargo were as liable to seizure as prize in his ownership, as they would be in that of any citizen in Louisiana, residing in New Orleans, and not actually engaged in active hostilities against the Union.

This brings us to the consideration of the events which transpired at New Orleans, and in its vicinity, very soon after the Venice was taken into Lake Pontchartrain.

The fleet of the United States, under command of Flag-officer, now Vice-Admiral, Farragut, reached New Orleans on the 25th of April, and the flag-officer demanded the surrender of the city, and required the authorities to display the flag of the Union from the public buildings. The mayor refused to surrender and refused to raise the National Flag, but declared the city undefended and at the mercy of the victors. The flag-officer then directed the flag to be raised upon the Mint. It was raised accordingly, but was torn down on the same or the next day. The flag of the rebellion still floated over the hall where the city authorities transacted business. On the 29th, the Union flag was raised again, both on the Custom House and Mint, and was not again disturbed. On the 30th, the flag-officer received from the

* Prize Cases, 2 Black, 674.

mayor a note so offensive in its character, that all communication was broken off.* The power of the United States to destroy the city was ample and at hand, but there was no surrender and no actual possession.

The transports conveying the troops under the command of Major-General Butler, commanding the Department of the Gulf, arrived on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but abundant manifestations of hostile spirit and temper both by the people and the authorities. The landing of the troops was completed on the 2d of May, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and the next day printed by some soldiers, in an office seized for the purpose, was published in the newspapers of the city. Some copies of the proclamation had been previously distributed to individuals, but it was not made known to the population generally until thus published. There was no hostile demonstration, and no disturbance afterwards; and we think that the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication; and that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time.

This proclamation declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. Two clauses only have any important relation to the case before us. One is in these words: "All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." The other is thus expressed: "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States." These clauses only reite-

* Message and Documents, 1862–63, part 3, pp. 282–288.

rated the rules established by the legislative and executive action of the national Government, in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union.

The fifth section of the act of July 13th, 1861, providing for the collection of duties and for other purposes, provided that, under certain conditions, the President, by proclamation, might declare the inhabitants of a State, or any section or part thereof, to be in a state of insurrection against the United States. In pursuance of this act, the President, on the 16th of August following, issued a proclamation declaring that the inhabitants of the States of Virginia, North Carolina, Tennessee, Arkansas, and the other States south of these, except the inhabitants of Virginia west of the Alleghanies, and of those parts of States maintaining a loyal adhesion to the Union and the Constitution, "or from time to time occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents," were in a state of insurrection against the United States.

This legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of loyal and the inhabitants of insurgent parts of the country; but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and the responsibilities of national citizenship.

The regulations of trade made under the act of 1861 were framed in accordance with this policy. As far as possible

the people of such parts of the insurgent States as came under national occupation and control, were treated as if their relations to the national Government had never been interrupted.

It is true that the general exception from the prohibition of commercial intercourse, which has just been mentioned, was cancelled and revoked by the President's proclamation of the 31st of March, 1863, and, instead of it, a particular exception made of West Virginia, and of the ports of New Orleans, Key West, Port Royal, and Beaufort, in North Carolina. But this revocation merely brought all parts of insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861. It affected, in no respect, the general principles of protection to rights and property under temporary government, established after the restoration of the national authority.

The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and of property have been, in general, respected and enforced. When Flag-officer Farragut, in his first letter to the rebel mayor of New Orleans, demanded the surrender of the city, and promised security to persons and property, he expressed the general policy of the Government. So, also, when Major-General Butler published his proclamation and repeated the same assurance, and made a distinct pledge to neutrals, he made no declaration which was not fully warranted by that policy. There was no capitulation. Neither the assurance nor the pledge was given as condition of surrender. Both were the manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations, under better forms and firmer guaranties, without any views of subjugation by conquest. Hence, the proclamation of the commanding general at New Orleans must not be interpreted by such rules as governed the case of the *Ships taken at Genoa.** Vessels and their cargoes belonging to citizens

* 4 Robinson, 387.

of New Orleans, or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States after the publication of the proclamation, must be regarded as protected by its terms.

It results from this reasoning that the Venice and her cargo, though undoubtedly enemies' property at the time she was anchored in Lake Pontchartrain, cannot be regarded as remaining such after the 6th of May; for it is not asserted that any breach of blockade was ever thought of by the claimant, or that he was guilty of any actual hostility against the national Government.

It is hardly necessary to add that nothing, in this opinion, touches the liability of persons for crimes or of property to seizure and condemnation under any act of Congress.

DECREE AFFIRMED.

[See *supra*, p. 135, *The Circassian;* a case, in some senses, suppletory or complemental to the present one.]

PICO *v.* UNITED STATES.

When a claim to land in California is asserted as derived through the Mexican Land System, the absence from the archives of the country, of evidence supporting the alleged grant, creates a presumption against the validity of such a grant so strong that it can be overcome, if at all, only by the clearest proof of its genuineness, accompanied by open and continued possession of the premises.

APPEAL by Andres Pico from the decree of the District Court of the United States for the Northern District of California, the case being as follows:

Pico claimed a tract of land in California, to the extent of eleven square leagues, under a grant alleged to have been issued to him on the 6th of June, 1846, by Pio Pico, then Mexican Governor of the department. In 1852 he presented a petition, for the confirmation of his claim, to the Board of Commissioners to ascertain and settle land titles in Califor-

nia, created under the act of March 3d, 1851. The board rejected the claim; but on appeal to the District Court, the decree of rejection was reversed, and the claim was adjudged to be valid, and was confirmed. The United States appealed from this decree of confirmation to the Supreme Court, and by that court the decree was reversed, and the cause remanded for further evidence.* Further evidence having been taken, the case was again brought before the District Court for hearing, and by that court a decree was entered, on the 4th of June, 1862, adjudging the claim to be invalid, and rejecting it. From this decree the present appeal to the Supreme Court is taken.

In support of his claim before the District Court, the claimant produced three documents,—the first purporting to be a grant from the Mexican Governor, Pio Pico, dated June 6th, 1846, for the land; the second purporting to be a certificate of the approval of the grant by the Departmental Assembly, on the 15th of June, 1846; and the third purporting to be a communication from the Deputy Secretary of the Assembly to the Secretary of State, informing him that the grant, together with two other grants, had been approved by the Assembly on the 15th of July, 1846.

Of the first two documents there was no trace in the archives, except what is furnished by the third document. There was no evidence that any of the proceedings required by the Mexican Colonization Regulations, preliminary to the issue of a grant, were taken, either by the claimant or the Governor. The journals of the Departmental Assembly showed that no proceedings were had on the 15th of June, 1846, relating to the grant in question; and that there was no session of that body on the 15th of July, 1846. The third document was found among the archives, but was on a separate sheet, unconnected with any other papers. There was no evidence in the case that the grantee ever took possession of the land under the alleged grant, or that such

* See United States *v.* Pico, 22 Howard, 406.

grant was known, or its existence suspected, until long after the United States had occupied the country.

Mr. Gillet, for the appellant.

Mr. Speed, A. G., and Mr. Wills, for the United States.

Mr. Justice FIELD delivered the opinion of the court.

The regulations of 1828, which were adopted to carry into effect the colonization law of 1824, prescribed with great particularity the manner in which portions of the public domain of Mexico might be granted to private parties, for the purposes of residence and cultivation. It is unnecessary to state the several proceedings designated, as they have been the subjects of frequent consideration in previous opinions of this court. All of them, from the petition of the colonist or settler to the concession of the Governor, were required to be in writing, and when the concession was made, to be forwarded to the Departmental Assembly for its consideration. The action of that body was entered, with other proceedings, upon its journals, and these records, together with the documents transmitted to it, were preserved among the archives of the Government in the custody of the Secretary of State of the Department. The approval of the Assembly was essential to the definitive validity of the concession, and when obtained, a formal grant was issued by the Governor to the petitioner. The regulations contemplated an approval to precede the issue of the formal grant; so when the grantee received this document the concession should be considered final. For a long time after the adoption of the regulations this course of proceeding was followed; but afterwards, and for some years previous to the conquest, a different practice prevailed, and the formal title-papers were issued without waiting for the action of the Assembly, a clause being inserted to the effect that the grant was subject to the approval of that body. Of the petitions presented and grants issued, whether before or after the approval of the Assembly, a record was required to be kept in suitable books provided for that purpose.

As will be perceived from this statement, it was an essential part of the system of Mexico, to preserve full record evidence of all grants of the public domain, and of the various proceedings by which they were obtained. When, therefore, a claim to land in California is asserted under an alleged grant from the Mexican Government, reference must, in the first instance, be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises.

Tested by this rule, the grant under which the appellant claims was properly rejected as invalid. The archives contain no trace of its existence, with the exception of a communication from the Deputy Secretary of the Assembly, addressed to the Secretary of State, informing the latter that the grant had been approved on the 15th of July, 1846. The certificate of approval produced by the claimant declares the approval to have been made on the 15th of June preceding. The journals of the Assembly destroy all confidence in the statements of both certificate and communication. They show that no session was held on the 15th of July, and that no proceedings with reference to the grant in question were had on the 15th of June. There can be little doubt, therefore, that the communication was introduced among the archives subsequently to the acquisition of the country.

Nor was there any evidence produced, either before the Board of Commissioners or the District Court, that the grantee ever entered into possession of the premises alleged to have been granted, or that the existence of the grant was known or suspected until long after the conquest.

The decree of the District Court rejecting the claim must, therefore, be affirmed; and it is

SO ORDERED.

Statement of the case.

Bronson et al. *v.* La Crosse and Milwaukie Railroad Company et al.*

1. Stockholders of a corporation, who have been allowed to put in answers in the name of a corporation, cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting—from unfounded and illegal claims against the company—*his own interest* and the interest of such other stockholders as choose to join him in the defence.
2. The filing of a cross-bill on a petition without the leave of the court is an irregularity, and such cross-bill may be properly set aside.
3. Judgments recovered against a corporation in Wisconsin, after the date of a mortgage by it, are discharged by a foreclosure of the mortgage.
4. Until the filing of his bill of foreclosure and the appointment of a receiver, a mortgagee has no concern or responsibility for or in the dealings of a mortgagor with third parties, such as confessing judgment, and leasing its property subject to the terms of the mortgage.
5. Where a mortgage is made in express terms subject to certain bonds secured by prior mortgage, these bonds being negotiable in form, and having in fact passed into circulation before such former mortgage was given, the junior mortgagees, and all parties claiming under them, are estopped from denying the amount or the validity of such bonds so secured, if in the hands of *bonâ fide* holders. Parties holding negotiable instruments are presumed to hold them for full value, and whether such instruments are bought at par or below it, they are, generally speaking, to be paid in full, when in the hands of *bonâ fide* holders, for value. If meant to be impeached, they must be impeached by specific allegations distinctly proved.
6. A court of equity, where a mortgage authorizes the payment of the expenses of the mortgagee, may pay, out of funds in his hands, the taxed costs, and also such counsel fees in behalf of the complainants as, in the discretion of the court, it may seem right to allow.

Bronson and Souter filed their bill in the Circuit Court for the District of Wisconsin, to foreclose a mortgage made on the 17th August, 1857, by the La Crosse and Milwaukie Railroad Company, a corporation of Wisconsin, covering a portion of a railroad made by the said company in that

* This case was decided at the last term.

State,—the portion being between Milwaukie and Portage City, about ninety-five miles, and called the Eastern Division.* The mortgage was made to the said Bronson and Souter as trustees, to secure the payment of bonds for one million of dollars issued by the company. *These bonds were payable to bearer* in New York, with interest at eight per cent., payable semi-annually. They were registered and countersigned by the trustees, and delivered to the company, and in the autumn of 1859 *had been negotiated and put into circulation.* They were for $1000 each.

The bill alleged that default had been made in the payment of interest, and prayed that the La Crosse and Milwaukie Railroad Company, and all other persons claiming under it, might be decreed to deliver to them, B. and S., or to their agents, and to put them into possession of, the railroad, with its appurtenances; and that all the income of the road might be applied to the payment of the moneys due, and to become due, on the mortgage or bonds; and that the road, with its rolling stock and franchises, might be sold, &c.; and that, pending the proceedings, a receiver might be appointed. The bill was filed December 9th, 1859.

An order *pro confesso* was entered against the company.

Certain other parties, however, besides the La Crosse and Milwaukie Railroad Company, were made parties to this bill.

1. The *Milwaukie and Minnesota* Railroad Company. This company had been organized upon a sale of the La Crosse and Milwaukie Railroad, just named, under a *third* mortgage, which had been made to one Barnes, as trustee, by the debtor company, junior to that of the complainants. This Barnes mortgage, with a supplement to it, was made to secure an issue of bonds to the amount of TWO millions of dollars. The mortgage and supplement, by its terms, was made subject to certain incumbrances, and, among them, "*to the bonds secured by a second mortgage on the Eastern Divi-*

* For an understanding of the position of this road, its Eastern Division, &c., see diagram, *infra*, p. 610.

Statement of the case.

sion of the road to the amount of one million of dollars;" the mortgage, to wit, now sought to be foreclosed. They also had on their back the indorsement thus:

"State of Wisconsin. La Crosse and Milwaukie Railroad Company, 3d mortgage sinking fund bond, seven per cent., &c.;" subject, among other things, "to a 2d mortgage on the same line of road of $1,000,000."

This company did not appear to the bill, but permitted it to be taken as confessed.

2. Certain private individuals—Zebre Howard, also Graham and Scott—were made defendants; the bill alleging that they had, or claimed to have, some interest in the mortgaged premises.

Howard answered the bill, setting forth that, on the 1st of May, 1858, he obtained a judgment against the debtor company, in the Circuit Court of Milwaukie County, for $25,586.78; and that this judgment remaining unpaid, he commenced suit thereon in the District Court of the United States, and recovered judgment in that court November 28th, 1859, for $16,379.86.*

Graham and Scott also answered the bill, setting up a judgment in their favor, recovered in the said District Court in December, 1859, for $41,008.86, founded on two former judgments in their favor in the State court.

The answer of Howard, and that of Graham and Scott, asserted that these judgments, respectively, were liens upon the mortgaged premises; and set forth various matters in defence against the relief prayed for by the complainants. Replications were filed to both these answers. No proof was made of these judgments other than that of their being included in a list of judgments appended to the report of a master in the case.

After the time had expired within which the Milwaukie and Minnesota Railroad Company ought to have answered, but before an order had been entered taking the bill against them *pro confesso*, one J. S. Rockwell, a stockholder of the

* There seemed to be some confusion about these dates, &c., not perfectly understood by the reporter.

said company, presented to the court his petition, charging collusion between the complainants or their agents and one Russell Sage, President of the said Milwaukie and Minnesota Company, to secure a foreclosure and sale in their cause, for the purpose of extinguishing the rights of the said Milwaukie and Minnesota Company, which was alleged to be the owner of the equity of redemption of the mortgaged premises; and that the President of the said last-named company, although requested by its stockholders, had declined to make any defence in this cause. The petition prayed leave to defend the bill, "*on the part of said company*, as a defendant therein, and to be let in and allowed to make such defence as he may be advised is proper or necessary, in the place of said company, as a party defendant to said action, and for a reasonable time to prepare and file his answer." Upon this petition, the court "ordered that the said Rockwell be, and hereby is, allowed to make defence to this bill in the name of said Milwaukie and Minnesota Railroad Company, to the same extent *as the said company could do*, under the rules and practice of this court." In pursuance of this order, Rockwell filed his answer, entitled "The separate answer of J. S. Rockwell, who, by the order of this court, is allowed to make defence to the bill, &c., in the name of the Milwaukie and Minnesota Railroad Company." This answer was signed by Rockwell individually.

Fleming, another stockholder of the Milwaukie and Minnesota Company, presented a petition, charging collusion, as before charged in the petition of Rockwell, apparently upon the theory that Rockwell's was his individual answer, and not that of the company, and praying leave "to put in an answer for said Milwaukie and Minnesota Railroad *Company*, and that said *company* may have thirty days' time to perfect the same, and *prepare a cross-bill as shall be necessary*." Upon this petition, the court "ordered that the said Fleming have leave to put in answer *in the name of the Milwaukie and Minnesota Railroad Company*." Under this order, Fleming filed an answer, entitled, "The answer of the Milwaukie and Minnesota Railroad Company, one of the defendants to

the bill," &c. This answer was signed "The Milwaukie and Minnesota Railroad Company, by A. Fleming, stockholder;" and also, "A. Fleming, stockholder of the Milwaukie and Minnesota Railroad Company." The complainants filed replications to these answers, entitled "Replications, &c., to the answer of J. S. Rockwell," and "Replication, &c., to the answer of the Milwaukie and Minnesota Railroad Company."

The answer of Fleming set up, in general terms, that the bonds of the La Crosse and Milwaukie Company for the one million of dollars were issued, and the mortgage of the road to the complainants made, in violation of the charter of the company, and in fraud of the stockholders and creditors, and it then set forth six particular instances of the alleged fraud on the part of the company, or its officers and directors, in disposing of the bonds. These six instances being connected with the names of, 1st, Chamberlain; 2d, one S. R. Foster; 3d, J. T. Souter, a trustee and complainant; 4th, Greene C. Bronson, another trustee and complainant; 5th, one Prentiss Dow. The 6th charge had reference to a certain leasing of the road to Chamberlain. The answer proceeded thus:

The defendant, answering, states and shows, *upon information and belief*, that the said mortgage and the said one thousand bonds, to which the same is collateral security, was gotten up, contrived, and executed by the said railroad company, when the said company was well known to its board of directors to be greatly embarrassed in its pecuniary condition and affairs, for the corrupt and fraudulent purpose of disposing of said bonds, or a large part thereof, in payment of pretended debts to the officers and agents of said company, or their friends, without any consideration to be paid therefor, or in exchange for the stock of said company, then of little or no value, held by its officers and agents or their friends; and that, in point of fact, a large part of said bonds were so disposed of and given away in violation of the true intent and meaning of the charter of said company, in fraud of its creditors, and of this defendant in par-

ticular; that two hundred of said bonds, being those numbered from 651 to 825 inclusive, and from 851 to 875 inclusive, were delivered or given to the defendant, Chamberlain, in *pretended* payment or satisfaction of a claim of said Chamberlain for services rendered to said company, or for damages sustained by him by reason of the breaking up or surrender of a contract or contracts between him and said company, which claim was wholly fictitious, or was greatly over-estimated, for the fraudulent purpose of enabling him to receive and hold said bonds; that one hundred of said bonds were given to S. R. Foster, of the city of New York, as a security for a *pretended* indebtedness of said company to him, but that, in truth and in fact, said company was not indebted to said Foster, on a fair settlement of accounts, in any sum whatever, but that said Foster was largely indebted to said company; that about fifty-five of said bonds were delivered to the said complainant, J. T. Souter, either without any consideration at all, or as collateral security to or in exchange for certain bonds of the said company, theretofore issued corruptly and fraudulently, and without any legal authority whatever, by the said company, and popularly known as "Corruption Bonds," or "Barstow Bonds," and that said Souter gave no valid or valuable consideration therefor, but that the said transfer to him of the said fifty-five bonds was fraudulent; that fifteen of said bonds were delivered to the complainant, G. C. Bronson, in exchange for stock of the said company, and was pretended to have been sold to him for the stock of said company, which stock was at the time nearly or wholly worthless; and this defendant insists that neither the said company, nor its directors, officers, or agents, had any authority, power, or right whatever to purchase from said Bronson said stock for or on behalf of said company, and pay therefor with money or property or bonds of said company, and that said pretended sale of said fifteen bonds to said Bronson was illegal and fraudulent; that about six hundred of said bonds were sold and disposed of at the nominal price of 80 cents on the dollar, as follows, viz.: forty cents on the dollar of the amount specified in the said bonds, respectively, was to be paid in money, and forty cents on the dollar of said amount in the bonds of said company, known as aforesaid as "Barstow Bonds," or in the said bonds known as "Corruption Bonds," or in the stock of said company; and that the said company received for said six

hundred bonds only about one hundred and ninety thousand dollars in cash, and that it received in said bonds known as "Barstow Bonds" and "Corruption Bonds," and mostly in said Barstow bonds, so-called, about one hundred thousand dollars, and the remainder, to make up said eighty cents on the dollar, in the stock of said company; and this defendant insists that neither the said company, nor its directors, officers, or agents, had any authority, power or right to sell said bonds and receive the capital stock of said company in part payment therefor, and that all of said six hundred bonds, disposed of as aforesaid, are fraudulent and void, and ought to be surrendered and cancelled.

The answer further stated that one *Prentiss Dow*, who was an agent of the company, received fourteen of the bonds for a sum less than one thousand dollars.

It then set forth the circumstances attending a certain *leasing of the road* by the La Crosse and Milwaukie Company to Chamberlain, and the delivery of possession of the same, with its rolling stock and appurtenances generally. According to the terms of the lease referred to, Chamberlain bound himself, after paying the interest and existing claims arising out of prior liens and incumbrances, to apply the net proceeds of the road to the accruing interest on the bonds secured by the mortgage to the complainants. And the allegation of the defendant was, that Chamberlain and the complainants, or their agents, combined to withhold the payment of the interest, for the purpose and with the intent of forcing a sale of the road and its appurtenances, under the mortgage, for the benefit of Chamberlain, that he might become the purchaser; and that the present suit was instituted in pursuance of this arrangement; that Chamberlain had funds in his hands, the proceeds of the road, to pay the interest coupons due the 1st of September, 1859. The answer then set out the title of the Milwaukie and Minnesota Company under the foreclosure of the third mortgage.

The answer of Rockwell, the other stockholder, was substantially the same as that of Fleming.

The evidence in regard to these facts was very voluminous and intricate, making what the court styled "a *most* compli-

cated and difficult case."* It filled a volume of more than one thousand large pages of small pica, set "solid." The facts, too, were resolutely contested, the argument in this court, and chiefly upon them, having lasted six days. It is not possible to present here the evidence of them. As assumed by the court in the result and truth to have been proved, they were in substance somewhat thus, though this was not exactly the view taken of them by Mr. M. H. Carpenter, counsel of the defendants to the bill, who collocated, presented, and enforced the evidence of irregular dealing with singular eloquence and force.

1. *As respected Chamberlain.* This person, who had been a contractor on the western part of the road, held a claim for damages against the company, on account of their failure to fulfil their contracts made with him; a failure which arrested the progress of the work. In the autumn of 1857, upon the issue of the bonds of the company under this second mortgage, an arrangement was entered into by the company, by which he received, towards payment of this claim, the two hundred bonds in question; not at par, but *at fifty cents on the dollar.*

2. *As respected S. R. Foster.* He had lent to the company more than one hundred and fifty thousand dollars, and had taken their bonds as security. Among them were the one hundred in question. At a meeting of the board of directors, 24th of May, 1858, the matter between the parties was adjusted by delivery to him of forty bonds, called "land grant bonds." The terms on which he held them were not distinct; but it was not shown that he paid what is called their "face;" in other words, their par.

3. *As respected J. T. Souter.* The fifty-five bonds in controversy between him and the company were settled, as appeared by a receipt of one Guest, their chairman and vice-president, on 14th of September, 1858, by the delivery of other bonds to the company.

4. *As respected G. C. Bronson.* He had purchased fifteen

* See 1 Wallace, p. 411, note.

thousand dollars worth of stock from the company in the spring of 1857, and *paid eighty cents, cash, on the dollar*, the president, at the time, agreeing that the company would repurchase it at the same rate at any time thereafter, if he should wish to surrender it back. In September, 1858, they did take it back; and for this, delivered to him the fifteen bonds. A meeting of the board of directors on the 2d of that same September had resolved that it would take into consideration the stock theretofore purchased by Judge Bronson, as he had rendered many services to the company, for which he had received no compensation.

5. *As respected Prentiss Dow.* It appeared that *thirteen* bonds had been received by him, and that for these he paid the company at the time but $11,400 in cash, stock, and *other bonds*, the value of which was not so entirely evident. However, he was afterwards engaged in the company's service as its agent, settling claims against the company.

Without going into more particulars, it seemed that at the time these bonds were issued, and afterwards, the La Crosse and Milwaukie Company were a good deal pressed for money, as it remained all along. Before issuing the bonds now in question, it had printed and circulated a letter essentially as follows; and the bonds, when made, were sold pretty generally, it rather appeared, for what they would bring; and that what they would bring was sometimes not much. The transactions, so far as the reporter could understand the immense body of testimony, had a good deal the aspect which generally marks the fiscal arrangements of unfinished and embarrassed railroad companies endeavoring to get themselves into successful operation. While resorts to equivocal expedients might have been sometimes practised, many of the witnesses spoke without personal knowledge, and from impressions chiefly. The circular was thus:

"Office of the La Crosse
and Milwaukie Railroad Co.,
August 10, 1857.

"The importance of completing our road this season to the junction of the Western Division, sixty-one miles from Portage

City, by which we should not only control the coming winter's travel of the Upper Mississippi, but receive over 300,000 acres of our land grant, has decided the board of directors to place before the stock and bondholders extraordinary inducements to furnish the means necessary to accomplish this object. The sum required to meet the engagements of the company, and finish the road sixty-one miles beyond Portage City, is about $400,000. To obtain this sum, the company now offers to the holders of its stock and unsecured bonds (now so much depreciated in market) a new issue of one million of eight per cent. bonds, payable in 1870, secured by a deed of trust to Hon. Greene C. Bronson, and J. T. Souter, President of the Bank of the Republic, in New York, upon the Eastern Division of its road from Milwaukie to Portage City, ninety-five miles, subject to a prior lien of about $13,000 per mile.

"It was intended to issue this new loan exclusively to stockholders, receiving in payment $400 in the stock of this company, and $400 in cash for a bond of $1000, but it has been concluded to extend a like privilege to bondholders of the *unsecured* bonds of this company which are outstanding, receiving such bonds, with unpaid coupons flat, upon the same terms as the stock.

"The subscription will be paid as follows: one-fourth of the cash payment at the time of making the subscription; the remainder, with the stock or old bonds, to be surrendered either at the time of subscribing, or on the first day of September, when the new bonds will bear date and be ready for delivery.

"Books are now open at this office.

"BYRON KILBOURN,
"President."

6. *As to the charge of collusion of the complainants with Chamberlain in the proceedings to foreclose the mortgage.* This allegation was founded upon an agreement entered into with Chamberlain, on the 13th of November, 1859. At the time of this agreement he was in possession of the road and in the receipt of its earnings, and, for the purpose of giving to the trustees the control of its earnings during the proceedings to foreclose, he agreed to deposit them with the agent of the trustees, from day to day; and the trustees, on their part, *agreed* to appropriate them to the objects and uses

provided for in the lease, as the exigencies and working of the road might require. The trustees, in order to secure the control of the agents of Chamberlain, connected with the earnings of the road and the receipts of its revenues, stipulated for a supervision over them, and for the discharge of any of them from the service if desired. They provided, also, for access to the books and papers relative to the revenues, &c., of the road; also, for the appointment of a receiver in case of the non-fulfilment of the agreement on the part of Chamberlain.

The interest on the second mortgage bonds, then due on them, amounted to $40,000. It was now agreed, that the proceedings of foreclosure should be conducted amicably; that no considerable opposition should be made to them by Chamberlain; and, also, that the sale should be made, if practicable, subject to the lease to Chamberlain, and that no opposition should be made to his purchase of the road at the sale under the foreclosure; but the trustees reserved the right to bid at the sale for the protection of the bondholders. The trustees also agreed, that in case Chamberlain should become the purchaser, they would extend a credit of nine, and twenty-four months upon so much of the interest as had become due.

On the 3d of September, 1860, Fleming exhibited in the District Court, in this cause, a CROSS-BILL in the name of the Milwaukie and Minnesota Railroad Company, against the complainants, for discovery in support of the answer filed by him in the name of the company; and, on the same day, the court made an order on the cross-bill, that a subpœna should issue, and service be made on the solicitor of the defendants. Subpœna was issued accordingly. On the same day the court ordered that the said Bronson and Souter, defendants aforesaid, "do enter their appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise, the bill filed must be taken as confessed." The defendants to the cross-bill moved the court to strike it from the files, for the

reason that it had been filed without leave of the court, and, also, subject to this motion to strike off, filed a demurrer to it. The court subsequently made an order sustaining the motion.

The cause was finally heard below, and decree passed in favor of the complainants, for FIFTY CENTS ON THE DOLLAR of the amount, principal and interest, specified in the bond secured by their mortgage to the complainants, and directing a sale of the railroad between Milwaukie and Portage.* The road was at this time in the hands of a receiver.

On appeal here, the following were the principal points:

1. As to the answers of the two stockholders, Rockwell and Fleming, and of Fleming more particularly:—How far these answers of individual stockholders were to be regarded as answers of the Milwaukie and Minnesota Company?

2. Whether the cross-bill of Fleming had been properly dismissed? no leave having been asked to file it.

3. As respected the judgments of Sebre Howard and of Graham and Scott:—Whether they were liens?

4. The real nature and effect of the transactions with the parties: 1. Chamberlain [his bonds]; 2. S. R. Foster; 3. J. T. Souter; 4. Greene C. Bronson; 5. Prentiss Dow; 6. Chamberlain [his lease, &c.].

5. Whether, on the whole case, and in view of the express terms of the third mortgage, that its bonds, &c., were to be subject to the prior, or second mortgage, the complainants were entitled to have no more than fifty cents, as decreed them in the court below, on the dollar, or to have the full amount which the bonds on their faces called for.

Mr. Carpenter, for the defendants:

1. An issue was formed upon the record, between the complainants and the Milwaukie and Minnesota Railroad Company, by their filing a replication to its answer; and the complainants are now estopped from insisting that the *com-*

* Whether this decree directed also a sale of any portion of the rolling stock, was one of the questions litigated by the parties in a second appeal, reported *infra*, p. 609.

pany has not made defence. It is merely a question between the company and its stockholders, Fleming and Rockwell; and as the company did not in court object to the individual answer, but, on the contrary, retained counsel in this court to insist upon it, the company must be deemed to have ratified the act of its stockholders, and thereby to have recognized and ratified the answer so made in its name.

2. No leave was necessary to file the cross-bill. The leave which was granted to file the answer carried with it the leave to sustain the answer by testimony; and the cross-bill was a legitimate and proper method of obtaining such testimony. If leave were necessary, the order of the court upon the cross-bill, directing subpœna to issue, and ordering the defendants therein to appear and answer, was equivalent to leave.

3. As respects the judgments of Sebre Howard and of Graham and Scott. There appears to be some confusion or misapprehension of dates. As we understand them, the judgments were liens. The existence of judgments cannot be really doubted. The mention of them by the master in his *list of judgments* should be enough in the absence of counter-testimony.

4. The testimony, as we understand it, goes to show that these transactions with Chamberlain, Foster, Souter, Bronson, and Dow, were very irregular; that the parties were not *bonâ fide* holders for full value at all. The bonds were procured by the relations of confidence and control in which the parties stood to the road, by breaches of trust and confidence, implied, if not direct. Certainly, there were many of them got at enormous discounts. This sort of operation is a crying evil of our country. Men placed to manage corporations for the interest of the stockholders, manage them only for their own. They become contractors, half ruin the corporation, pay themselves with its assets at enormous discounts, then resuscitate things and are rich in the result. Here Chamberlain, confessedly, paid but fifty per cent. for his large amount. As to Souter, he was a trustee; a party who ought not to have dealt in these bonds at all.

Guest, under whose act he claims, was vice-president, no doubt; but this gave him no authority to make the transactions with Souter which he did. Bronson's claim is worse; he was a trustee and a stockholder both; stockholder in an insolvent corporation. He sold, or pretended to sell, his stock to the company for $15,000; bonds secured by mortgage on its property. This was a fraud upon its creditors. The assets of a corporation constitute a fund for the payment of its debts. "If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. *If they have been distributed among stockholders*, or gone into the hands of other than *bonâ fide* creditors or purchasers, leaving debts of the corporation unpaid, *such holders take the property charged with the trust in favor of creditors*, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts."* Bronson was transformed by the operation which he effected, and which we object to, from the condition of one of the corporators of an insolvent corporation to that of its preferred creditor.

5. How does the notice on the back of the third mortgage affect the case? Even though the organization of the Milwaukie and Minnesota Company arose under a junior mortgage, it still claims with the rights of both a purchaser and a creditor, for it advanced its money on a specific lien.† Such a party may always set aside a fraudulent conveyance, even though when about to lend his money such conveyance may have been flouted in his face to prevent his doing so. These trustees nowhere assert that they hold for *full value*, or that any one under them does, though they state that the bonds were signed, registered, issued, and negotiated. Every one in Wisconsin knows that no full value was given. The term "Corruption Bonds" was not more the stigma of a fraud than an illustration of the natural tendency of language to assert proper nomenclature from new facts. The

* Curran *v.* State of Arkansas, 15 Howard, 307.

† Finch *v.* Earl of Winchelsea, 1 Peere Williams, 278.

circular issued August 10th, 1857, shows the circumstances under which parties were invited to buy these bonds. They were invited to irregular transactions; and the sequel showed that they profited well of their bidding.

6. The lease to Chamberlain was a part of the general style of management; and if the final arrangements by which the attempt to foreclose the second mortgage were facilitated are conceived of by the court as we conceive them, it will have no difficulty in simply affirming the decree.

Messrs. Carlisle and J. S. Brown, contra:

1. The answers by Fleming and Rockwell were not an appearance of the *company*, or answer of the *company*, in fact. The company was a distinct, political, or legal person, which could sue Mr. Fleming or Mr. Rockwell, or be sued by them. A corporation must appear by its authorized attorney, and its answer must be under seal, authenticated and attached by the proper officers. The law intrusted the management of its affairs to a board of directors, and in the eye of the law, and for purposes of this suit, they alone represent the company. It was for that board to determine whether any defence, and what defence, was expedient, and whether they would file an answer admitting our rights, or by silence give an admission in the law. That board of directors chose the latter mode, and upon that fact the court below gave us an order, *pro confesso*, against it. Its position as defendant to a foreclosure suit gave the court below no power to take the management of the suit from the directors (or, in other words, from the defendant interested) and give it to a man who, although stockholder, was in the law a stranger. It certainly gave no power so to do on a petition, without notice to the directors interested in the result. If they had abused their powers, or misrepresented the interests of the company in such a manner as to justify a decree of ouster, that should have been obtained by decree of a State court having jurisdiction over such matter, upon proper proceeding, for that identical purpose; and then the management of the company affairs and of its defence would be in

such new hands as the law intrusted them to, and not in a mere volunteer for the purpose of litigation.

2. The fact that the cross-bill was irregularly filed we think to be clear by the settled rules of chancery. The court below, itself, set it aside, though decreeing generally so much against us.

3. To entitle Graham and Sebre Howard to defend against the mortgage as a fraud upon creditors, it was necessary for them to set up in their answers, and to *prove* their relations as creditors at the *time* of the mortgage; a *subsequent* relation of creditors does not enable them to inquire into these frauds. No evidence of judgments is before the court but the list attached to the master's report, and this does not prove their dates or their existence. Courts do not allow litigation of abstract principles; and a party who complains of fraud must show that he can gain or lose by the decision of the court.

In their answers, Graham and Scott allege a judgment in the Circuit Court of Milwaukie County in September, 1858, and a judgment in the United States District Court in 1859, both of which were *subsequent* to the third mortgage. Howard alleges a judgment in the Circuit Court of the County of Milwaukie in May, and a subsequent judgment in the United States District Court in 1859, for the same cause of action.

4. The making of the mortgage and the issuing of the bonds is confessed. Now how stand the individual cases which make the most defined cause of defence?

As to Chamberlain. The two hundred bonds issued to him depend upon the power of directors in good faith to agree with a contractor upon the amount of damages done to him for breach of contract. Chamberlain had a just claim, and they pay him in bonds at their market rate. What objection is there to this, even if the rate is but fifty per cent.?

As to Foster. These one hundred bonds were sold in the regular course of business; and the directors afterwards, on settlement, allowed Mr. Foster an additional amount in land-grant bonds.

As to J. T. Souter. These fifty-five bonds were given in

exchange for other bonds of the company, for which the receipt of the vice-president is produced.

As to G. C. Bronson. The fifteen bonds of Bronson were delivered to him in exchange for stock purchased by him of the company, under an express agreement that they would repurchase at the same price,—eighty cents on the dollar.

As to Prentiss Dow. These bonds, fifteen only, were purchased and paid for by him in the regular course of business, and are long since sold.

Six hundred and fifteen bonds stand unimpeached by any legitimate testimony. The answer deals, indeed, in general allegations. It alleges that so many bonds were sold to various persons, for which, in the aggregate, only a certain sum was received in money, and the balance (of eighty cents on the dollar) in "Barstow Bonds," or "Corruption Bonds," or in stock. But what "Corruption Bonds" were, or "Barstow Bonds" are, we are not told. So we are uninformed as to what proportion was paid in money, what in stock, what in these bonds; nor does the answer distinguish between the different transactions. Indeed, only this kind of general allegation marks even those cases where specific charges are pretended to be set up. The charge as to the transaction with Foster merely alleges in general terms that the La Crosse Company was overreached. That as to Dow is in the same position. That as to Souter is a little more distinct in its charge of fraud on the La Crosse Company, but, like the rest, fails to state what bonds were so obtained. The charge as to Chamberlain is a general one, that in some way, under pretence of settling a claim for damages, he obtained a larger sum than should have been allowed him. The charge that directors made the mortgage in fraud of creditors is the one in which allegations are the most specific; but even with these no debts are stated, no creditors given, nor is it charged that any one of the holders of bonds was aware of the condition of the company, or of the fraudulent intentions of the directors. No combination is anywhere charged. Now, in all the cases specified, and in the remainder not specified,

we insist upon this rule, to wit, that when an answer seeks to attack bonds issued by a railroad company to various parties, by various transactions, and to set aside such bonds as fraudulent, it must, in regard to each transaction, contain all the allegations which would be necessary in an original bill against the holder to set aside such bonds.

5. The fact that the third mortgage was made subject in terms to the payment of the Bronson and Souter bonds in full, is ingeniously evaded by Mr. Carpenter. It is not met and answered. What equity have these junior mortgagees with such a fact in the case? Admit that the bonds were sold below par, or given away for nothing, still, had not the *stockholders*, when asking a new loan, a right to ratify them as against these parties? to say to parties proposing to lend, "We shall be happy to deal with you, but you must recognize *in full* the existing bonds. *Observe the conditions?*" That is what they did say. And subject to what was said the lenders lent: lending at higher rates in proportion as their security was impaired by its stipulated inferiority to the preceding debt. If the case were between original *stockholders*, denying the acts of the directors of the road, and the holders of the second mortgage bonds, an equity might exist. But the case is not that one.

6. Finally, it is to be remembered, that at the time when these bonds were negotiated, the whole Northwest, and especially Wisconsin, was under a cloud, and railroad property was of doubtful value. The division of the road in question was then subject to a mortgage of $13,000 on every mile. Interest was in arrears; and if the earnings of the road pending litigation on our mortgage were not faithfully applied to keep down interest on prior incumbrances, those prior incumbrances might be foreclosed, and sweep the entire property from under our mortgage. This, indeed, we may say, in passing, was the secret of the agreement in the lease to Chamberlain. Thirteen hundred thousand dollars in those days could not easily be raised for investment in Western securities. The circular of 17th of August, adumbrates, or rather projects, in broad cast, the case.

We submit that in such a case, indeed, that in most cases the negotiation and sale of railroad bonds do not stand upon the same footing as ordinary transactions between individuals. Whatever may be the opinion of any one as to the expediency of such a policy, the custom of the country has established a mode of dealing in such securities peculiar to itself. These bonds are universally sold in the market for what they will bring. They are not founded upon, nor do they presuppose a previous indebtedness to support them.

Independently of this, it is too late for any corporation, municipal, railroad, or other, to issue bonds, to sell or negotiate them in ordinary transactions, and then come into *this* court, with a hope of getting clear of any portion of the payment of them. Repudiation, in whatever garb or guise it has presented itself, within these precincts, and in *this* purprise, has been invariably sent away; driven out with peremptory orders never, in any form, to appear again. Such doctrines as have been asserted in some of our legislatures, and tolerated even in certain courts of the States, have been frowned on as dishonoring the law, and dishonoring the land.* If, in particular cases, they have worked hardship to particular persons, or in particular regions, they will do infinite service to the country in that they keep in full life the sense of obligation which should ever attend the creation of debt, and that they maintain, in its proudest elevation, that honorable justice which is the standing interest of all countries and of all times.

Mr. Justice NELSON delivered the opinion of the court:

As the two stockholders (Rockwell and Fleming), though not made defendants by the bill, were permitted, by leave of the court, to appear and put in answers in the name of the Milwaukie and Minnesota Company, it is material to inquire into the effect to be given to them. That they can-

* See Mercer County *v.* Hacket, 1 Wallace, 83; Gelpcke *v.* City of Dubuque, Id. 175, REP.

not be regarded as the answers of the corporate body is manifest, as a corporation must appear and answer to the bill, not under oath, but under its common seal. And an omission thus to appear and answer according to the rules and practice of the court, entitle the complainants to enter an order that the bill be taken *pro confesso*. A further objection to the practice of permitting a party to appear and answer in the name of the corporation is the inequality that would exist between the parties to the litigation. The corporation not being before the court, it would not be bound by any order or decree rendered against it, nor by any admissions made in the answer or stipulations that might be entered into by the parties or their counsel. It is thus apparent, that while the name of the corporation is thus used as a real party in the litigation so far as the rights and interests of the complainants are concerned, it is an unreal and fictitious party so far as respects any obligation or responsibility on the part of the respondents.

It is insisted, however, that the directors of this company refused to appear and defend the bill filed against them, and for the fraudulent purpose of sacrificing the interests of the stockholders; and, hence, the necessity, as well as the propriety and justice, of permitting the defence by a stockholder in their name.

Undoubtedly, in the case supposed, it would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless. But in such a case, the court in its discretion will permit a stockholder to become a party defendant, for the purpose of protecting his own interests against unfounded or illegal claims against the company; and he will also be permitted to appear on behalf of other stockholders who may desire to join him in the defence. But this defence is independent of the company and of its directors, and the stockholder becomes a real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and

should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong. A complainant, if he chooses, may compel a corporation to appear and answer by a writ of *distringas;* or he may join with the corporation, a director, or officer, if he desires a discovery under oath. But we are not aware of any other except a complainant who can compel an appearance or answer.

Now, although the appearance and answers of the stockholders (Rockwell and Fleming) were irregularly allowed by the court, as each was permitted to appear and answer in the name of the company, yet, as the defence set up is doubtless the same as that which they would have relied on if they had been admitted simply as stockholders, we are inclined to regard the answers the same as if put in by them in that character, in the further views we shall take of the case. Each one swore to the truth of his answer in the usual way.

Before we enter upon an examination of the merits of the case, it will be proper to dispose of the cross-bill filed by Fleming against the complainants.

This bill was filed in the name of the company alone, signed by their solicitors and counsel. The name of Fleming does not appear. And in addition to this, it appears that Fleming, in his petition for leave to appear and answer the bill in the name of the company, also asked leave to file a cross-bill. Leave was granted to put in the answer, but not to file the bill. The filing of it subsequently, therefore, was an irregularity for which the court below very properly afterwards set it aside. The cross-bill, so much spoken of in the argument, is thus out of the case. In this connection we may as well refer to the answers of the judgment creditors, who were made parties defendant to the bill of complaint.

Sebre Howard recovered a judgment in the United States District Court, on the 28th November, 1859, against the La

Crosse and Milwaukie Railroad Company, for the sum of $16,379.86; and Graham & Scott, a judgment in a State court of Wisconsin, on the 25th November, 1858, against the same company for the sum of $29,820.71; and another judgment in the same court, on the 21st September, 1858, for the sum of $11,188.15; and also a judgment against the same company, in the United States District Court, on the 11th January, 1860, for the sum of $44,413.18. This latter judgment appears from the answer, as we understand it, to have been founded on the two previous judgments in the State court. Now, it appears that each of these judgments were recovered after the date of the third mortgage of the La Crosse and Milwaukie Company, upon the foreclosure of which the Milwaukie and Minnesota Company was formed. The liens of these judgments were subsequent to this mortgage, and were cut off by its foreclosure. Indeed, the judgment of Howard, of November, 1858, and the last judgment of Graham & Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse and Milwaukie Company, the defendants in the judgments, as the equity of redemption had already passed to the purchaser under the sale to Barnes in the foreclosure of the third mortgage, and afterwards became vested in the Milwaukie and Minnesota Company. These judgment creditors, therefore, according to their answers, have no interest in the subject-matter of this litigation. We may add, that as replications were filed to the answers, the proof of these judgments should have been produced at the hearing. But the only proof of them that we have found in the record, is in a list of judgments annexed to the report of the master. They were material, and were put in issue by the replication.

These answers of the judgment creditors being thus disposed of, the issues in the case are brought down to those raised by the answers of Rockwell and Fleming, in the name of the Milwaukie and Minnesota Company, which we have agreed to consider rather by indulgence than as matter of strict right, as the answers of the individual stockholders.

And this brings us to an examination of what may be called the merits of the case.

Before we take up the questions presented by these answers to the bill which bear upon the merits, it will be proper to refer to some matters there presented, and very much discussed on the argument, which, in our judgment, should be laid entirely out of the case, as tending only to confuse and embarrass the real questions involved. We refer to those parts of the answers which relate to the dealings between the La Crosse and Milwaukie Company and Chamberlain, in which the complainants in this suit were not concerned, and with which they had no connection, as, for instance, the lease of the road to Chamberlain, and the allegation of fraud against him and against the company in conducting the business of running the road under this lease. Also, in respect to other contracts between these parties in relation to the indebtedness of the company to Chamberlain, and to the building and completion of unfinished portions of the road, and equipping it with the rolling stock for use. These relate to the dealings of the mortgagor, the La Crosse and Milwaukie Company, with a third person, over which the complainants, as mortgagees, had no control, and for which they were not responsible. These dealings were subsequent to the execution and lien of the mortgage, and could not affect prejudicially the rights of the mortgagees. They had no interest in the earnings of the road, or concern in the appropriation of them, until the filing of the bill and the appointment of a receiver.

The only matters, therefore, set forth in these answers, and in the proofs, which have any bearing on the merits, are:

1. The allegation that Chamberlain received from the La Crosse and Milwaukie Company two hundred of the bonds secured by this mortgage fraudulently and without consideration.

2. That S. R. Foster received one hundred of the bonds in the same way.

3. That J. T. Soutter, one of the trustees, received fifty-five of them, and refused to deliver them to the company.

4. That Greene C. Bronson, the other trustee, received fifteen for the stock of the company.

5. That Prentiss Dow, an officer of the company, received fourteen for less than one thousand dollars.

And 6. That Chamberlain, who had covenanted, in the lease of the road from the company, to apply the proceeds derived from the use of it to the payment of the interest accruing on the bonds, withheld the payment in pursuance of a fraudulent arrangement with the trustees, or with their agents, for the purpose of bringing about a foreclosure of the mortgage, that he might be enabled to purchase the road.

These are the allegations that bear upon the merits of the controversy, and deserve to be considered. We shall not, however, encumber this opinion with any very detailed explanation of them, but shall briefly refer to the proofs relating to each of these charges.

1. *As to Chamberlain.* It appears that he held a large claim for damages against the company, on account of their failure to fulfil contracts made with him to build the Western Division of the road. The work on the road was suspended by reason of this failure. And in the fall of 1857, upon the issue of the bonds of the company, under this second mortgage, an arrangement was entered into by the company, by which he received these two hundred bonds, at fifty cents on the dollar, towards payment of this claim.

2. *As to S. R. Foster.* He had loaned the company over one hundred and fifty thousand dollars, and had taken their bonds as security, and, among others, the one hundred in question. It appears that, at a meeting of the Board of Directors, 24th May, 1858, the matter between them was adjusted by delivery of forty land-grant bonds to Foster.

3. *As to T. J. Soutter.* The fifty-five bonds in controversy between him and the company were settled, as appears by a receipt of their chairman and vice-president, on 14th September, 1858, by the delivery of other bonds to the company.

4. *As to G. C. Bronson.* He had purchased fifteen thousand dollars of stock, one hundred and fifty shares, from the company, in the spring of 1857, and paid eighty cents cash on

the dollar, the president at the time agreeing that the company would repurchase it at the same rate, at any time thereafter, if he should wish to surrender it back. The company was, doubtless, pressed for money at the time. At a meeting of the Board of Directors, on the 2d of September, 1858, it was resolved, that it would take into consideration the stock theretofore purchased by Judge Bronson, as he rendered many services to the company for which he had received no compensation; and afterwards, in September of the same year, it appears that the president of the company, who had induced him to purchase the stock, received it back, and delivered to him the fifteen bonds in question. The truth of the case, therefore, is, that instead of receiving from the company the money he had advanced for the stock, according to their agreement, he received in place of it only bonds of the company of less than half the value; and, as it appears, nothing for his legal advice and services.

5. *As to Prentiss Dow.* It appears that but thirteen bonds had been received by him, and for which he paid the company, at the time, $11,400 in cash, stock, and other bonds, and was afterwards engaged in its service as agent, settling claims against the company.

In this connection, it is proper to refer to the terms, as published in a circular by the La Crosse and Milwaukie Company, and under which these bonds were negotiated and put into circulation. This paper is dated August 10th, 1857. The company state, that the importance of completing the road this season to the junction of the Western Division (sixty miles from Portage), by which they would not only control the coming winter's travel of the Upper Mississippi, but receive over 300,000 acres of the land grants, have determined the Board of Directors to place before the stock and bondholders extraordinary inducements to furnish the means; that the sum of $400,000 would be required. To obtain this sum, the company now offers the holders of its stock and of unsecured bonds, a new issue of one million of 8 per cent. bonds, &c. The terms proposed are, to receive in payment for a bond of $1000, $400 in cash, and the like

sum in the stock or unsecured bonds of the company. It was upon these terms that the directors went into the market, in the city of New York and elsewhere, for the purpose of negotiating the bonds which now constitute the subject of litigation.

6. *As to the charge of collusion of the complainants with Chamberlain, in the proceedings to foreclose the mortgage.* This allegation is founded upon an agreement entered into with Chamberlain, on the 13th of November, 1859. At the time of this agreement he was in possession of the road, and in the receipt of its earnings, and the obvious object of it, on the part of the trustees, was to procure the control of the net proceeds of its earnings, pending the proceedings of foreclosure. For this purpose, Chamberlain agreed to deposit the whole of the earnings with the agent of the trustees, from day to day; and the trustees, on their part, agreed to appropriate them to the objects and uses provided for in the lease, as the exigencies and proper working of the road might require. The trustees, in order to secure the fidelity of the officers and agents of Chamberlain, connected with the earnings of the road and the receipt of its revenues, stipulated for a supervision and control over these persons, and for the discharge of any of them from the service, in case of a dereliction of duty. They provided, also, for access to the books and papers relating to the revenues, management, and running of the road; also, for the appointment of a receiver, in case of the non-fulfilment of the agreement on the part of Chamberlain. These provisions were very important, as the revenues of the road, according to the terms of the lease, after covering running expenses and paying the interest on prior incumbrances, were to be applied to the discharge of the interest on these second mortgage bonds. The interest then due on them amounted to $40,000. It was also agreed that the proceedings of foreclosure should be conducted amicably; that is, no unreasonable opposition should be made to them by Chamberlain. It was further agreed that the sale should be made, if practicable, subject to the lease of Chamberlain, and that no

opposition should be made to his purchase of the road at the sale under the foreclosure; but the trustees expressly reserved the right to bid at the sale for the protection of the bondholders. The trustees also agreed that, in case Chamberlain should become the purchaser, they would extend a credit of nine and twenty-four months upon so much of the interest as had become due.

It is supposed that the arrangement was entered into for the fraudulent purpose of enabling Chamberlain to purchase the road at the foreclosure sale, and thereby cut off subsequent incumbrances, and especially the rights and interests of the Milwaukie and Minnesota Company, formed under the third mortgage. But there is no evidence of this charge in the proofs, nor even of any previous dealings between the parties, tending to this conclusion. They came together for the first time after the trustees had determined to foreclose the mortgage for default in the payment of interest, and finding Chamberlain in the possession of the road, and refusing to deliver it over to the trustees, as provided for in the mortgage, but, on the contrary, insisting upon his right to run the same pending the legal proceedings, it is not strange that the trustees should have endeavored to arrange with him for a supervision and control, in the meantime, over the earnings and management of the road, and that he should forbear any unreasonable opposition to the foreclosure suit. And as to the provision relating to the purchase in case of a sale, there is nothing in it interfering with any rights that belonged to the trustees, or to the prejudice of third parties, the judgment creditors, or company formed under the third mortgage. In a word, the arrangement was highly beneficial to the bondholders represented by the trustees, and prejudicial to no one concerned in the foreclosure suit.

We shall not, however, dwell longer on this branch of the case; indeed, much that we have thus far said has been rather by way of explanation, and for the purpose of clearing it of matters and issues that do not belong to it, and have served only to confuse and embarrass its consideration. In view of this object and purpose, we have referred to the two

answers of the stockholders, Rockwell and Fleming, and have endeavored to separate the irrelevant matter from that which bore upon the merits, so as to confine the examination to the latter, namely, to the charges against the validity of the bonds impeached, of the number of some three hundred and eighty, in the hands, or which passed into the hands of several individuals named, and have shown, as we think, by a reference to the proofs, that these charges are not well founded. The general and sweeping allegations against the other portion of the bonds, without specification or identity, we have not specially noticed. These charges are too general to be entitled to consideration, and the proofs relied on are as general and indefinite as the allegations.

We have also shown that the judgment creditors who appeared and answered have no interest in the matters in controversy; and, lastly, that the charges of a fraudulent collusion between the trustees and Chamberlain rest upon suspicion instead of upon proofs.

We now come to a branch of the case which presents a more conclusive answer to all the charges, whether in allegations or in proofs of the respondents, and overrides all other views that may or can be taken of them.

As we have seen, this third mortgage, under which the Milwaukie and Minnesota Company was formed, was executed and delivered to Barnes, the trustee, on the 22d June, 1858, to secure the payment of an issue of $2,000,000 in bonds, and a supplement to this mortgage was executed to the same trustee, on the 11th August following.

These two mortgages, or rather one in two parts, were, in express terms, *made subject, among other incumbrances mentioned, to the bonds secured by a second mortgage on the Eastern Division of the road, to the amount of one million of dollars.*

Again, the bonds issued under this third mortgage, one of which is in the proofs, have an indorsement on the back, as follows: "*State of Wisconsin, La Crosse and Milwaukie Railroad Company, third mortgage sinking fund bond, seven per cent.,*

&c.;" subject, among other things, "*to a second mortgage on the same line of road of* $1,000,000."

At the time this third mortgage was executed, and thus made subject to the second mortgage bonds, all these bonds had been negotiated by the company, and were in circulation in the business community. They were all negotiated in the months of September, October, November, and December, 1857. This, the company, of course, well knew at the time of the execution of the third mortgage, and knew, also, of the circumstances attending the negotiation of them. They had received and were in the enjoyment of the avails of them, and with this knowledge, and under these circumstances, the third mortgage, and the bonds issued under it, were made in express terms subject to the payment and satisfaction of the bonds issued under the second. All persons, therefore, taking these third mortgage bonds, or coming in under the mortgage, took them and came in with a full knowledge that the mortgagor had made the security subject to the prior lien and indebtedness. Even if there had been any valid objection to these bonds under the second mortgage, it was competent for the obligor to waive them, and no better proof could be furnished of the waiver, than the acknowledgment of the full indebtedness, by making the subsequent security subject to it. This was a question that belonged to the obligor to determine for himself when giving the third mortgage; but, besides this, what right have those coming in under it to complain? They come in with full notice of the acknowledgment of the indebtedness and previous lien; and, especially, what right have the Milwaukie and Minnesota Company to complain, who purchased the equity of redemption through Barnes, their agent, subject to the previous incumbrances of $1,000,000. They have the benefit of that incumbrance by an abatement of that amount in the price of the purchase.

Without pursuing the case further, we are satisfied the decree of the court below, reducing the indebtedness of the La Crosse and Milwaukie Company to the bondholders, is

erroneous, and that the decision should have been for the full amount of one million of dollars, and interest.

WE SHALL, THEREFORE, REVERSE the decree, and remit the cause to the Circuit Court of the United States for the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same; and that if the moneys thus applied are not sufficient to discharge the interest due on the first day of March, 1864, then to ascertain the balance remaining due at that date, and in case such balance is not paid within one year from the date of the order of the court ascertaining it, then an order shall be entered directing a sale of the mortgaged premises, under the direction of the court, and on bringing the proceeds into court, they shall be applied to the payment of the balance of interest; and if they exceed such balance, shall be applied to the future accruing interest down to the sale; and if they exceed that, to the principal of the bonds, in case the bondholders assent, or *pro rata* to those who may assent, and any remaining balance of the proceeds to be invested, under the direction of the court, for the payment of future accruing interest, and ultimately the principal.

AND FURTHER, that in case the interest upon the bonds is paid without a sale, the decree shall remain as security for subsequent accruing interest, and ultimately for the principal.

AND FURTHER, that the court may pay out of moneys in the hands of the receiver, or out of the proceeds, the taxed costs of the trustees in the proceedings for the foreclosure of the mortgage, not taxed and received from the defendants in those proceedings; and also such counsel fees in behalf of the trustees, as the court, in its discretion, may seem right to allow.

DECREE ACCORDINGLY.

Statement of the case.

RANSOM *v.* WILLIAMS.

Under the statute of Illinois which authorizes execution to issue against the lands of a deceased debtor, *provided* that the plaintiff in the execution shall give notice to the executor or administrator, *if there be any*, of the decedent,—a sale without either such notice or *scire facias*, as at the common law (or proof that there were no executors?), is void. On a question of title, *under this statute*, the burden of proving that his purchase was after due notice rests with the purchaser; the record of execution and sale not of itself raising a presumption that notice was given.

RANSOM brought ejectment against Williams, in the Circuit Court for the Northern District of Illinois. Both parties claimed title from Galbraith. The plaintiff relied upon a sheriff's deed, made pursuant to a sale under an execution upon a judgment against Galbraith and others, obtained in the State court of Ogle County, on the 27th of March, 1841. The execution was issued on the 25th of November, 1847; the sale made on the 25th of November, 1848, and the deed executed on the 24th of July, 1849. The defendants claimed under a deed from Galbraith and wife, dated on the 31st of May, 1842. This deed contained a special covenant against the "claims of all persons claiming, or to claim, by, through, or under him." Galbraith died in 1843, and letters of administration upon his estate were issued on the 25th of February in that year.

A statute of the State of Illinois, it is here necessary to say, authorizes execution to issue against the lands and tenements of a deceased judgment debtor, "*provided, however*, the plaintiff or plaintiffs in execution, or his or their attorney, shall give to the executor or administrator, if there be any, of said deceased person or persons, at least three months' notice in writing, of the existence of said judgment before the issuing of execution." There was no proof that such notice had been given to the legal representatives of Galbraith; but it was proved by the plaintiff that the premises in controversy had been sold under a prior execution, and that, on the motion of the judgment creditor, the court

Argument in support of the sale.

to which the execution was returned had set the sale aside, quashed the execution, and ordered that another execution should issue. This order was made on the 24th of September, 1847.

The court below charged the jury, that the want of proof of due notice to the legal representatives of Galbraith, before the issuing of the execution, under which the sale was made, was fatal to the plaintiff's case.

The jury found accordingly, and the plaintiff excepted. The correctness of the charge was the point on error here.

Mr. E. S. Smith, in support of the sheriff's sale: The only thing made necessary by the proviso, before execution can issue, is notice to the executors, or administrators, *if there be any*, of the existence of the judgment. The statute dispenses with the common law proceedings, and in cases only *where there are administrators or executors appointed*, is it necessary to give notice. If there be no executors or administrators, execution can issue and sale be made, after the death of the defendant, without notice, and this sale can be defeated only by showing that administrators had been appointed at the time the execution issued, and that no notice of sale was given to them. The design of the statute was to give to the creditor a cheap mode in which to enforce the lien of his judgment. The lien once attached, it will operate until the judgment is satisfied.

The record is regular on its face. It is just as it ought to be, supposing notice to have been given. Even if notice had been given, that fact would not appear on *it*. Herein, a sale, under the Illinois statute, would differ from a common law proceeding, where the *sci. fa.* to revive would be a part of the record proper. The present record thus affords presumptive evidence that notice had been given; and it placed the burden of proof on the defendants to show want of notice, if there was such want. The defendants could have called the administrators to show this want, if it really existed.

The defendants claim title from Galbraith, by deed, dated

Argument in support of the sale.

May 31st, 1842, which shows, so far as the rights of the plaintiff are concerned, that there was no notice required to the administrators or heirs. The deceased had, long prior to his death, conveyed all his right in the property to Williams, the defendant, and, of course, it was subject to the judgment lien. It would be folly to require of the plaintiff proof that notice had been given to a party who had no interest in the property. After showing title in themselves, the defendants are estopped from showing irregularity in the execution from want of notice. They do not stand in the shoes of the heirs. The only question is, who had the first lien?

But, in addition, it appears that the execution on which the land was first sold was set aside, and a second execution ordered. It is thus plain that the court was even more than commonly advised. It is to be presumed in law—it cannot be doubted as fact—that the court had satisfactory notice that the administrators of Galbraith had received notice. At any rate, the proceedings cannot be attacked collaterally. These doctrines have been declared with great strength by this court in more cases than one.* But, in these cases, the court did no more than enforce settled principles of English common law. *Prigg* v. *Adams*, reported by Serjeant Salkeld, A.D. 1692,† affords foundation for all since iterated here. In that case, which was trespass and false imprisonment, the defendant justified, as an officer, under a *ca. sa.* on a judgment in the Court of Common Pleas, upon a verdict of five shillings for a cause of action in Bristol. The plaintiff replied, and set forth a private act of Parliament, erecting the court of conscience in Bristol, wherein was a clause that, if any person bring such action in any of the courts of Westminster, and it appeared upon trial to be under forty shillings, that no judgment shall be entered for the plaintiff, and if it be entered, *that it shall be void.* Upon demurrer, the question was, whether the judgment was so far void, that a party shall take advantage of it, in this colla-

* See *supra*, Florentine *v.* Barton, p. 210, also Tyler v. Harvey, *infra*, p. 328, and cases cited.

† 2 Salkeld, 674.

teral action. And the court held that it was not; and construed the statute to mean, that *it should be void only at the instance of the defendant, in direct proceedings taken by him to vacate or set aside the judgment on that ground.* Apply the principle in that case to the one under consideration, and treat the statute as declaring, that if an execution issue against the lands and tenements of a deceased defendant, without the record showing that notice was given to the administrator, it shall be void; and then, we say, that the defendants in this suit cannot take advantage of the objection in this way. None but the representatives of the deceased defendant, or the heirs, could make the objection; and they only by motion to set aside, or other proceedings to vacate the order.

The result of the whole is, that the plaintiff below should have had judgment.

Mr. Hitchcock, contra: Under the laws of Illinois, the judgment should have been revived by *scire facias*, or by a notice in writing to the administrators of the deceased, of the existence of the judgment before issuing the execution. The first is a common law proceeding, and the second is authorized by the statute quoted. This notice is provided as a protection to heirs against dormant judgments, and is a substitute for *scire facias*. No evidence was offered of revivor in either mode. For want of notice the execution is void. This is a rule of property in Illinois. In New Hampshire, Pennsylvania, Mississippi, and elsewhere, courts may have decided that an execution issued after the death of a defendant is voidable only, and cannot be attacked collaterally. Such, however, we think, is not the rule in the courts of Illinois *under this statute.* Every maxim of the law imposes the burden of proof, in this respect, upon the plaintiff. He claims a statutory benefit, and must aver and prove himself to be within the terms of it. He holds the affirmative in asserting title under the statute. The fact that notice was given is peculiarly within his knowledge, and the means of proof within his control. The statute makes it his duty to give the

notice, and he is presumed to preserve the evidence of a fact so essential. The defendant is a stranger to the judgment, to the notice, and to the administrators. A party will be held to prove a negative, if the means of such proof are specially within his control. *A fortiori* is the burden upon him, if he asserts a title upon an affirmative proposition, with the means of proof specially within his power. A different rule would impose on the defendant the burden of proving a negative.

The question is, moreover, settled by authority.*

Mr. Justice SWAYNE delivered the opinion of the court.

By the common law, the death of either party arrested all further proceedings in the case. If the death occurred before judgment, the suit abated. If there was but one defendant, and he died after judgment, no execution could issue unless it was tested before the death occurred. In such case it was necessary to revive the judgment by *scire facias*. The statute of Westminster 2d (13 Edward I) first gave a remedy against the lands of judgment debtors. The same rules applied to a writ of elegit sued out under that statute. If there was more than one defendant, and one of them died, execution might issue against all, though it could be executed only as to the survivors. It was so issued, because it was necessary that it should conform to the record of the judgment.†

The notice under the statute is cumulative. The plaintiff may give it, or resort to the common law remedy by *scire facias*. Executions in Illinois are required to bear test on the day they are issued.‡ When a defendant dies after judgment, and an execution is subsequently issued without the notice required by the statute having been given, or the

* Laflin *v.* Herrington, 16 Illinois, 301; Finch et al. *v.* Martin et al., 19 Id. 105.

† Woodcock *v.* Bennet, 1 Cowen, 711; Stymets *v.* Brooks, 10 Wendell, 207; Erwin's Lessee *v.* Dundas et al., 4 Howard, 77; Brown *v.* Parker, 15 Illinois, 307.

‡ Brown *v.* Parker, 15 Illinois, 309.

judgment revived by *scire facias*, the execution is a nullity, and all proceedings under it are void.*

The order of the court of Ogle County, that another execution should issue, does not in our judgment affect the case. Upon the death of Galbraith, the jurisdiction of the court as to him terminated. He was no longer before the court. When the order was made he had been dead more than four years. It does not appear that his legal representatives were present, or had any knowledge of the proceedings. The order was proper, and the execution was valid as to the surviving defendants. As to them, the process might have been executed. We cannot understand from the order, that the court intended to affect the estate of Galbraith, or those claiming under him. If such were the intention, the order having been made against parties not shown to have been actually or constructively before the court, was, so far as they are concerned, clearly void.

The authorities which require the fact of competent jurisdiction to be presumed in certain cases have no application here. The statute is in contravention of the common law, and hence to be construed strictly. The notice is a substitute, and the only one permitted for the proceeding, otherwise indispensable, by *scire facias*. The provision is plain and imperative in its language, and it is the duty of a court called upon to administer it, not lightly to interpolate a qualification which the statute does not contain.

The deed from Galbraith contains a special covenant against the "claims of all persons, claiming, or to claim, by, through, or under him." If the premises in controversy should be lost to the defendants, his estate would be liable in damages; and his legal representatives were entitled to all the time which the statute allowed them after notice, to show, if they could, that the collection of the judgment ought not to be enforced.

It is contended that it was incumbent on the defendants

* Picket *v.* Hartsock, 15 Illinois, 279; Brown *v.* Parker, Id. 307; Finch et al. *v.* Martin et al., 19 Id. 111.

to show that the proper notice had not been given. We cannot take that view of the subject. The judgment survived only for the preservation of its liens, and as the basis of future action. The statutory notice, or its alternative—a *scire facias*—was necessary to give it vitality for any other purpose. Upon the death of the defendant being shown, any execution issued upon it was, as to him, *primâ facie* void. This presumption could be overcome only by showing, either that no legal representative had been appointed, or that the notice required by the statute had been given. The plaintiff asserted a title, and it was for him to show everything necessary to maintain it. The rule on this subject is thus laid down by Chief Justice Marshall:* "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends upon an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its vitality might depend. It forms a part of his title: it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title." We understand the Supreme Court of Illinois to have ruled this point in the same way.†

The instructions given in the Circuit Court were, in our opinion, correct, and the

JUDGMENT IS AFFIRMED WITH COSTS.

* Williams *v.* Peyton, 4 Wheaton, 79; see, also, Thatcher *v.* Powell, 6 Id. 127.

† Finch et al. *v.* Martin et al., 19 Illinois, 110.

CASE v. BROWN.

A claim for a combination of several devices, so combined together as to produce a particular result, is not good as a claim for "*any mode of combining* those devices which would produce that result," and can only be sustained as a valid claim for the peculiar combination of devices invented and described. *Burr* v. *Duryee*, 1 Wallace, 553, affirmed and applied.

AMONG the inventions of our country that have assumed great value—especially in the regions of the West, where Indian corn is largely produced—are those known as CORN-PLANTERS. The machine consists of a mechanism resembling somewhat, in external appearance, and in section view, a high plough on wheels. It is drawn by a horse, while a man walks behind and manages it. The object is to plant corn at spots, which spots shall be both equidistant and in rows.

The corn to be planted is placed in a hopper or sort of box, which is fixed in the body of the machine; and, at proper intervals, as the machine is drawn by the horse, the grains are permitted to enter and fall through a valve, *at the base* of a short vertical spout, to the ground, another valve being at the top of the spout. If the grains were permitted to fall through the *full length* of the spout as the machine passed on, by a valve at the *top only* of the spout, they would not reach the ground exactly under the place at which the valve was opened; inasmuch as in the interval of time that the grain was descending through the spout, the machine would have passed over a certain space of ground in being drawn along by the horse. But, by employing *two* valves, one opening into the upper end of the spout from the hopper, and one at the bottom of the spout in close proximity with the ground, correct dropping is insured; the forward motion of the machine being compensated for by the double valves.

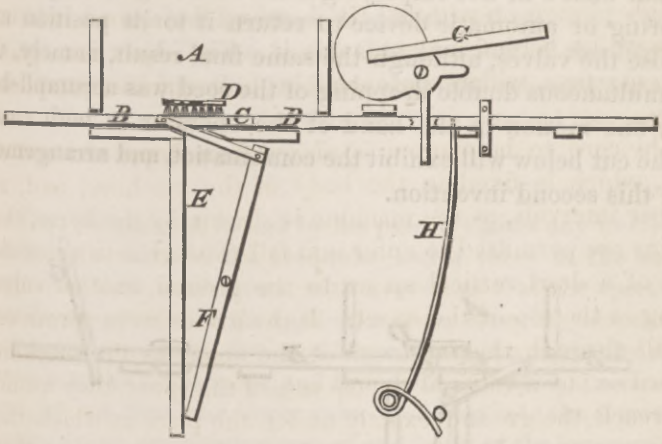
A certain Jarvis Case had invented one of these corn-planters, and took a patent for it in January, 1845. In *this* patent he limited his claim to the particular combination of parts which constituted his machine. In November, 1858,

Statement of the case.

he surrendered his patent and obtained a reissue with a more expanded claim. That claim was thus:

"I claim, in combination with a corn-planting machine that is constantly moved over the ground, and drops the grain intermittently, *the so combining of two slides, one of which is at or near the seed-hopper, and the other at or near the ground*, or their equivalents, *with a lever*, as that the operator or attendant on the machine can open said slides at the proper time to deposit the seed and prepare a new charge by the double dropping herein specified."

The cut below shows in section the combination or arrangement.



A is the hopper which carries the corn, B the seed-slide or valve leading from the hopper to the seed-tube E, C is the seed-cup in the seed-slide, D is the cut-off in the hopper, E is the seed-tube, F is the slide or valve to seed-tube, G is the hand lever by which the tubes are opened and closed in the plaintiff's machine, H the recoil-spring by which the slide-valves B and the valve F are simultaneously closed when the hand is removed from lever G.*

* This recoil-spring, H, relieved the operator from replacing or pushing back the lever with his extended arm; a matter which, when to be performed many hundred times a day, makes a large demand on muscular strength. *With* the recoil-spring, *one* muscular effort did the work of two.

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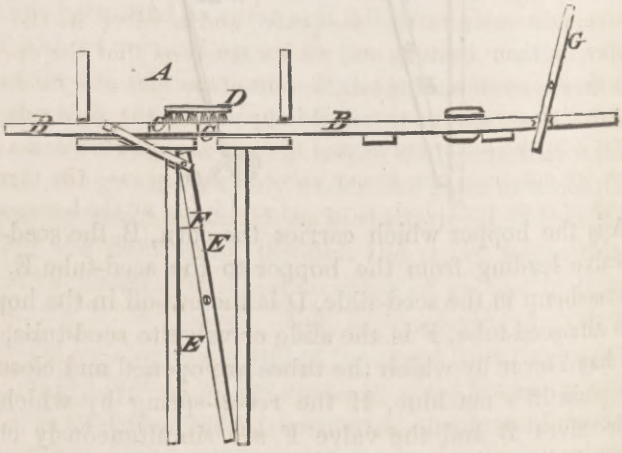
In this machine of Case's a lever G, of a peculiar form, was used, which, by being pressed down, effected two operations, viz.: it carried the charge of grain out of the seed-box, and dropped it into the tube E, and it raised the slide F to let out the previously dropped charge. Thus the same operation that planted one charge put the next succeeding charge in close proximity to the ground, so that it had but a few inches to fall when the valve or slide F was opened.

About the same time that Case originally invented his machine, a person named Brown invented one also, and got a patent in May, 1855. The parties were independent inventors. In its essential features, Brown's machine differed from Case's in not employing a lever having a weight or a spring or automatic device to return it to its position and close the valves, although the same final result, namely, the simultaneous double dropping of the seed was accomplished by one motion of the hand of the operator in both cases. The cut below will exhibit the combination and arrangement in this second invention.



A here represents the hopper carrying the grain, B the slide-valve, and C the seed-cup between the hopper and the seed-tube E, and F the slide-valve which permits the seed to pass from the lower end of the seed-tube to the ground.

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G is the lever. When the upper end of this lever G is moved from the position shown in the drawing towards the hopper A, it is evident that the grain-cup C would be carried over and discharged into the tube E, and the same movement of the lever G would move the slide-valve F so as to permit the grain which it retained at its lower extremity to fall to the ground. *Each* movement of the lever, with this *double seed-tube*, whether forward *or* back, produced a "drop."

Thus a similar double dropping of grain was accomplished in this machine of Brown as was accomplished in the machine of Case; but there was no spring or automatic recoil arrangement attached to the lever G, for restoring it to its former position, as it is on the plaintiff's machine. It required to be worked by hand in both directions.

Case now sued Brown, in the Circuit Court of the Northern District of Illinois, for infringing his reissued patent. The action was case. On this trial his counsel requested the court to charge the jury—

"That the plaintiff, in and by his patent, claims any mode of combining a valve in the seed-tube, and a valve in the seed-hopper, or their equivalents, with a lever, as that the operator may *by one operation, or the application of one muscular force*, carry a charge of corn from the seed-hopper into the seed-tube, and arrest it at the lower valve, and *by the same operation or muscular force*, let out from the lower valve and drop into the furrow a charge of corn, previously dropped and lying at the lower valve.

"That the plaintiff by his patent is not confined to the *peculiar means of returning the seed-slide* which he has adopted in his said model. That his claim covers *any arrangement* to operate the valves and lever which will produce the result, although he may not in the other machine employ the rock shaft and weighted lever, or any automatic element. He may employ some substitute for the automatic element, *so that* he *by one operation, or the application of a single muscular force* applied to the lever, drops from the lower valve, and supplies a new charge to take its place, *by the same operation or muscular force* so as aforesaid applied to the lever, combined with the valve at the seed-tube and the valve at the seed-hopper, or their equivalents."

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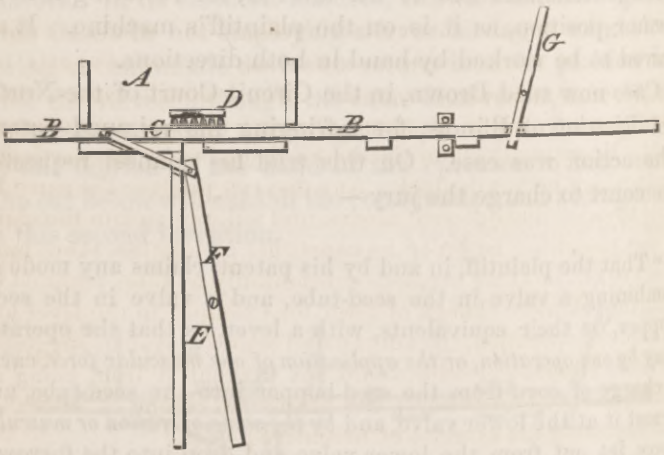
[As bearing on the interpretation asked for by defendant and adopted by the court below, it is to be noted, that on the question of the prior state of the art to the plaintiff's invention, the defendant proved at the trial that a seed-planting machine had been invented and used to a limited extent, and a description thereof filed in the patent office, as early as 1852, by one Charles Finn, in which was combined the two slides and lever, for accomplishing the same final result as in the plaintiff's machine. A sectional drawing of Finn's machine is given below, in which the corresponding letters are used as in the other two plates.



A, being the hopper, B the slide-valve, C the seed-cup, E the seed-tube, F the slide-valve, and G the lever,—this arrangement agreed with the plaintiff's arrangement in nearly every respect in which the defendant's machine did, and differed from the plaintiff's in having no automatic recoil attachment to the lever, such as a weight or spring.]

The court below refused to charge as requested by the plaintiff, but charged in substance that the thing patented to him, was a technical combination consisting of certain elements, and that to constitute an infringement, all these elements must be used by the defendant; that among these, is that particular kind of lever G, described by the patentee,

which is so combined with a weight or spring, that when the valve has been opened by the hand of the operator moving the lever in one direction, the weight, acting through the lever and moving it in the reverse direction, causes the valves to close; and that unless the defendant's machine *employs a lever having the same mode of operation*, that is to say, the peculiar arrangement described by the patentee for moving it in the reverse direction, or some other arrangement which is a mere mechanical equivalent therefor, the patent is not infringed.

The language of the court as quoted exactly was this:

"In order to constitute an infringement, the whole combination must be used, because he claims not the various parts, but the whole combination together. The plaintiff cannot claim what is called double dropping of corn,—that is a *result* or an *effect*. He can only claim the double dropping by the particular mode which he has devised. Any one can produce the same results by other and different modes, and still not violate the claim of the plaintiff. In order to constitute a violation, there must be a use of the same methods substantially as those adopted by plaintiff. A mere change of form, for example, in the lever and its mode of operation, the adoption of some equivalent suggested by mere mechanical skill, would not prevent it from being an infringement; otherwise, if the change were one of substance and requiring the exercise of inventive power."

Thus the charge made the case turn on the question, whether the defendant employed in his machine, as one element of his combination, a lever having the same mode of operation as that of the plaintiff, to wit, having two motions in opposite directions at every dropping, one produced by the hand of the operator to open the valves, and the other by an automatic arrangement to close them.

Of course, the charge was in opposition to the plaintiff's request; and the jury having found a verdict for the defendant, the case was brought by writ of error to this court.

Mr. Roberts, for Case, the plaintiff in error: The court erred

in its charge by withdrawing the question of fact from the jury, whether the machine of the defendant did not so combine the valve and lever as to produce the result substantially produced by the plaintiff's; as it manifestly did in limiting them to the inquiry, whether defendant employed a lever with such arrangements as required two motions to plant each hill of corn.

The error was in construing the claim to be for a technical combination, and resolving the device into its rudimental parts, and inquiring whether the defendant used all of these parts, and whether each part had a mode of operation substantially the same in the two machines. That this was an error, numerous cases show.*

Mr. Goodwin, contra, for Brown: It is the duty of the court to construe the patent on the maxim "*ut magis res valeat quam pereat*," and therefore in the course of a *nisi prius* trial, the judge will apply to such construction the state of the art, the surrounding circumstances in which the inventor is placed, and the previous existence of some things mentioned or referred to in the patent, as developed on the evidence.†

In order to distinguish the plaintiff's invention from that of Finn, the judge was obliged to limit the claim as he did, and in order to constitute a violation of the plaintiff's patent thus construed by the court, it was necessary that a party should use the whole combination, that is to say, the tube-valves *and lever combined substantially in the same way* as the plaintiff had combined them, and if any one of the elements necessary to constitute the entire combination were left out,

* Carver *v.* Braintree Manufacturing Co., 2 Story, 432; Winans *v.* Denmead, 15 Howard, 330; Wilbur *v.* Beecher, 2 Blatchford, 132; Foster *v.* Moore, 1 Curtis, 279.

† Winans *v.* Denmead, 15 Howard, 338; Brooks *v.* Fiske, Id. 215; Hogg *v.* Emerson, 6 Id. 437; Neilson *v.* Harford, Webster's Patent Cases, 350, 370; Morris *v.* Barret, per Leavitt, J., Ohio, 1858; Whipple *v.* Middlesex Co., Sprague, J., Massachusetts, 1859; Ames *v.* Howard, 1 Sumner, 485; Buck *v.* Hermance, 1 Blatchford, 401.

then there was no infringement, leaving the question as to the identity of the plaintiff's and defendant's machines fairly to the jury.*

Under a new disguise, is not the question here raised exactly the same as that involved in *Burr* v. *Duryee*, decided by this court but a year ago?† If this is so, it would be indecorous to discuss it. No case in the law of patents was ever more ably discussed than that; the united sciences of jurisprudence and mechanics having been brought as sister lights, with memorable ability, to bear upon the matter in issue. The court will remember the very able arguments of all the gentlemen; that one especially, as found in the report of the case, which we now beg to refer to, of Mr. George Harding, of Philadelphia, who, for the sake of juridical science in its application to the useful arts of the country, was allowed almost to convert these precincts of the Law into an Institute of Science. The case was not less ably expounded from the bench in giving judgment in the case. Overruling nothing, perhaps, the opinion there given did not the less dissipate a "bank of fog," which the learned justice who gave it remarked, "that the subtle ingenuity with which its principles were sometimes presented" had involved the law of patents, and in which my learned brother of the other side would now cover it again.

Mr. Justice GRIER delivered the opinion of the court.

The error alleged is the refusal of the court to give certain instructions, the substance of which, when extricated from the mass of verbiage with which it is encumbered, seems to be, "that the plaintiff had a right to claim any mode of combining" the various mechanical devices, in the improved machine, which would produce the same effect or result, as mere equivalents for those described in his patent. The court refused to give this instruction to the jury; but, on the contrary, instructed them in the language quoted

* Eames *v.* Godfrey, 1 Wallace, 78; Turrill *v.* Railroad Co., Id. 491.
† 1 Wallace, 531.

in the reporter's statement.* The instruction there quoted is a correct exposition of the law, and if it produced a verdict in favor of defendant, the plaintiff had no right to complain.

The plaintiff's original patent limited his claim, very properly, to the particular devices and combination of parts which constituted his improved machine. But as this claim was not broad enough to cover the improvement described in defendant's patent, the plaintiff surrendered his, and had it reissued with a more *expanded claim*. It is for the infringement of this *reissued* patent that the action is brought.

We have had occasion to remark, in a late case,† on this new art of expanding patents for machines into patents for "a mode of operation," a function, a principle, an effect or result, so that by an equivocal use of the term "equivalent," a patentee of an improved machine may suppress all further improvements. It is not necessary again to expose the fallacy of the arguments by which these attempts are sought to be supported, though we cannot hinder their repetition.

LET THE JUDGMENT BE AFFIRMED.

HARVEY *v.* TYLER.

1. The court reprehends severely the practice of counsel in excepting to instructions *as a whole*, instead of excepting as they ought, if they except at all, to each instruction *specifically*. Referring to *Rogers* v. *The Marshal* (1 Wallace, 644), &c., it calls attention anew to the penalty which may attend this unprofessional and slatternly mode of bringing instructions below before this court; the penalty, to wit, that the exception to the whole series of propositions may be overruled, no matter how wrong some may be, if any *one* of them all be correct; and when, if counsel had excepted specifically, a different result might have followed.
2. Where a statute gives to county courts authority and jurisdiction to hear and determine *all* cases at common law or in chancery within their respective counties, and "*all such other matters as by particular statute*"

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* *Supra*, p. 325.

† Burr *v.* Duryee, 1 Wallace, 535; see, also, McCormac *v.* Talcott, 20 Howard, 405.

Statement of the case.

might be made cognizable therein, such county courts are courts of general jurisdiction; and when jurisdiction of a matter, such as power to declare a redemption of land from forfeiture for taxes (in regard to which the court could act only "by particular statute") is so given to it,—parties, a subject-matter for consideration, a judgment to be given, &c., being all in view and provided for by the particular statute,—the general rule about the indulgence of presumptions not inconsistent with the record in favor of the jurisdiction, prevails in regard to proceedings under the statute. At any rate, a judgment under it, declaring lands redeemed, cannot be questioned collaterally.

3. Statutes are to be considered as acting prospectively, unless the contrary is declared or implied in them. The 21st and 22d sections of the Virginia statute of 1st April, 1831, "concerning lands returned delinquent for the non-payment of taxes," were not confined to delinquencies *prior* to the passing of that statute.
4. Under the said sections, land is rightly exonerated by the county court of the county in which alone it was always taxed; even though a part of the land lay of later times in another county, a new one, made out of such former county.
5. Under the code of Virginia (ch. 135, § 2), ejectment may be properly brought against persons who have made entries and surveys of any part of the land in controversy, and are setting up claims to it, though not in occupation of it at the time suit is brought.
6. Where parties enter upon land and take possession without title or claim or color of title, such occupation is subservient to the paramount title, not adverse to it.

TYLER brought ejectment against Harvey and others in the District Court of the United States for the Western District of Virginia, to recover one hundred thousand acres of land in what was formerly *Kanawha* County alone, though afterwards partly Kanawha and *partly Mason* County; the last-named county having been created out of the former. The defendants set up that this title had been interrupted by a forfeiture of the land for non-payment of taxes to the commonwealth, and the vesting of it in the President and Directors of the Literary Fund, under a statute of Virginia passed 1st April, 1831, "concerning lands returned delinquent for the non-payment of taxes;" and there was no doubt that this was so unless the forfeiture had been relieved by certain proceedings in the *County Court of Kanawha County*, under two sections,—the 21st and 22d of the same act.

The provisions of these two sections were, in their mate-

rial parts, as follows; and the reader will observe how far they authorize redemption for delinquencies prior to the date of the act of 1st April, 1831; and how far for any term *after* the passage of it.

"§ 21. If any person having title to any tract of land returned delinquent for the non-payment of taxes, and not heretofore vested in the President and Directors of the Literary Fund, and having legal possession thereof, shall prove, by satisfactory evidence, to the court of the county in which such land may lie, before the first day of January, 1833, that prior to the passage of this act he was a *bonâ fide* purchaser of such land so claimed by him; that he has a deed for the same, which was duly recorded before the passage of this act; and that he has paid all the purchase-money therefor, or so much thereof as not to leave in his hands sufficient to satisfy and pay the taxes and damages in arrear and unpaid at the date of his purchase; or that he fairly derives title by, through, or under some person so having purchased and paid the purchase-money, it shall be the duty of the court to render judgment in favor of such person, exonerating the land from all arrears of taxes, and the damages thereon anterior to the date of such purchase, except so much as the balance of the purchase-money remaining unpaid will be sufficient to pay, &c.; but no judgment shall be rendered except in presence of the attorney for the commonwealth, or of some other attorney appointed by the court to defend the interest of the commonwealth. . . . . No judgment in favor of such applicant shall be of any validity, unless it appears on the record that the attorney for the commonwealth, or the attorney appointed as aforesaid, appeared to defend the application.

"§ 22. And if any person having legal possession of and title to any tract of land returned delinquent for non-payment of taxes, and not heretofore vested in the President and Directors of the Literary Fund, shall show, by satisfactory evidence to the court of the county where the said land may lie, at any time before the first day of January, 1833, that the taxes in arrear and due thereon are not in arrear or due, either having been erroneously charged on the books of the commissioner, or having been actually paid, or that in the years for which said land or lot was so returned delinquent, there was sufficient property on

the premises whereon the collector might have made distress, it shall be the duty of the court, under the limitations, injunctions, and conditions contained in the preceding section, to render judgment exonerating such land from the taxes so erroneously charged thereupon."

The records of the County Court of *Kanawha* disclosed next the following entries:

"At a county court held for *Kanawha* County, at the court-house thereof, the 14th day of November, 1831, present David Ruffner, Andrew Donnally, John Slack, and James McFarland, gentlemen, justices, &c.

"*Order.*—This day came Matthias Bruen, having title to one tract or parcel of land containing one hundred thousand acres, lying *partly in the county of Mason* and *partly in the county of Kanawha;* the said tract of one hundred thousand acres being also the same charged in said lists of lands and lots to the Bank of Delaware, John Hollingsworth, and John Shallcross, &c., and returned delinquent in said names for the year 1815. And the said Matthias, having proved by evidence satisfactory to this court that prior to the passage of the act entitled 'An act concerning lands returned delinquent for the non-payment of taxes,' &c., passed April 1, 1831, he was a *bonâ fide* purchaser of said tract, and that he has a deed or deeds which was or were duly recorded in the clerk's office of the County Court of Kanawha County previous to the passage of the aforesaid act; and that he has paid all the purchase-money therefor, having no portion thereof in his hands to satisfy and pay the taxes and damages in arrear and unpaid at the date of his purchase, or any part thereof; and further, that he is in legal possession of the said tract, and was so in possession at the time of the passage of the act before recited.

"Therefore this court, *in the presence of the attorney prosecuting the pleas of the commonwealth in said court, who hath appeared and defended this application, upon full consideration of all the matters and things on either side alleged,* doth render judgment in favor of the said Matthias Bruen, and doth order, adjudge, and decree that the said tract of land above mentioned be released, discharged, and exonerated from all the arrears of taxes and the damages charged or chargeable thereon anterior to the 14th of

April, 1815, the date of the purchase thereof by the said Matthias.

"And the said Matthias Bruen, having further proved by evidence satisfactory to this court that during all the years 1815–'16–'17–'18–'19 and 1820, the years for which the said tract is charged to the said Matthias, and in his name returned delinquent for the non-payment of taxes, there was sufficient property whereon the sheriff or collector might have made distress, and out of which the said taxes for the said several years might have been made and collected. Thereupon this court, *in the presence of the attorney prosecuting the pleas of the commonwealth in the said court, who hath also appeared and defended this application*, upon *full consideration of all the matters and things on either side alleged*, doth further adjudge, order, and decree, that the said tract of land be released, discharged, and exonerated from all the arrears of taxes and the damages charged or chargeable thereon for the said several years 1815–'16–'17–'18–'19, and 1820, whether the same be charged to the said Matthias or to any other person or persons whatsoever; all of which is ordered to be certified according to the act of Assembly in that case made and provided."

An order, dated 12th of November, and similar to this last, exonerated the tract, upon the latter ground, for the years from 1821 *to* 1831, *inclusive.*

THE FIRST POINT in the case was as to the effect of these orders; that is to say, whether, under the statute, they exonerated the land; and this again depended, perhaps, part on the character of this County Court of Kanawha, and to what extent it was or was not a court of general jurisdiction. On this point, it appeared that these county courts derived their powers from a statute of Virginia authorizing them, whose seventh and eighth sections read thus:

"§ 7. The justices of every such court, or any four of them, as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority, and jurisdiction to hear and determine, all cases whatsoever now pending, or which shall hereafter be brought in any of said courts at common law, or in

chancery, within their respective counties and corporations, and all such other matters as by any particular statute is or shall be made cognizable therein.

"§ 8. That said courts shall be holden four times per year for the trial of all presentments, criminal prosecutions, suits at common law and in chancery, where the sum or value in controversy exceeds twenty dollars, or four hundred pounds of tobacco."

It depended, also, in part, perhaps, on another question, connected with the location of the land. As already intimated, the land was situated in what was originally Kanawha County, but out of which another county, Mason, had been, of later times, created. At the time of these proceedings (A. D. 1831) in the County Court of Kanawha, the land had come to lie in part in this new county of *Mason.* It had, however, for the term of thirty-one years,—the term for which the exoneration extended,—been always listed for taxation as one tract, and as being in the County of *Kanawha;* and, as the bill of exceptions showed, had been charged with taxes *nowhere but in that county.* Moreover, the Auditor of the State of Virginia, after these orders of the Kanawha County Court were made, entered an exoneration of taxes as to the *entire* tract.

Upon this whole part of the case, the court below instructed the jury that the two orders "did exonerate the taxes delinquent on the land in controversy for the year 1831, *and* all years *prior* thereto."

THE SECOND POINT—one, also, which arose on the charge of the court—was, as to whether certain parties, *not in possession*, but, nevertheless, made defendants, were properly made so.

The code of Virginia* enacts as follows:

"The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person *exercising ownership* thereon, or

* Chap. 135, § 2.

claiming title thereto, or some *interest* therein, at the commencement of the suit."

Under this statute the court, on a request to charge in a particular way, charged in substance, that if some of the defendants had made *entries* and *surveys* of any part of the land in controversy, under which they were *setting up claims to it*, they were properly sued, although not in occupation of it at the time the suit was instituted.

THE THIRD POINT in the case related to adverse possession, and was whether the court had rightly charged in saying, that if the jury found plaintiff's title was the paramount title, and that the defendants entered and took possession *without any title, or claim, or color of title to any part*, that such entry and possession was not adverse to the plaintiff's title, but was subservient thereto.

The case was twice elaborately argued in this court. Below, as here, the suit was contested with determination; and the record which was brought up showed that the defendants had asked for no less than FORTY-SIX different instructions! They ran over twelve pages, and were submitted in three series of requests. The first series, comprising twenty-four propositions of law, the second series twelve, and the third ten; and it rather appeared from the bill of exceptions, that each of these series was prayed for, and the action of the court on them excepted to, as a whole. Three only of the forty-six were granted. The court below granted, also, three of the plaintiffs' requests; in which three, in fact, the substance of all that was argued was comprised.

Verdict and judgment having been given for the plaintiffs, the case was brought here by the other side on error.

Mr. J. H. Brown, for Harvey, plaintiff in error, and defendant below.

1. The County Court of Kanawha was a court of inferior jurisdiction; OR, rather—

2. If not so, in general, it had a jurisdiction derived from

statute only in this particular matter; a matter quite alien from the ordinary common law or chancery jurisdiction conferred by the statute creating these county courts. The jurisdiction is limited as to duration of time, as to the class of persons for whose benefit it is intended, as to the subject-matter, and as to the mode of its exercise.

In either case, however,—that is to say, whether the court was constitutionally a court of inferior jurisdiction, or whether the jurisdiction conferred by the act is what is termed a special limited statutory jurisdiction,—every fact essential to authorize the court to make the orders, must appear upon the record which the court makes of its transactions.* *Martin* v. *McKinney*, a leading case in Kentucky,† as to the character of "county courts," is in point, and we cite it the more particularly, since the laws of Virginia and of Kentucky are known to be much identical, the latter State having been created out of the former. The County Court of Mason County there—acting under a statute which gave the court authority to deprive a keeper of a ferry of his license, if he either neglected to furnish the necessary boats, *or* the number of hands required by the court, *or* if the ferry itself became wholly disused and unfrequented for two years —had deprived Martin of his right to keep a ferry over the Ohio; but the judgment of the county court did not state for which of the three causes the court had done what it did, or even that it had done it for any. On motion to set the judgment, for want of such specification in the record, aside, the Court of Appeals says:

"This being a law which authorizes the county court to interfere with and deprive citizens of their rights and property in a summary way, it should appear from the record of their proceedings that they acted within their power and authority, and, therefore, nothing ought to be presumed to support their proceedings. Nor can this case be assimilated to the proceedings

* See Ransom *v.* Williams, *supra*, p. 313.

† Kentucky Decisions, sometimes called Printed Decisions (a rare work, Frankfort, 1805), p. 380.

of a court of unlimited jurisdiction in correcting the acts of ministerial officers, who, in carrying judgments into execution, either wilfully or negligently abuse the process of the court. In the latter case, every presumption is to be indulged in support of the unlimited jurisdiction, because it is derived from the common law. In the former, no such presumption is permitted, because the authority is given by statute, which must be strictly and substantially pursued."

The judgment of the county court was accordingly annulled. The case does, however, but act on the principle declared by the Court of King's Bench, A. D. 1778,* in *Crepps* v. *Durden*, a case made a prominent one in Smith's Leading Cases,† and largely annotated by Hare, J.

Now, as to *first of the decrees or judgments or orders*—by whatever name the release may be called—of the County Court of Kanawha:

It does not aver or show that the land was not, prior to the first day of April, 1831, vested in the President and Directors of the Literary Fund.

It does not aver and show that Matthias Bruen derived title to the land from any of the persons in whose names the land is shown by the release to have been returned delinquent; nor does it aver or show that Bruen claimed the land either mediately or immediately by grant from the commonwealth.

It does not aver or show that Bruen had legal possession of said land.

It does not aver or show that said land had been returned delinquent (as it was) in the names of Jesse Waln and others, or any other person or persons, from 1805 to 1814, inclusive. Therefore, the court had no jurisdiction to release the land for those years, and for the delinquency of those years the land became forfeited, and vested in the commonwealth.

The second release is equally defective.

* 17 George III; Cooper, 640.

† 1 Smith's Leading Cases, *816, sixth American edition.

Argument against the redemption.

It does not aver or show that the land was not, prior to the 1st of April, 1831, vested in the President and Directors of the Literary Fund; nor does it show any of the prerequisites necessary to give the court jurisdiction, unless it can be aided by the recital in the first release, which it cannot be.

It does not aver or show that, between the years 1815 and 1820, inclusive, there was property on the land, out of which the sheriff or collector might have made distress for the tax, or that the taxes for which the land was returned delinquent were not in arrear and due, or that they had been paid; and yet these were the only grounds upon which the release was authorized under the second section of the act aforesaid.

It was error to exonerate the land from all the taxes and damages charged or chargeable thereon, whether charged in the name of Bruen, or any other person or persons whatsoever; this was unauthorized by law, and in derogation of the provisions in favor of *bonâ fide* occupants in the same act.

Both the releases aver that the land, at the time of the releases, lay partly in Mason and partly in Kanawha, without showing what parts or proportions lay in the respective counties, and yet the act only authorized the County Court of Kanawha to release so much of said land as was situate in Kanawha County. Releasing the whole land, therefore, in both counties, was contrary to law, and makes the entire judgment void.

Moreover, the whole reading of the 21st and 22d sections shows that they had reference to lands returned delinquent *before* or but up to the year 1831, the date of the act. Now the judgments exonerate them for 1831; that is to say, to 1831 inclusive. These sections, relied on by the plaintiffs, employ the past tense. They are sections of amnesty for the past; having no reference to delinquencies after the date of the act. The main purpose of the act was to secure the *payment* of taxes in arrear. We cannot reasonably suppose that the legislature invited owners *not* to pay, by giving them the right to have their lands released for future time.

2. Though the Virginia code gives a right to sue in ejectment certain persons not in what the common law would

call "possession," it has never been regarded as authorizing suit against parties who had merely made entry and surveys, under which they were about to set up claims. The provision of the code, which, it is to be noted, is in derogation of the common law principle, speaks of persons "*exercising ownership* thereon; or claiming *title* thereto, or some *interest* therein." The instruction goes beyond this.

3. Our third point may be less tenable than the others. Still we think that a person may be in possession, not asserting any title, and yet that such occupancy will not be actually and positively subservient to another title. It may be negative in its operation only; but the court below makes it positive, and positive in favor of a title certainly not in form *admitted.*

Mr. B. H. Smith, contra.

Mr. Justice MILLER delivered the opinion of the court.

This case has been twice argued before this court. It involves the title to a hundred thousand acres of land. The oral argument has been able on both sides; but the manner in which the record brings the case before us, is one which we have repeatedly condemned, and which has sometimes precluded us from the consideration of points relied on by counsel as error.

It is a fair inference from the bill of exceptions that each of the three series of instructions refused was prayed and excepted to as a whole. If so, the proceeding was not only a clear violation of a rule of this court; but if any proposition in the series ought to have been rejected, then the court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked separately, ought to have been given. The exception is a general one to the refusing the prayer of the plaintiffs in error, and to the granting the prayer of the defendants in error.*

* Rogers *v.* The Marshal, 1 Wallace, 644; Johnson *v.* Jones, 1 Black, 209; Rule 38 of the Rules of this Court.

However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception. This opportunity is not given when pages of instructions are asked in one prayer, and if refused as a whole, are excepted to as a whole. We may rightfully expect of counsel who prepare cases for this court, that they shall pay some attention to the rules which we have framed for their guidance in that preparation; as well as to those principles of law referred to, which are necessary to prevent the prayer that counsel has a right to make to the court for laying down the law to the jury, from being used as a snare to the court, and an instrument for perverting justice. These observations, which are of daily application in this court, are fully justified by a record, which shows forty-six propositions asked of a court at once, as a charge to a jury.

In the present case, while we are relieved from the necessity of examining the forty-three propositions asked by plaintiffs in error (three of the forty-six were granted), we are also relieved from any apprehension that this will work injustice; because the only three propositions asked and granted on the part of defendants in error, and to which by a little liberality we are able to hold the exceptions sufficient, involve all the questions of law which are entitled to consideration, if not all which were argued in the case.

One branch of the controversy—the one of engrossing importance—turns upon the validity of the orders made by the County Court of Kanawha County.

The court below instructed the jury that these orders "did exonerate the taxes delinquent on the land in controversy for the year 1831, and all years prior thereto," and it is the soundness of this instruction which we are first to consider.

Opinion of the court.

The plaintiffs in error contend that these orders are void, and therefore nullities, because the records of them do not show that several matters were proven, which are essential to the right of the party to have his lands thus exonerated.

Ten or twelve of these omissions are urged as applicable to one or the other, or both, these orders; some of which are founded in misconception of what the record contains; some on the absence of averments merely negative, such as the failure to allege that the land had not been vested in the Trustees of the Literary Fund; and all of them, except one or two which will be noticed hereafter, concern matters, which may well be supposed to have been substantiated by proof before the court; if we are at liberty to make any presumptions in favor of the validity of the orders of the court.

This brings us to the issue of law in the case. The plaintiffs in error maintain:

1. That the county court which made these orders is a court of inferior and special jurisdiction, and therefore every fact essential to authorize it to make such orders, must appear upon the record which the court makes of the transaction; or,

2. If the court is not held to be of this inferior and special character, that the statute confers upon it in this class of cases only such special jurisdiction, and that its orders are subject to the same rule in testing their validity.

It is certainly true that there is a class of tribunals, exercising to some extent judicial functions, of which it may be said, in the language of Chief Justice Marshall, that they are "courts of a special and limited jurisdiction, which are created on such principles, that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction."*

The first inquiry, then, on this subject, must be into the character of the County Court of Kanawha County, which rendered these judgments of exoneration.

The powers of these courts in Virginia were originally

* Kempe's Lessee *v.* Kennedy, 5 Cranch, 173.

conferred and prescribed by the act of 1792, and are to be found fully stated in section 7th of the act of 1819.* "The justices of every such court, or any four of them, as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority, and jurisdiction, to hear and determine, all cases whatsoever now pending, or which shall hereafter be brought in any of said courts, at common law or in chancery, within their respective counties and corporations, and all such other matters as by any particular statute is or shall be made cognizable therein." Section 8 provides, that said courts shall be holden four times per year for the trial "of all presentments, criminal prosecutions, suits at common law, and in chancery, where the sum or value in controversy exceeds twenty dollars, or four hundred pounds of tobacco."

It is impossible to come to any other conclusion from this statute, than that the county courts of Virginia were courts of general jurisdiction; and were inferior only in the sense that their judgments might be revised by some appellate tribunal. They were in no sense courts of special jurisdiction, and were unlike county courts in other States,—Kentucky, for example, in reference to which a Kentucky decision has been quoted to us,—which had no common law or chancery jurisdiction, whose principal functions were ministerial, in reference to the roads, bridges, and finances of the county, to which are sometimes added those judicial functions which relate to wills and the administration of the estates of decedents. These all differ widely from the county courts of Virginia, which have all those powers of general jurisdiction usually found in circuit courts, courts of common pleas, courts of chancery, and others of similar character.

In reference to all these the general rule is, that every presumption not inconsistent with the record, is to be indulged in favor of their jurisdiction; and their judgments, however erroneous, cannot be questioned, when introduced

* 1 Revised Code, 246.

collaterally, unless it be shown affirmatively that they had no jurisdiction of the case.*

In regard to the second proposition, it is not so easy to determine in all cases the principle which is to govern.

The jurisdiction which is now exercised by the common law courts in this country, is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law, but often in derogation of that law.

In all cases where the new powers, thus conferred, are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made, as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times. There is, however, one principle underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. It is, that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some direct proceeding for that purpose. The only difficulty in applying the rule, is to ascertain the question of jurisdiction.

* Kempe's Lessee *v.* Kennedy, 5 Cranch, 173; Voorhees *v.* Bank of United States, 10 Peters, 449; Ex parte Watkins, 3 Peters, 193; Grignon *v.* Astor, 2 Howard, 319.

Opinion of the court.

Former adjudications of this court have done much to throw light upon this difficult point, and to settle the rules by which it may be determined. We will notice a few of the most important.

One of the earliest is the case of *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173. Certain acts of the legislature of New Jersey confiscated the property of those who had sided with Great Britain in the war of the Revolution. They conferred the power of ascertaining that fact by inquest instead of by regular indictment, in the inferior court of common pleas of each county. In an action of ejectment, brought in the Circuit Court of the United States by Grace Kempe, the defendants set up a title acquired under proceedings thus authorized. In this court, on error, it was argued that, as to these proceedings, the court must be considered as one of special and limited jurisdiction. But the court, by Chief Justice Marshall, said: "This act" (the statute of New Jersey), "cannot, it is conceived, be fairly construed to convert the court of common pleas into a court of limited jurisdiction in cases of treason." "In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and if an offence punishable by the law had been in fact committed, the accused was amenable to its jurisdiction, so far as respects her property in New Jersey. The question whether this offence was or was not committed, that is, whether the inquest which was substituted for a verdict on an indictment, did or did not show that the offence had been committed, was a question which the court was competent to decide. The judgment was erroneous, but it was a judgment, and until reversed cannot be disregarded."

In the case of *Voorhees* v. *The Bank of the United States*,* the validity of certain proceedings in attachment were called in question, on the ground that the record of the court of common pleas, in Ohio, in which the proceedings were had,

* 10 Peters, 449.

did not show certain steps which the law required. The defendant in the attachment proceedings was a non-resident; yet his land had been levied on, condemned, and sold, without an affidavit, without notice by publication, without calling him three times, at three different terms of the court, and without waiting twelve months from the return of the writ, before the sale; all of which are specially required in the act regulating the proceedings. Here was a case of special and stringent proceedings *in rem*, in the absence of jurisdiction over the person, where material provisions of the law, for the protection of defendant's rights, were omitted, so far as the record showed. "It is contended," said this court, "by the counsel for plaintiffs in error, that all the requisitions of the law are conditions precedent, which must not only be performed before the power of the court to order a sale, or of the auditors to execute it, can arise, but such performance must appear in the record." This is precisely what is contended for in the case now before us, and the circumstances of this case and of that are remarkably similar in their relation to the principles which we are now discussing. The court said, in reply to this: "The provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear upon the record." "We do not think it necessary to examine the record in the attachment suit, for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy are narrowed to the single question, whether this omission invalidates the sale. The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction, to which was added, by the act of 1805, the power to issue writs of attachment, and order a sale of the property attached, on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached." "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly

done, till the contrary appears." "If the defendant's objection can be sustained, it will be on the ground that this judgment is false, and that the order of sale was not executed according to law, because the evidence of its execution is not in the record. The same reason would equally apply to the non-residence of the defendant within the State, the existence of the debt due the plaintiff or any other creditor, which is the basis of the whole proceedings."

In the case of *Thompson* v. *Tolmie*,* a sale of real estate by three orphans of this city was assailed in this court on similar grounds: The court says: "Those proceedings were brought before the court collaterally, and are by no means open to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervisory power of the court to receiving its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only." "If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right and afford no justification; and may be rejected when collaterally drawn in question."

Both these latter cases are cited, reaffirmed, and the doctrine amplified, in *Grignon* v. *Astor*.†

The application of these principles to the case before us will be very obvious upon a slight examination of sections 21 and 22 of the act of 1831, which confers on the county courts the power to exonerate lands from delinquent taxes. We have already seen that they are courts of general jurisdiction. These sections authorize them, when certain facts are proved by the owner of the land, "to render judgment in favor of such person, exonerating the land;" "but no judgment shall be rendered except in the presence of the attorney for the commonwealth, or some other attorney

* 2 Peters, 157.

† 2 Howard, 319.

appointed by the court to defend the interest of the commonwealth. If the application shall fail, judgment shall be rendered against the applicant, and he shall be adjudged to pay costs." Now here are all the usual accompaniments of a judicial proceeding; a court of competent jurisdiction, parties, plaintiff and defendant, namely, the applicant and the State; a subject-matter of consideration, to wit, the exoneration of the land from delinquent taxes, and a judgment of the court, either establishing such exoneration, or that the claim to it is not a rightful claim, and in either case conclusive of that claim. Care is taken that the commonwealth shall be represented by capable counsel; and the only fact required by the act to appear on the record is the presence of such counsel. That the appearance of this fact on the record is made the only one essential to the validity of the judgment, is strong evidence that the other facts, on which the judgment of the court may depend, need not so appear.

The transcripts of the judgments of exoneration produced in this case, show that there were proper parties before the court, that the subject-matter of the exoneration of the land from delinquent taxes was before it, and that it rendered judgments exonerating it from all delinquent taxes. Can it be required to give validity to these judgments, that the record shall show that every fact was proved, upon which the judgment of the court must be supposed to rest? Such a ruling would overturn every decision made by this court upon that class of cases, from that of *Kempe's Lessee* v. *Kennedy*, already referred to, down to the present time.

It is urged that the 22d section of the act of 1831 was not intended to confer the right of exoneration as to taxes delinquent after the passage of the act.

If this were true, we do not feel sure that, under the principles just considered, it could invalidate the judgment of the court. It would be a mistake as to the law, which would make the judgment erroneous; but would it, therefore, be void? We do not, however, concur in this construction of the act. There is nothing in its language which limits this

relief to past delinquency, and it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect. The powers of the court over this subject, it is true, is limited in point of duration to three years; but that period extends beyond the time when the taxes for the year 1831 would become delinquent, and would, therefore, seem to embrace them, unless expressly excluded. The third section of the act of December 16, 1831, and the second section of the act of March 10, 1832, both recognize and proceed upon this construction of these sections, and remove any doubt which may have existed on that subject.

It was in proof that, at the time these judgments were rendered, a considerable part of this one hundred thousand acre tract lay in other counties which had been created out of the County of Kanawha; and it is said, as to so much of said land, the judgments of the county court of that county were without jurisdiction.

The tract had always been listed for taxation as a unit, in the County of Kanawha, for the entire period of thirty-one years or more, to which the *exoneration* extended. The bill of exceptions states, that the land was uniformly charged with taxes there, and *not elsewhere*. It was these delinquent lists, returned regularly by the Auditor of the State to the county from whence they came, from which the owner desired to be relieved. An application to the court of a county where they did not exist, would have been unavailing. It would be sticking in the bark to say, that a party entitled to relief could not get it in one county because all the land did not lie there; nor in any other county, because no evidence of such delinquency appeared in the tax-lists of the latter to be exonerated. The land in question was charged with taxes nowhere but in Kanawha County, and in that county it was proper that the *exoneration* should be entered.

It is to be remarked of all these objections to the judgments of exoneration, that the parties who made them show no patent, or other title, from the State of Virginia, and are

setting up defects in those judgments, of which neither the State of Virginia, which was a party to the proceedings, nor the Trustees of the Literary Fund, who were entitled if they were invalid, have ever complained, or sought to take advantage. On the contrary, the Auditor of the State of Virginia, its official accounting officer, recognized these judgments as valid, by making entries in his books, to the effect that the taxes were released by them.

We are of opinion, therefore, that the first instruction given at request of plaintiffs was correct.

The second was to the effect that if some of the defendants had made entries and surveys of any part of the land in controversy, under which they were setting up claims to it, they were properly sued, although not in occupation of it at the time the suit was instituted.

The code of Virginia, as well as that of several other States, allows the action of ejectment to be brought against persons claiming title, or interests in the property, although not in possession. It says:* "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit." If then there was a part of the tract claimed by some person, on which there was no occupant, the case existed which the second clause of the section provides for. The policy of this act is obvious. It is that persons out of possession, who set up false claims to land, may by a suit in ejectment, which is the legal and proper mode of trying title, have that claim brought to this test. The act provides that such a judgment is conclusive against all the parties; and thus the purpose of the law to quiet title by a verdict and judgment in such cases, is rendered effectual. The language of the code of New York is identical with that of Virginia on this subject. And the construction we have given to it was held to be the true one, by the Supreme Court of the former State.†

* Chapter 135, § 2.

† Banyer *v.* Empie, 5 Hill, 48.

Opinion of the court.

The third and last instruction given at the instance of plaintiffs, had reference to the question of adverse possession, in its relation to the statute of limitations. Its purport was that if plaintiffs' title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, *without title or claim, or color of title*, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto.

We think this law to be too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the Government, or in some one deriving title from the Government, State, or National. Any one in possession, with no claim to the land whatever, must in presumption of law be in possession in amity with and in subservience to that title. Where there is no claim of right, the possession cannot be adverse to the true title. Such is the rule given as recently as 1854, by the Court of Appeals of Virginia, in the case of *Kincheloe* v. *Tracewells.** The court there says: "An entry by one upon land in possession, actual or constructive of another, in order to operate as an ouster, and gain possession to the parties entering, must be accompanied by a claim of title."†

We have thus examined the points made by the exceptions to the instructions asked by plaintiffs and given by the court. If there are points made on the instructions prayed by defendants and refused by the court not embraced in those we have discussed, they are of minor importance, and do not affect the merits of the case.

JUDGMENT AFFIRMED.

[See *supra*, p. 210, Florentine *v.* Barton. REP.]

* 11 Grattan, 605.

† Society, &c., *v.* Town of Pawlet, 4 Peters, 504; Ewing *v.* Burnett, 11 Id. 52; Angell on Limitations, § 384, 390

THE SLAVERS. (KATE.)

1. Where a vessel is bound to the western coast of Africa, under such circumstances as raise a presumption that she may be about to engage in the slave-trade,—such circumstances, *ex gr.*, as a professed sale at an excessive price, just before the contemplated voyage, a false crew-list, an equipment not unsuited for a slave voyage, a cargo not fully on the manifest, suspicious character or conduct, in the immediate matter, of her crew, or of other persons connected with her, an appearance and subsequent disappearance of an unknown person, with a Spanish name, as claimant,—she must clearly explain those circumstances under pain of forfeiture.
2. Persons trading to the west coast of Africa, on which coast two kinds of commerce are carried on,—one (the regular trade) lawful, the other (the slave trade) criminal,—should keep their operations so clear and distinct in their character, as to repel the imputation of a purpose to engage in the latter.

THE United States filed a libel of information and forfeiture in the District Court for the Southern District of New York, against the bark Kate, her cargo, &c., alleging that she had been equipped, fitted, loaded, and prepared "for *the purpose*" of carrying on a trade in slaves, within the acts of Congress of March 22, 1794,* and 20th of April, 1818;† which acts make such equipping, fitting, preparations, &c., cause of forfeiture. The question, therefore, was, whether the vessel had been fitted with that purpose.

The case was one of four; all like each other, in their general aspects, and reported here in immediate sequence; cases, all, where confessedly the proof of unlawful purpose was not of the most direct kind. The present case was thus:

The Kate, then purporting to be owned by B. & A. Buck, of Baltimore, Maryland (C. W. Buck being master), arrived at New York from Havana on the 17th of May, 1860, with a cargo of rum, wine, copper, sugar, &c., consigned to one Antonio Ross, of New York.

Six days after her arrival at New York, B. & A. Buck, by

* 1 Stat. at Large, 347. † 3 Id. 450.

Statement of the case.

C. W. Buck, as their attorney, purported to sell the vessel to "C. P. Lake, of Brooklyn, State of New York;" the consideration stated being $10,500. [She was appraised soon after by the custom-house appraisers at $4000.]

The vessel was of about 250 tons, with one deck, three masts; was 114 feet long, 26 wide, and 10 deep; sharp built, and had sixteen or eighteen *spare* spars and sails; there was an iron tank six feet square, for water, in the hold.

She was registered on oath of "C. P. Lake, of Brooklyn, State of New York," on the 30th of May, 1860. The register bond was executed on the same day, by Lake, Frederick Otto, and H. C. Smith, and describes Otto as then master of the vessel. Smith was the custom-house broker who cleared the vessel. He appeared to have cleared vessels on former occasions for the slave trade. The Kate was cleared on the 3d of July, 1860, "*bound for Cape Palmas and ports on the west coast of Africa*," and put to sea on that day. She had not gone far before she was seized, as mentioned hereafter, by Captain Faunce, of the United States Revenue Cutter Harriet Lane, and brought back; libelled for forfeiture, and her cargo placed in a public warehouse. A stipulation having been given for value and costs, she was released, and about the middle of September, cleared by Smith again for sea, Lake, the person above mentioned as "purchaser," swearing that "he chartered the vessel for a voyage to the coast of Africa, trading and return to New York, and that the vessel *was loaded with the goods of the charterer* and ready for sea on the 2d of July."

The outward manifest of the cargo of the Kate, presented at the custom-house on the 3d of July, 1860, declared that it was to be landed at Cape Palmas and leeward ports, west coast of Africa, but named no consignee. It was valued at $7000, and included large quantities of rum and other liquors, beef, pork, tongues, rice, and bread, 5000 feet of lumber, 82 water-casks, filled with fresh water, hoop-iron, vinegar, iron pots, pails, drugs, &c. The lumber was piled on the water casks, and formed a flooring throughout the length of the vessel, and the cargo was over that. The shipper's

manifest, purporting to be of part of cargo shipped by Jose Hernandez, &c., for the same destination, and without designating either consignee or place where it was to be landed, embraced all of the goods, &c., reported in the manifest first named, and about $200 worth barrels of beef and tongues, not reported in it.

After her second seizure, it was found that the vessel had on board some articles which were not reported to the custom-house; among them, bread, beef, and pork, coils of rope, zinc, lime, sand, tar, flour, rice, potatoes, globe lanterns, pewter pitchers, a surf-boat, stove, and a variety of articles of food. The boxes manifested as containing "iron pots" contained furnaces, with boilers on top, which could be used for cooking a quarter of a barrel of rice each. They were termed "boxes of hardware."

The shipping articles of 3d July, which declared the vessel "bound for Cape Palmas and a market, and back to a final port of discharge in the United States," showed thirteen men besides the captain, a somewhat large crew, perhaps, for an ordinary trading vessel of the size of the Kate. The crew list appended to it was inaccurate in some particulars. All the crew were represented as having been born in the United States; whereas Otto W. Raven, the first mate, who was put down as "O. J. N. Raven, born in New York," was a German, and had begun to go to sea at Bremen seventeen years before, about which time he came to New York, and was afterwards naturalized. He had been four or five times to the coast of Africa; the last time in the bark Cora, since seized as a slaver. The second mate was entered by the American name of Francis Stevens, born in Louisiana; he was a Portuguese, named Stevo. How many of the rest were Americans did not appear. The shipping articles for the September voyage—whatever voyage it was—were in like form, with the same number of crew list, retaining the two mates and most of the men on the first, and repeating the same designations, except that Stevens was here said to have been born in New York.

On the 3d of July, 1860, when the Kate first started, she

Statement of the case.

was getting out to sea, when Captain Faunce, of the revenue cutter Harriet Lane, noticed the small tug Magnolia approaching her. He boarded the tug, and sent a customs officer to take charge of the Kate. On the tug was a man named Da Costa, a Portuguese, whom the boarding officer said that he recognized as a person that he had seized in 1856, with others, on board the slaver Braman, and who had been indicted, in July, 1856, as owner and builder of that vessel, and for causing her to be sent into the slave-trade. This man, or whoever else it was that was then seized, forfeited his recognizance in 1856, and having been afterwards surrendered by his surety, escaped from the officer. The tug had been hired by Otto to take him and Da Costa down the bay and put them on board the Kate, after she had gone some distance from port. It was after Otto had been put on board the Kate that she was seized, Da Costa remaining still on board the tug. When, afterwards, Da Costa was brought on the Kate, Otto denied that he had ever seen him before; inquired who he was, and if he was in the custom-house department; said he did not know him, and the parties did not appear to recognize each other. But, at the same time, as was testified to by some person belonging to the Harriet Lane, they communicated with each other secretly through the mate, Raven, who also appeared not to know Da Costa. On the same day, McCormick, agent for the tug, who had carried Otto and Da Costa to the Kate, prayed Judge Russell, City Judge of New York, for a writ of *habeas corpus* for the release of Da Costa, under the name of *John Garcia*, then detained by Captain Faunce, which writ was issued. On the 5th of July, however, a warrant issued out of the United States District Court for his arrest as Henrico Da Costa, on the pending indictment in the Braman case; and having been held on that charge, he was discharged on recognizance on the 18th of September, since when he had not been heard from. When taken from the tug, he asserted himself to be Garcia, and not Da Costa. He also pretended to be ignorant of our language, but was proved to have understood it. He was not produced by the claimant to ex-

plain these facts, nor were they explained from any other sources.

As already noticed, the name of the shipper of the Kate's cargo on the 3*d of July*, who swore to the shipper's manifest on that day, was *Jose Hernandez. Da Costa was then in New York.* When the manifest of cargo was again presented to the custom-house for a clearance, on the 14th or 15th of September, the name of Jose Hernandez did not appear on it as shipper; *no* shipper, in fact, appeared to make oath at that time. *Da Costa was then in custody of the marshal on the charge for which he stood indicted.* "Hernandez" never appeared either as claimant or witness, nor was any account given of him.

The bark and all her cargo was either adapted or capable of being adapted to a slave voyage.

On the other hand, it was shown by one Machado, a Portuguese, long in the African trade, and a person frequently summoned in slave cases, and by Smalley, a stevedore, engaged in loading vessels for the west coast of Africa, and by other persons of better standing than either, that there is a regular trade with Cape Palmas and the west coast of Africa; that houses of unquestionable integrity in New York are engaged in it; *that the vessel, as respected size, was suitable enough for the legitimate trade; also, that every article on the manifest of this vessel was well adapted to it; staple articles in demand and consumption by the native Africans; articles which the inhabitants of that country buy, and for which they pay in the natural products—palm oil, hides, gold dust, ivory, and other things—indigenous to their own region.*

No manacles were found upon the vessel, nor unnecessary chains or fastenings, nor any supply of medicines unusual in a lawful voyage.

The District Judge (Betts) gave an opinion, laying down principles of evidence, in application to this class of cases, as follows:

"In actions of this class, the Government is not restricted to proof of positive facts in laying a foundation for a presumption

or inference that acts have been done in violation of law, but they may invoke circumstances calculated to raise suspicions that the purpose of mind or matter inducing the acts performed were illicit; which suspicions must avail as convicting evidence, unless countervailed or explained by proofs in the power of the claimant to furnish. In the earlier seizures and prosecutions under the slave acts, vessels employed in the trade were found fitted out with arrangements so manifestly designed for that business, that the circumstantial proofs furnished by their preparations and equipment were nearly equivalent to positive testimony. The species of indirect or circumstantial proofs of that order, and then generally regarded as necessary to a conviction, were made public law by the treaty between England and Spain, so far as those high contracting parties were concerned, and were generally acquiesced in by courts of the United States as laying down a safe rule of evidence. It soon grew almost into the course of the courts to look for and demand that extreme force of circumstantial evidence to inflict the condemnation of a vessel upon presumptive proofs alone. Very soon slave-traders discarded sets of manacles as part of their preparation. A slave deck was no longer found laid in the vessel or prepared for putting down. She exposed no longer an extraordinary supply of provisions, medicines, or equipments specially adapted to the use of slaves, or other conveniences (except, perhaps, large supplies of water or water-casks) peculiar to the trade, on examination of the ship, or a mere inspection of her outfit, to become very forcible evidence of her business and destination. For years past these *insignia* of slavers, except supplies of water, have disappeared from vessels detected in the trade and laden with slaves on actual transportation; and it has become notorious, from publications of writers thoroughly conversant with the course of the business, from proofs in courts of justice on the trial of vessels seized for violations of the laws, from public documents and the decisions in cases of the arrest of vessels for the offence, that slaving vessels are now employed in the trade, fitted and cleared at ports abroad and in this country openly, with the appearance of lawful traders carrying substantially like cargoes and equipments as those which pursue a lawful trade on the coast of Africa; and that on arrival out to the point where slave cargoes are collected, the ship is, *impromptu*, put in a state to receive their victims on board, and is thus en-

abled, often in one hour's time, to become transmuted from the fitment and aspect of an honest trader to a slaver under way, laden with hundreds of human beings on transportation to foreign markets as merchandise.* This new practice of discarding from the preparation of slaving vessels most of the *insignia* of their real design, and, on the contrary, giving them the semblance of lawful traders, yet possessing the faculty of using at once, in their condition, the means necessary to accomplish their nefarious calling, appeals impressively to justice to put in active service all the capabilities of the law of evidence in order to detect and thwart the imposition and crimes attempted to be carried out. Accordingly, in support and accordance with the doctrine that when the evidence on the part of the Government creates *strong suspicions* or *well-grounded suspicions* that the vessel seized as being employed in the slave-trade was fitted out or fitting out for that purpose, the decisions in this court have been uniform and distinct, that such evidence must produce her conviction and condemnation, unless rebutted by clear and satisfactory proofs on the part of the claimants, showing her voyage to be a lawful one."

His honor accordingly condemned the bark, and the Circuit Court having affirmed the decree, the case was now here by appeal.

Messrs. Donohue, Evarts, and Gillet, for the appellants, owners of the bark Kate, or of other vessels under sentence appealed from.

I. The burden of proof is upon the Government to show, affirmatively, that the vessel was fitted out, &c., for the purpose of carrying on the slave-trade.

1. Because this traffic is a heinous offence against religion, morals, and the law of nature.

2. Because, by statute, it has been declared piracy.

3. Because the proceeding is for the enforcement of a severe forfeiture.

* Canot's Narrative of the Slave-Trade; Lieutenant Foster's Notes on Africa, Exec. Doc. 2d sess. 28th Cong. No. 148; The United States *v.* The Butterfly, U. S. Dist. Court, MSS. 1840; The United States *v.* The Bark Laurens; also in this Court Scrap-Book, 158, July, 1849.

Argument for liberation of the Bark.

The legal presumption, therefore, is, that the fitting out of the bark was for a lawful purpose.

II. As to the kind and quantity of proof, upon which alone a forfeiture can be declared.

1. The simple fact that the bark was bound for the coast of Africa with such a cargo on board as is usually taken there for the purpose of lawful trade, can raise no legal presumption against her. Upon such a case, the law would presume her voyage innocent, however a suspicious person might suspect the contrary.

2. It is true that a lawful cargo is consistent with an illegal purpose to engage the vessel containing it in the slave-trade on reaching the African coast; but to forfeit or convict upon that ground, there must be positive proof of such guilty purpose. It is the *preparation* of the vessel, and the *purpose* with which this is done, which constitute the offence; and this guilty purpose must be affirmatively made out by such proof as shall leave no reasonable doubt on the subject.* If the cargo and equipments of the vessel are all innocent in their own nature, a forfeiture may, nevertheless, be decreed, *provided there be positive proof of a guilty intention to employ her in the slave-trade.* But not otherwise.† It was only by disregarding these principles—which are as ancient as the law itself—that the court below was enabled to pronounce the decree of forfeiture, from which this appeal was taken.

III. Let us examine the evidence and the circumstances relied upon to sustain the decree.

1. There was nothing in the *destination* of the bark indicating an unlawful purpose. She was bound for Cape Palmas and the western coast of Africa. It is admitted that lawful commerce can be carried on with that country as much as with England or France.

2. There was nothing in the *size* of the bark to indicate

* The Emily and Caroline, 9 Wheaton, 381, 389; United States *v.* Gooding, 12 Id. 460, 472, &c.

† The Plattsburg, 10 Id. 133, 140.

that she was intended to be employed in an unlawful trade. She was of the usual tonnage of vessels sent to the western African coast upon legal voyages.

3. There was nothing in the other characteristics of the bark, her outfit, equipments, or cargo, which was not entirely suitable for a lawful voyage, or which was in any respect inconsistent with the purpose of prosecuting a lawful trade. This, in effect, is conceded.

There is, in fact, therefore, nothing but the testimony of inferior revenue officers, common sailors, custom-house clerks, and persons of slight weight; the testimony which they gave, even if it came from good sources, being most unsatisfactory. How uncertain is the fact of Da Costa's identity with Garcia! How little trustworthy much of all that was testified about the conduct of Otto! [The counsel here went into the evidence of particular facts, discrediting it largely.] The case of the Government rests, in short, on the fact that the vessel was about to sail for the western coast of Africa, where two sorts of trade are carried on,—one lawful, the other criminal,—and that she does not feel bound to prove, affirmatively, that she was *not* about to engage in the criminal one. It rests on an unsatisfied surmise, arrived at by the absence of positive testimony. Is this court ready to lay down, as a rule of evidence, that every vessel about to sail for the African coast shall, *ipso facto*, be presumed guilty of a purpose to engage in the slave-trade, unless she proves herself, affirmatively, innocent? Congress may, no doubt, enact by statute that this shall be so. It may or may not be well that Congress should so enact. But neither the spirit nor the decisions of the common law, as yet, have ever declared that such a presumption has existence anywhere in the law of evidence.

The country is desirous to see the African slave-trade exterminated. It may be said to have a deep interest in hastening that result. But it should be more desirous still—it has no interest deeper—that the great laws of evidence, by which property and reputation and life itself are maintained, be scrupulously respected. Not only justice,

but justice judicially administered, and to be administered, is the standing interest of all commonwealths; of this not less than of any other. We address ourselves to the "judicial conscience" of the court. We protest against the doctrine laid down in the District Court, that men are to be deprived of property, life, and character—for a forfeit of all these are the penalties of engaging in the slave-trade—on any "suspicions," however strong. When we hear a learned judge of America, in this nineteenth century, thus speaking from the seat of judgment, it is well to recur to the wisdom of a former day. A great English chancellor* spake differently. "Suspicions among thoughts," said he, "are like bats among birds; they fly ever by twilight. Certainly they are to be repressed, or at the least well guarded; for they cloud the mind. They are defects, not in the heart, but in the brain. There is nothing makes a man suspect more than to know little; and, therefore, men should remedy suspicion by seeking to know more, and not to keep their suspicions in smother."†

Mr. Assistant Attorney-General Ashton, for the United States.

The slave-trade, it is known, is carried on at this moment to a frightful extent on American vessels from American ports, and by the aid of American capital. Millions of dollars are said to be invested in the traffic. Why is this? The fault is not with our people, nor with Congress; the last of which, from the foundation of our Government, and the former from before, have uninterruptedly, faithfully, and most conscientiously, been endeavoring to extirpate this horrid inheritance, left us as a charge by the rapacity of our British and French ancestors. The fault is not with our navy, of which so many gallant crews and officers fall annually a sacrifice to the malignant fevers of the African coast, in their service upon our Treaty squadron. And the fault has not been with our courts, where law is administered with ability, learning, and impartiality. Yet, in spite

* Bacon.

† Essays: Of Suspicion.

of laws, navy, and courts, aided and supported by the feeling of the whole country, the illegal traffic continues in open day. What, again, we may ask, is the cause of this?

In *this* day this traffic is so managed, that while every one knows the truth of the case, the truth of the case is always defeated; that while every one can point out the felon, the felon still walks abroad, sworn to and certified an innocent man. By plan, no one reveals his true character. Fraud is ingenious in device. The trade, however amenable in reality to the law, is *now* carried on with a regular machinery to *evade law*. This is a prerequisite of the trade; an invariable part of it; a machinery which requires lies, fraud, and perjury at the bottom of everything; a machinery of agents and foreigners, regularly prearranged in anticipation of discovery; having no reality for any purpose, and no design but to circumvent justice.

General characteristics, however, still adhere. The course of a defence on a libel, such as this one, can be calculated as certainly as the course of any moral thing whose laws are settled and known to us.

In cases of *guilt*, the following are standing *indicia:*

1. A sale of the vessel, not long before the projected voyage, and generally at an extravagant price.

2. A crew-list which is false: foreigners, Portuguese and Spaniards chiefly, shipped as Americans.

3. Stock witnesses: Machados, Smalleys and Smiths,—all known at the custom-house as well as noted thieves are at the chief's of police.

4. A set of *figurantés*, who *appear* at every emergency, and in any character; owners, shippers, charterers, persons having all interest, no interest, or any interest between; and who *dis*appear;—this *dis*appearance being just at those moments when a gibbet becomes visible in the background; the Da Costas, Hernandez, Garcias, Ottos of this case, and of every slaver libel or indictment; sometimes bearing one name, sometimes another; at one time Spaniards or Portuguese, at another our own people. An appearance, as claimants *on the record*, under their own or an assumed

name, of parties interested in the vessel or cargo, when the seizure is first made, and their subsequent *dis*appearance,—when their claim is to be maintained in court,—is a common characteristic.

5. A cargo scrupulously proper for the lawful trade; but with this characteristic of it, that every item of it is equally applicable to the slave-trade, and can easily and instantly be so converted and applied.

6. No attempt to show that the special voyage is a lawful one; or that a reputable house has to do with *this* vessel; although the whole defence is based on the fact that a lawful commerce is extensively carried on with the west coast of Africa, and that the houses which carry it on are well known, and never supposed to have in view any voyage but a lawful one. A total failure, in short, by everybody, to produce the ship's papers, showing the real purpose of the voyage or cargo, or to give the Government a clue to where such evidence might be obtained.

These characteristics of guilt consist as well in what is sure to be sworn to as in what it is never attempted to prove.

Now, all the standing characteristics appear here, and one of them strikingly. Da Costa and Hernandez, if not one myth, are plainly one man. And *Hernandez* appears as shipper in July, 1860, and does not appear in September following, when equally wanted, only because *Da Costa* was at large in the former month, and a culprit under seizure, or fled away in the latter.

But this case has special characteristics. [Mr. Ashton here arranged, grouped, and presented the particular facts in such a way as to make them bear with force upon his cause.] But we need not enforce these. We rather enunciate principles applicable not less to this than to other cases now before the court,—the Sarah, Weathergage, and Reindeer, heard, or to be heard; cases distinguishable from the present case only by having, as in the Sarah, water-casks "in shooks," instead of casks erected; or, as in the Weathergage, a clearance for *Hong Kong viâ* Ambriz, on the western coast, instead of a clearance to Cape Palmas; or, as in the

third and last-named, a roundabout voyage by way of Havana, and a fraudulent attachment laid to arrest our forfeiture; cases in which the arguments may not be much reported; being, as they will be, but repetitions of those in this; and cases to be affirmed or reversed, probably, as this one may be.

We assert, as a true rule of evidence in regard to these slaver voyages, the rule laid down by the District Judge; a gentleman who brings to every class of question, high intelligence, of course, but to this class brings specially as well, an advantage which no intelligence could give,—the advantage of "old experience" with the shipping business of our great American port. In speaking of invoking "circumstances calculated to raise suspicions," he may not have spoken philologically well, but he spoke well practically; for his meaning is obvious, and his idea is right. When we are dealing with the slave-dealer, we are dealing not only with the most depraved and most cruel of human beings, but one who is the most crafty also; "one who would circumvent God." What the learned justice meant was this: that a degree of circumstantial evidence which would be insufficient, in allegations of most crime, to convict, is enough here to put parties to the proof that their business was a lawful one. The observation was right when applied, as it was, to a class of persons whose art is the *ars celare artem;* to a trade where the avarice and wicked invention of Europe and America alike have been engaged for half a century, with the gallows in view before the operator, as the penalty of failure,—in reducing to a *science* the art of stealing men; of practising the most frightful theft of the world, and not to leave a trace of it behind. The party alleging a guilty intention is compelled, it must be remembered, to extract evidence of it from acts and preparations designed to conceal it, and to rely on such facts of suspicious aspect as accident, carelessness, or the natural incongruity between truth and falsehood, may develop. We are here inquiring into a *purpose.* Where the guilty purpose is hidden under the guise of a lawful enterprise, with such skill and adroitness as the

slave-traders are well known to have exhibited, those suspicious facts are apt to be few and insignificant. When they *are* discovered and proved, their ordinary force ought to be greatly strengthened by the failure of a party on whom they are fastened to make full and frank explanation of them. And the force of such suspicions will increase in proportion as their explanation is easy to the party. The claimant, although he, and he only, holds the clues to these mysteries, will not disclose them, but chooses rather to rest under the shadow of the suspicions and presumptions they arouse, than to subject them to the light of full and free investigation.

On the whole, we apprehend that the case falls within the spirit of *The Emily and Caroline*.* This court there said: "There was no attempt whatever to explain the object of these peculiar fitments, or to show that the destination of the vessel was other than that of the slave-trade. We may, *therefore*, safely conclude, that the purpose for which these vessels were fitting was the slave-trade."

The CHIEF JUSTICE delivered the opinion of the court.

The libel charges that the vessel was prepared at New York, in the summer of 1860, for the purpose of trade in slaves, contrary to the acts of Congress in that behalf; by reason whereof, and by virtue of the acts, the bark, her tackle, apparel, furniture, and lading became forfeited. There is no question of the construction of the acts of Congress, prohibiting the slave-trade, or of the forfeiture, if the allegations of the libel were established by proof. The case therefore turns on the evidence.

In considering this evidence, it is to be borne in mind, that for more than three hundred years the western coast of Africa has been scourged by the atrocities of the slave-trade; and that this inhuman traffic, although at length proscribed and pursued with severe penalties by nearly all Christian nations, has continued, with almost unabated ac-

* 9 Wheaton, 381.

tivity and ferocity, even to our times. Fears of forfeiture of property, and even of life, have been easily overcome by hopes of enormous gains, and so long as markets for slaves remain open, and imperfect execution of the laws permits the expectation of profit from crime, the most conspicuous results of penal legislation will be, more cunning in the contrivance and more adroitness in the use of means for evading or defeating its intent and operation. The difficulty of penetrating the disguises of crime is enhanced in the case of the slave-trade by the circumstance that a very considerable traffic, regarded as legitimate, has sprung up and is carried on with the same African coast from which human cargoes are collected. It does not seem unreasonable, since it is the paramount interest of humanity that the traffic in men be, at all events, arrested, to require of the trader, who engages in a commerce, which, although not unlawful, is necessarily suspicious from its theatre and circumstances, that he keep his operations so clear and so distinct in their character, as to repel the imputation of prohibited purpose.

The bark Kate arrived from Havana at New York about the 17th of May, with a cargo consigned to parties there. She was then apparently owned by Benjamin Buck and Alfred Buck, of Baltimore, and was commanded by C. W. Buck as master. Some six days after her arrival, she seems to have been sold by the master, as attorney for the owners, to one Lake, for $10,500. She was registered on the 30th of May, 1860, as owned by Lake, and commanded by one Frederick Otto. Her crew-list, sworn to by Otto, on the 3d of July, 1860, does not state the rank or employment of any of the persons named, but describes one, O. F. N. Raven as born in New York, and another, Francis Stevens, as born in Louisiana. Another crew-list, made out in September, describes Raven as mate, and as born in New York, and Stevens as second mate, and as born also in New York.

The equipment of the bark was somewhat peculiar. She had an unusually large number of spars and sails; was provided with the water-casks and tanks necessary for a slaver;

and had a large quantity of articles, not on her manifest, suited to the purposes of the trade.

She was twice seized: first, after being cleared and having sailed on the 3d of July, 1860, for Cape Palmas and ports on the west coast of Africa; and again, after refusal of her second application for clearance and before sailing.

The shipper's manifest, dated July 3, 1860, purporting to be of part of cargo, embraced all the articles mentioned in the manifest delivered to the custom-house, and a number of barrels of beef and tongues in addition. This shipper's manifest was signed Jose Hernandez. The record shows no manifest of her second cargo; but the return of the inspectors, under whose supervision it was unladen, shows that it was composed substantially of the same articles as the first.

When the bark was first seized, she was accompanied outside the harbor by a tug, which conveyed the captain, Otto, and one Da Costa. This Da Costa had, some four years before, been indicted for slave-trading, and had forfeited his recognizance, and had evaded the officers of the law. He pretended to be a stranger to Otto; to be ignorant of our language, and to have no connection with the bark; but trunks marked with his name were found in her cabin; he was detected exchanging signs with Otto, and it was soon discovered that his ignorance of our language was a mere pretence. Hernandez, who represented himself as shipper of part of the cargo, but whose manifest of part included every article on the custom-house manifest, and several others, never appeared to protect his interest. There is reason to think that the name was but an *alias* for Da Costa.

Lake, who alone intervened to claim both the bark and the cargo, says that the vessel was chartered for the African voyage, and loaded with the goods of the charterer; but he does not name the charterer, nor offer any evidence of the ownership of the goods. The proof, so far as it affords any light on this point, indicates Hernandez or Da Costa as the owner. Lake asserts that he bought the vessel for $10,500; while the appraiser's valuation is at $4000. It seems highly improbable that he paid a price so disproportioned to value,

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for the mere purpose of chartering her for an ordinary trading voyage. The charter-party is not produced, nor is any reason given for its non-production. The crew-list represented all the persons named on it as Americans born, and it was sworn to by Otto, but the proof shows conclusively, that neither the master nor mate were Americans, and deprives the oath, which represents the others as such, of all claim to credit.

We do not think it necessary to examine the evidence more in detail. The case presents none of the marks of an honest transaction, but bears upon it such indications of the guilty purpose to employ the bark in the slave-trade, that we should require clear explanation by convincing proof to repel the conclusion that such was her destined employment. But there is no such explanation. There is no attempt to clear the case of the damaging inferences which the destination of the voyage, the character of the vessel and cargo, and the character and acts of the parties prominently connected with both, irresistibly suggest.

We conclude, therefore, that both were rightly condemned by the District Court, and

AFFIRM ITS DECREE.

THE SLAVERS. (SARAH.)

The principles of the preceding case (The Kate), redeclared in this case, and a vessel bound to the west coast of Africa, condemned under circumstances—individually not very strong, but collectively of weight—raising a presumption, which there was no attempt to overcome by explanation, that she was about to engage in the slave-trade.

LIKE the preceding case, this was a libel of forfeiture, filed in the District Court for the Southern District of New York, against a vessel and cargo, under the 1st section of the act of Congress of 22d March, 1794,* and the 2d of that of 20th April, 1818,† prohibiting persons engaging in the slave-trade.

* 1 Stat. at Large, 347. † 3 Id. 450.

Statement of the case.

The former declares that no person shall "build, fit, equip, load, or otherwise prepare any ship or vessel, within any port or place of the United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; or for the purpose of procuring from any foreign kingdom, place, or country, the inhabitants of such kingdom, place, or country, to be transported to any foreign country, port, or place whatever, to be sold or disposed of as slaves; any ship or vessel so fitted out, &c., to be forfeited to the United States," &c.

The latter is of an import essentially the same; its language being, "for the purpose of procuring any negro, mulatto, or person of color."

One Couillard intervened, on the 3d of May, 1861, as claimant and bailee of the cargo, which was stated to belong to R. J. Arguelles, who, however, did not in any way appear. Arguelles, or some person bearing that name, had sworn to it as of the value of $22,000. There was no denial that the vessel was on her voyage to the African coast. Her clearance, in fact, had been for Cape Palmas.

The Sarah was a bark of about 260 tons, 103 feet long, 25 feet broad, 11 feet 3 inches deep, with three masts, was similar to the Kate, condemned (*supra*, p. 366) for being engaged in the slave-trade. She was clipper-built, intended for fast sailing, with high and light spars, calculated to carry a press of canvas, and sharp. Her cooking-galley was 19 to 20 feet long, and wide in proportion. She had on deck a number of extra spars, similar to those on the Kate, and besides her ordinary boats, two large surf-boats. The manifest showed a large quantity (19,448 gallons) of what is called "oil-cask shucks," with a proportionate quantity of iron hoops and rivets. These would hold water as well as oil. It was proved that these casks—"oil casks"—are found in large quantities on nearly all vessels condemned as slavers. On examining the cargo, 15 or 16 barrels of beef or pork not on the manifest, also 16 barrels of bread and 6 barrels of flour, and 1 tierce of rice, marked for the homeward

passage in plain letters, were found on the vessel. There were half a dozen water-casks on deck, besides the casks in shucks on manifest, which were of the same style as those on board the Kate.

The manifest showed 150 hogsheads of rum, also cases of muskets.

On the 7th of March, 1861, Augustus Head, Jr., of Boston, had purported to sell the bark to one "C. P. Smith, of the city of New York," for $9250, and *he*, on the 11th of March, sold her to Couillard, the intervener, for $10,000. No proof of actual sale was made. De Graw, a clerk in the custom-house for seven years, testified that, on the sale or transfer of slavers, he had noticed that there are usually two or three transfers made previous to the sailing; that he did not know of any P. C. Smith engaged in the trade; that he had looked in New York city directories carefully for C. P. Smith for five years; that the name was not there; and had looked (though in vain) in one Brooklyn directory. The claimant did not attempt to prove the existence of such a person. De Graw, the clerk above mentioned, stated that he knew the principal houses in New York engaged in the legal trade to the African coast, but did not know any such persons as Couillard or Arguelles.

The deputy marshal who seized the bark stated that he seized her fifteen miles down the New York bay. When approaching, and within half a mile of her, he saw through a spy-glass that several persons on board were examining the vessel he was on, and that immediately after, from the vessel which they were watching, somebody threw a box, about 2 by 3 feet in size, overboard, which sank. Couillard was on board, in command, when this occurred. He gave no explanation of the fact.

In addition to the facts already stated, it appeared that one Miller, who had shipped under the name of Reed, had authority to ship men for the voyage, and to exercise control in the absence of Captain Couillard. He stated to a seaman named Delano that he was to be the actual master

of the vessel. He shipped Delano under the name of Comstock, and paid his advance-money.

Delano swore that Miller, "on board, acted as captain, mate, and all hands," and signed receipts for the cargo. Miller, in the act of employing Delano, represented himself as master of the vessel; said "he was going to the coast of Africa; was going black-birding," and sometimes used the word "ebony," and tried to induce the witness to go along by giving him liquor, and by promises of large profits. He said, "If you go with me, you will be gone about four months, and have about $3000 or $4000 when you get back." On another occasion, he said that "he was going over to the coast of Africa, and wanted me to go as second mate." Such, at least, was the testimony of some of these parties. There was, however, no more specific evidence against the vessel. No manacles nor unusual supply of medicines were found on her, and the cargo was one which would have suited a lawful voyage to the African coast.

The District Court condemned the bark. The Circuit Court affirmed the decree. Appeal here. After an able argument *by Mr. Evarts for the appellant, and by Mr. Coffey, special counsel of the United States, contra*,—

Mr. Justice CLIFFORD delivered the opinion of this court.

This was a case of seizure and forfeiture, and the case comes before the court on appeal from a decree of the Circuit Court of the United States for the Southern District of New York.

Referring to the transcript, it will be seen that the libel of information was against the bark Sarah, her tackle, apparel, and furniture, and the lading on board, and that a decree was entered in the District Court condemning both the vessel, &c., and her cargo, as forfeited to the use of the United States. Appeal was taken by the claimant to the Circuit Court, where the parties were again heard, but the Circuit Court affirmed the decree, and the claimant again appealed to this court.

1. Allegations of the libel are founded upon the first sec-

tion of the act of the twenty-second of March, 1794, and the second section of the act of the twentieth of April, 1818, prohibiting any person or persons from engaging in the slave-trade. In order to entitle the libellants to a decree of condemnation, they must prove either that the vessel was fitted, equipped, loaded, or otherwise prepared for the voyage, or that she was caused to sail on the voyage in which she was engaged for the purpose of carrying on a trade or traffic in slaves to some foreign country, or for the purpose of procuring from some foreign country, &c., the inhabitants of such country, to be transported to some other foreign country, port, or place, to be sold or disposed of as slaves, or for the purpose of procuring negroes, mulattoes, or persons of color from some foreign country, to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of as slaves, or to be held to service or labor.*

2. Intervening for the interest of himself as owner of the bark and bailee of the cargo, the appellant, on the third day of May, 1861, made claim in the District Court to the vessel and cargo, averring that he was in possession of the same at the time of the seizure, and that he was the true and *bona fide* owner of the vessel and the bailee of the cargo on board. One of the charges is the fitting out of the vessel, and the other is the causing the vessel to sail, either of which, if proved, will induce a forfeiture. Full proof is exhibited that the vessel had completed her fitting, equipment, and lading, and that she was avowedly proceeding on a voyage to the west coast of Africa, when she was boarded and seized. Obviously, therefore, the main question is one of fact, whether she was fitted out, equipped, and loaded, and was proceeding to that coast for the purpose of a lawful trade, or for the purpose of engaging in the trade or traffic in slaves. Undoubtedly, the statutory offence is completed when the preparations for the voyage have reached a stage which shows satisfactorily that the purpose of the fitting and equip-

* 1 Stat. at Large, 347; 3 Id. 451.

ment was such as is described in the libel of information. Plainly, the object of the law is to prevent the preparation of vessels in our ports for that trade; and, consequently, the law looks at the intention, and confers the authority to take from the offender the means required to enable him to perpetrate the mischief.*

3. Argument for the United States is that the evidence clearly shows that the voyage for which the bark was fitted and prepared, and which she commenced from the port of New York under a clearance for Cape Palmas, on the western coast of Africa, was undertaken for the purpose and with the intent of engaging in the slave-traffic. Claimant denies that proposition, and insists that the evidence offered to prove the allegation is wholly insufficient to warrant any such finding, and, consequently, that both the District and Circuit Courts were in error. He admits, however, that the character of the vessel, her size, build, and equipment, do not absolutely exclude the conclusion that she was capable of such service. Denial of the fact involved in the admission could not well be made, because the proofs are full to the point, not only that she was capable of such service, but that she was, in all respects, well suited to the service, and, indeed, that she was such a vessel as those engaged in the nefarious traffic usually select as best modelled for such an adventure.

4. Unlike what is usual in cases of this description, the destination of the vessel is admitted; and it cannot be denied that the destination would have carried her to markets where it is known that the traffic in slaves is prosecuted. Proofs show that she was a vessel of about two hundred and sixty tons burden; that she was a hundred and three feet in length, twenty-five feet in breadth, and eleven feet and three inches deep. She was clipper-built, with three masts, and was adapted for a large press of canvas, and was fast-sailing. Expert witnesses also say that she had a number of extra spars on her deck, similar to other vessels condemned as slavers; and that besides her ordinary boats, she had two

* The Emily and Caroline, 9 Wheaton, 381.

large surf-boats not needed by a vessel bound to a regular commercial port. Certain articles of the cargo are also significant of an unlawful purpose. Unusually large quantities of shooks for casks appear on the manifest, and also a proportionate quantity of iron for hoops and rivets for fastening the same. "Casks in shooks" are the words of the manifest, and the quantity stated is nineteen thousand four hundred and forty-eight gallons for oil; but it is quite obvious that the shooks, when set up and hooped, would be as suitable to hold fresh drinking-water as oil; and the evidence shows that they are found in large quantities on most or all of the vessels condemned as slavers. Some half dozen water-casks were on deck, besides the casks in shooks appearing on the manifest. Fifteen barrels of beef and pork were found on board not on the manifest, and sixteen barrels of bread, and six barrels of flour, and one tierce of rice, plainly marked for the homeward voyage. Other articles on the manifest, which deserve notice, are ten cases of muskets, eleven hogsheads of tobacco, and one hundred and fifty hogsheads of rum, which, the expert witnesses say, is a well-known article of trade in the purchase of negroes. One of the expert witnesses, who had been an entrance and clearance clerk in the custom-house at New York for seven years, testified that he had noticed that vessels designed to be used in the slave-trade were usually transferred two or three times just previous to the sailing of the vessel; and in this case it appears that the bark was, on the seventh day of March, 1861, sold by one Augustus Head to one C. P. Smith, of the city of New York, for the sum of nine thousand two hundred and fifty dollars; and that the purchaser, four days afterwards, conveyed the same to the present owner. None of the witnesses know the last-named grantor, and one of them testifies that he has looked carefully into the directories of the city of New York and of the city of Brooklyn for the last five years, and that he can find no such name. Suspicion also attaches to the conduct of the present owner, both in his character as such, and as master for the voyage, and he has not employed any proper means to repel that sus-

picion. He has produced a bill of sale from C. P. Smith, but he has not introduced the grantor as a witness or either of the witnesses of the bill of sale. And he has failed to show, what might easily be proved, if true, that he actually paid the consideration expressed in the bill of sale or any other sum for the vessel, or that there is or ever was any such person as the one therein named as his grantor.

5. Common prudence required him to explain these matters, and yet he has neglected to do so; and he has also neglected to furnish other explanations of equal importance: As, for example: the bill of lading discloses the fact that the vessel was under a charter-party, but he neither produces the instrument nor attempts to account for its absence. Testimony was also introduced by the libellants showing, beyond controversy, that as the boarding officers approached the vessel for the purpose of seizing her, some person or persons on board the bark were seen to throw overboard a large box, which immediately sank, and yet the claimant does not attempt to explain the transaction. Although he claims as bailee of the cargo, still he offers no proof to show where or by whom it was purchased, or how or by whom it was paid for, and furnishes no explanation upon the subject. Evidence to show that he was engaged in any legitimate trade to that quarter of the globe, or that he had any connection with any commercial house lawfully trading on that coast, is entirely wanting; and it does not appear that he had made any arrangements for an honest return cargo. Large quantities of beef, pork, and bread, not on the manifest, were found on board, but he offers no explanation of the matter, and does not even examine the mate or any one of the crew. Shipper of the cargo, R. J. Arguelles, is not introduced, although it appears that the value of the shipment, as sworn to by him, was twenty-two thousand dollars; still, he does not appear as claimant, nor is he examined as a witness. Appellant claims the cargo as bailee, but he nowhere states or proves for whom he is bailee, and nothing in the case shows satisfactorily who is the real owner of the goods.

6. Considered as a whole, the various circumstances to which reference has been made afford very strong ground of presumption that the allegations of the libel of information are true. Evidence which satisfies the mind of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, says Mr. Starkie, constitutes full proof of the fact, and it would seem that the combined force of these various circumstances can scarcely fail to generate that full belief.*

Doubt cannot be entertained, that the circumstances adverted to are fully established, and it is certain that they are consistent with the hypothesis assumed by the United States. Some of them, it must be admitted, if separately considered, are not of a conclusive nature and tendency, but taken as a whole, it is difficult to say that they do not satisfy the mind of the truth of the charge, even to the exclusion of every reasonable doubt.

7. Suppose it were otherwise, however, still there is direct evidence in the case which, when considered in connection with the circumstantial facts, fully establishes the charge. Reference is here made to the statements of the mate, who is proved to have shipped under a false name, and the whole evidence shows that he had authority to ship men for the voyage, and to exercise control in the absence of the master. Suggestion of the appellees is that he was to have been the master for the voyage, and it must be admitted that there are many facts and circumstances in the case which give countenance to that theory, but it is unnecessary to determine the point in this investigation, as it is clearly proved that he was authorized to ship men as part of the crew, and to perform the duties of master, when the person recognized as such in the ship's papers was absent. Seaman Delano was shipped by him under the name of Comstock, and he collected his advance-money from the clerk of the shipping notaries, and paid it to the seaman as one of the crew. Delano testifies that the mate "acted as master, mate and all

* 1 Starkie on Evidence, p. 450.

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hands," and it is fully shown that he signed receipts for cargo. While in the act of employing the seaman, when clearly he was acting as master of the vessel, he stated that he was going to the coast of Africa, and that he was to be master of the vessel. He also "said he was going black-birding," and endeavored to persuade the witness to enlist and go with him, by promises of large profits. Among other things, he also stated that they would be gone about four months, and that the witness, if he would go, would have three or four thousand dollars when he got back; and on another occasion, he stated that the bark was going on a trading voyage to the African coast, and would probably bring back some negroes. Viewed in connection with the circumstantial evidence, these statements are regarded as affording full proof of the truth of the allegations contained in the libel of information. Such were the views of the District and Circuit Courts, and we have no doubt they are correct.

The decree of the Circuit Court is therefore

AFFIRMED.

THE SLAVERS. (WEATHERGAGE.)

The general principle declared in *The Kate* and of *The Sarah* (*supra*, pp. 366, 372) acted on in a case of the same general type, but where the facts were more close.

Where the size, build, equipment, and cargo of a vessel—the non-appearance and doubtful existence of her asserted owners—the non-production by the claimant of important witnesses, and other circumstances, lead to a presumption that her purpose is to engage in the slave-trade, and no attempt is made to repel that presumption by explaining the suspicious circumstances, the vessel may be condemned as a slaver. The fact that she is cleared for China, does not of itself repel the presumption, the clearance being *viâ* Ambriz, a Portuguese port on the west coast of Africa, and that port being within about one hundred miles of the Slave-coast.

THIS, like the two preceding cases, was a libel filed in the District Court for the Southern District of New York, against

a vessel in the port of that city, under acts of Congress,* prohibiting the equipment, loading, and other preparation of the vessel, for *the purpose* of carrying on a trade in slaves, and like fitting, &c., and causing the vessel to sail for *the purpose* of procuring negroes, mulattoes, and persons of color, to be held, sold, or otherwise disposed of as slaves, &c. The libel was served October 23, 1860. On the 30th, John Morris, "intervening for the interest of himself as owner of the vessel and carrier of the cargo, appears before the honorable court, and makes claim to the said vessel, &c.," and averred himself to be true and *bonâ fide* owner, &c. The District Court condemned the vessel. On appeal, the Circuit Court affirmed the decree. Appeal here. The facts were thus:

On the 5th of September, 1860, one J. T. Woodbury purported to sell the vessel to "John Morris, of New York," "for the sum of $12,000."

The vessel was a bark of about 365 tons, 114 feet 8 inches long, 26 feet 6 inches wide, 13 feet 3 inches deep, with two decks and three masts.

The outward foreign manifest, sworn to by Edward Mitchell, who purported to be captain, on the 12th of September, 1860, represented her as bound for *Hong Kong, viâ* Ambriz, with a crew of fourteen men, and a cargo valued at nearly $19,000. The captain swore that this manifest contained "a full, just, and true account of all the goods, and then actually laden on board said vessel;" that he will report any additional cargo, and also, that "said cargo is truly intended to be landed in the port of Hong Kong, *viâ* Ambriz."

The shipper's manifest purported to report part of cargo shipped by Anthony Tuero, embracing the same goods, &c., contained in the manifest sworn to by the captain, and the oath, taken on the 12th of September, 1860, was, that "the said merchandise is truly intended to be exported to Ambriz." Tuero himself, whose deposition was taken in the District Court, though he was not examined in the Circuit,

* Acts of 22d of March, 1794, and 20th of April, 1818.

stated the same thing, namely, that the cargo was to be discharged at Ambriz, and that he was not to have anything to do with the vessel afterwards.

The bark had a between-deck, made of rough boards, about 5½ feet below the main deck; two surf-boats, besides four other small boats, which were manifested, with oars, rudders, tillers, &c. The surf-boats were covered and had hatches. A lot of lumber was stowed between decks, manifested as 100 pieces, 4 by 6 timber, and 762 pieces pine boards; 17 coils of rope, 3 bolts of sail-duck, 8 anchors, coopers' tools, nails, and a variety of things, usual in fitting a slaver, but not *unusual* in fitting any vessel. She had 12 swivels, and quantities of muskets and powder.

The cargo included 80 barrels of bread, 85 barrels and 100 half-barrels of rice, 57 barrels mess-beef and pork, 10 barrels of flour, beans, meal, &c., 3 barrels of vinegar, sixty fathoms of chain, 40 kegs of paint, 10 cans of linseed oil, 4 cans of spirits of turpentine, 96 bundles of white oak shucks, 4 hogsheads of shucks for heads of casks, 2 boxes of coopers' tools, 114 casks filled with water, 10 furnaces and boilers, and a large lot of firewood, and 375 sheets of copper. Other portions of the cargo were blankets, coarse cotton goods, muskets, powder, rum, wine, &c. *All this cargo was perfectly suited to the slave-trade.*

As respected Morris, it appeared that no man of that name was, on the 6th September, when the bill of sale was made, known to be in the shipping business of New York. No person, indeed, of the name was known by clearing clerks, some of whom were examined, or others, at the custom-house at all. Nor had he been ever heard of by one Machado, a man extensively engaged in the African trade. The vessel was appraised by the custom-house appraisers at $9000; the cargo at $11,681. The partner of Woodbury, —the alleged vendor of the vessel, and confessedly a real person, one Schmidt, a ship-broker,—did not know Morris, or what his business was, or whether he lived in New York, or whether he was "an owner or go-between." He had only seen him once, in the street, two months before.

Woodbury was at the hearing in the District Court in town, but was not called by the claimant, nor was the witness to the execution of the bill of sale examined or produced. When appeal was taken to the Circuit Court in Morris's name, on the 7th of February, 1861, the petition was signed by his counsel, and the bond then given for appeal. It was executed by one Fogerty, surety for Morris, but not by Morris himself. Fogerty swore that he had never heard of such a person as Morris till that morning, and that he had signed the bond because the counsel requested him.

Ambriz is a Portuguese town on the west coast. It was testified that there is no regular trade to Hong Kong *viâ* that port; and that vessels never clear from New York for China *viâ* any such place, though they do sometimes from South America. It was testified, also, that the ordinary size of vessels in the trade, on the west coast of Africa, is from 200 to 400 tons; that of those trading to China, averaging from 800 to 1200.

On the other hand, it seemed, if the testimony of Schmidt was to be received as true, that the $12,000 purchase-money of the vessel was actually paid by Morris to his partner Woodbury. No manacles, nor any unusual supply of medicines, were found on the vessel, which was unladed carefully. Her size and equipments, though fitting her for a slaver, were not unfit for a lawful voyage to the region where she purported to be going. *All articles found on the vessel were entered on the manifest.* Both vessel and cargo were consigned to one Lievas, superintendent of the English mines at Ambriz, who it was not suggested had been concerned at any time in the slave-trade. Ambriz itself was a town of about 3000 inhabitants, having a certain amount of commerce, but not any considerable amount; the same trade as the Congo River,—palm oil, ivory, hides, pepper and gum being shipped from the district. It is about 100 miles from any point where slaves are got. It has a custom-house, and exacts duties. It appeared that one house in Salem, Massachusetts, testified to be "respectable," traded there; that barks of about the same size with the Weathergage, and

of a structure not essentially different, made voyages to the place; that temporary decks were sometimes highly convenient, and were used accordingly in lawful voyages to Africa; and surf-boats, also; these last being useful in loading and unloading. Large quantities of water, too, is sent out in casks; "the water being pumped out, and oil, from the region, being poured in, just as the casks stand." The cargo, generally, would be "as likely to go for legal as illegal purposes." The witness, however, who testified to this, and that $20,000 would not be an excessive value for a cargo bound to Ambriz, had never known "*just such* a cargo" sent there as the one on the Weathergage, nor known of any vessel sent to Hong Kong *viâ* Ambriz, while neither knew he of any slave-trade *viâ* China. He had been established for ten years trading to the western coast of Africa and Gulf of Guinea, and had sent from seventy-eight to one hundred vessels there.

Mr. Beebee, for the appellant; Mr. Assistant Attorney-General Ashton, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This was a libel of information in a cause of seizure and forfeiture, and the case is brought here by an appeal from the decree of the Circuit Court of the United States for the Southern District of New York. Substance of the charge, as contained in the libel of information, is that the bark Weathergage was fitted, equipped, loaded, and otherwise prepared in the port of New York for the purpose of carrying on a trade or traffic in slaves to some foreign country; or for the purpose of procuring negroes, mulattoes, or persons of color, from some foreign country, to be transported to some other port or place, to be held, sold, or otherwise disposed of as slaves, or to be held to service or labor.*

Process was served on the 23d day of October, 1860, and on the 30th of the same month, John Morris, intervening

* 1 Stat. at Large, 347; 3 Id. 451.

for the interest of himself as owner of the vessel, and as the carrier of the cargo, appeared before the court and made claim to the same, and was allowed to make defence. Testimony was taken, and a decree, condemning both vessel and cargo, was entered in the District Court. Claimant appealed to the Circuit Court, and the record shows that additional testimony was taken in that court, and that the decree of the District Court was subsequently in all things affirmed. Appeal was then taken by the claimant to this court, and the parties have here been again fully heard.

1. Condemnation and forfeiture were decreed both in the District and Circuit Courts, upon the ground that the evidence shows that the vessel was fitted, equipped, and loaded, or caused to sail, for the purpose of engaging in the slave-trade. Claimant denies that the finding was warranted by the evidence, and that is the principal question in the case. Undoubtedly, it is the preparation of the vessel, and the purpose for which she is to be employed, that constitute the offence, and draw after it the penalty of forfeiture. As soon, therefore, as the preparations have progressed so far, as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches.*

Contrary to the views of the claimant, the counsel for the United States insist that the character of the preparations for the projected voyage was such as to indicate clearly that the purpose was the same as that charged in the libel of information. They admit that the circumstances given in evidence show that the projectors of the voyage had skilfully determined to give it the appearance of an honest and lawful enterprise; but they insist that a careful scrutiny of the evidence will show that the guilty purpose is not so successfully covered up with the garb of innocence as to conceal the true features of the transaction.

2. Looking at the evidence, it is apparent that it is, in its general characteristics, substantially the same as that exhi-

* The Emily and Caroline, 9 Wheaton, 381; The Plattsburg, 10 Id. 133; United States *v.* Gooding, 12 Id. 460.

bited in the other slave-trade cases decided at the present term. Differences are seen in the details of the evidence, but the quality and general nature of the proofs are substantially similar. Title of the bark, on the 5th day of September, 1860, appears to have been in one J. T. Woodbury, and the record shows that he on that day made a bill of sale of the same to one John Morris, of New York, for the sum of twelve thousand dollars. Counsel of the claimant introduced the bill of sale of the vessel, but they did not examine the person who witnessed its execution.

3. Proofs show that the Weathergage is a bark with two decks and three masts, and that she is of the burden of three hundred and fifty-five tons. Her outward foreign manifest, sworn to by the master, Edward Mitchell, on the 12th of September, 1860, represents her as bound to Hong Kong *viâ* Ambriz, with a crew of fourteen men, and a cargo valued at nearly nineteen thousand dollars. Statements of the manifest are, that it contains "a full, just, and true amount of all the goods then actually laden on board the vessel," and that the "cargo is truly intended to be landed in the port of Hong Kong *viâ* Ambriz;" but the shipper's manifest states that the merchandise is truly intended to be exported to Ambriz, which is a place on the coast of Africa.

4. Suspicion attaches strongly to the equipment of the vessel. She had a temporary between-deck, made of rough boards, about five and a half feet below the main deck, and which was not necessary to carry the cargo laden on board; and she had a large quantity of lumber stowed between decks, and manifested as lumber, and eight thousand three hundred and eighty-two feet of pine boards. She had two surf-boats, besides four other small boats, together with rudders and tillers and "oars for the same." In addition to the articles mentioned, she also had seventeen coils of rope, three bolts of sail duck, eight anchors, coopers' tools, nails, and almost every variety of article which is essential in the fitment of a slaver. Mention should also be made, that she had as part of her fitment, though included as cargo, twelve swivels and a large quantity of muskets and powder.

5. Portions of the cargo proper should also be noticed, as affording strong grounds of presumption that the purpose of the voyage was such as is charged in the information. Among other articles, it contains eighty barrels of bread, eighty-five barrels and one hundred half barrels of rice, fifty-seven barrels of beef and pork, besides four barrels of flour, and six barrels of beans and meal, and three barrels of vinegar. Besides the articles mentioned, the manifest also shows that she had one hundred and fourteen casks filled with water, and shooks and headings to make ninety-six more, together with forty bundles of iron for hoops, such as is used on such casks. She had also ten furnaces and boilers, with a large quantity of fire-wood, and three hundred and seventy-five sheets of copper. Argument for the claimants is, that the cargo was as suitable for a lawful voyage to the supposed port of destination, as for the purpose charged in the libel of information; but it is not possible to accede to that proposition. On the contrary, it seems to us, in view of the evidence in the case, that the manifest is a "more complete one, in every respect, for engaging in the slave trade," than any one heretofore presented to the court.

6. Although the master testified that the cargo was intended to be landed at Hong Kong, the great weight of the evidence shows that it was destined for Ambriz, or some other port on the coast of Africa. The shipper was not called as a witness in the District Court, but he was examined in the Circuit Court. He testified that he owned and shipped the cargo, and that it was to be discharged at Ambriz, and that he was not to have anything to do with the vessel, after the cargo was discharged. Libellants prove that there is no trade from New York to Hong Kong, or any other port in China, by the way of Ambriz, or any other port on that coast, and that no vessel ever cleared from the port of New York for such a voyage.

7. None of the witnesses, on the one side or the other, know the alleged owner and claimant of the vessel. Satisfactory proofs were introduced, showing that there was not then and has not been since, to the time of the hearing, any

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person by that name engaged in the shipping business in the port of New York. Two or more clearance clerks were examined, and they testify that they never heard of a business man there of that name. Persons who have for years been engaged in the China and African trades were also examined, and they testify to the same effect. Even Schmidt, the ship-broker and partner of the person who sold the vessel for twelve thousand dollars, testifies that he never saw him but once, and that was in the street, and that he did not know whether he was the actual owner, or merely the agent of the real purchaser of the vessel. Woodbury, the grantor of the vessel, was not called by the claimant. When the appeal was taken in the Circuit Court, the petition was signed by his counsel, and the bond given on the appeal, although drawn for the signature and seal of the claimant, was executed only by a surety, and the surety testifies that he never heard of such person until the morning of the day when his examination as a witness took place. Neither the master nor any of the crew are called to explain any of these inculpatory circumstances, nor is there any attempt to afford any explanation upon the subject. For these reasons, we are of the opinion that the finding in the court below was clearly correct. The decree of the Circuit Court is, therefore,

AFFIRMED.

THE SLAVERS. (REINDEER.)

1. A vessel begun to be fitted, equipped, &c., for the purpose of a slave-voyage, in a port of the United States, then going to a foreign port, in order evasively to complete the fitting, equipping, &c., and so completing it, and from such port continuing the voyage, is liable to seizure and condemnation when driven in its subsequent course into a port of the United States.
2. In libels for the alleged *purpose* of violating the acts of Congress prohibiting the trade in slaves, a wide range of evidence is allowed. Positive proofs can seldom be had; and a condemnation may be made on testimony that is circumstantial only, if the circumstances be sufficiently numerous and strong, and especially if corroborated by moral coincidences.

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3. Libels *in rem* may be prosecuted in any district of the United States where the property is found.

THE bark Reindeer, Cunningham, master, was forced by stress of weather into Newport, R. I., July 11, 1862, where the collector of the port immediately placed her in custody of a revenue officer. On the 1st of August he made a formal seizure of her for violating the laws relating to the slave-trade. On the 7th of August following, the United States filed a libel and information in the District Court for Rhode Island, against the bark, her tackle, cargo, &c., in a case of seizure and forfeiture, alleging,

First. The fitting and other preparation of the vessel within, and causing her to sail from, the port of New York, by a citizen or resident, &c., of the United States, for the purpose of carrying on a trade in slaves, contrary to the provisions of the first section of the act of Congress of 22d March, 1794,* &c.

Second. The employment and making use of the said vessel by a citizen or persons, &c., residing in the United States, in the transportation or carrying of slaves, &c., contrary to the provisions of the first section of the act of 10th May, 1800;† and,

Third. The fitting, &c., of said vessel within, and causing her to sail from, the port of New York, by a citizen or citizens of the United States, or other person or persons, for the purpose of procuring negroes, mulattoes, or persons of color, &c., to be held, sold, or otherwise disposed of as slaves, &c., contrary to the provisions of the second section of the act of 20th April, 1818,‡ &c.

On the 28th of August, 1861, one Gregorio Tejedor, said to be a Spanish subject, residing at Havana, and alleging himself to be owner of the cargo and charterer of the bark, intervened, averring that he was the *bonâ fide* owner of the cargo and charterer of the vessel.

On the 2d of September, 1861, D. M. Coggeshall, sheriff of the county of Newport, and H. P. Booth, J. E. Ward,

* 1 Stat. at Large, 347. † 2 Id. 70. ‡ 3 Id. 450.

and Samuel Shephard, alleging themselves to be attaching creditors of one Pearce of New York, owner of the vessel, filed a claim and answer, denying the allegation of the libel that the vessel was a slaver. They also averred that Coggeshall, as sheriff, on the 20th July, 1861, again on the 26th July, 1861, seized and attached the bark, by virtue of attachments duly issued out of the Supreme Court of Rhode Island; that, by virtue thereof, he then became possessed of her, and ever since has held, and, by reason thereof, that this court has no jurisdiction of the vessel, &c. They also averred that the acts charged were stated to have been done at New York, and not within the district of Rhode Island, and therefore denies jurisdiction.

During the progress of the cause, the vice-consul of the Queen of Spain, at Boston, filed a claim, professing to intervene "for the Government of her Catholic Majesty," and claiming the bark and cargo as the property of Gregorio Tejedor, a Spanish citizen. But there was no sufficient evidence that he was authorized to do this by the Government of Spain, or that the Government participated in the controversy in the court below.

The District Court condemned the vessel, cargo, &c., from which decree, *Coggeshall, sheriff, and Booth, Ward, and Shephard*, appealed to the Circuit Court. Tejedor also prayed an appeal, but did not take it.

So far, therefore, as the interests and rights of Tejedor were concerned, the decree of the District Court was final, and could not be here disturbed.

The Circuit Court ordered a sale of the vessel, &c., and cargo; and, on the 20th of January, 1862, the marshal sold her for $3000, and the cargo for $7756.52.

The Circuit Court heard the case on the appeal of Coggeshall, Ward, Booth, and Shephard, and affirmed the decree of the District Court, from which decree the said Coggeshall, Ward, Booth, and Shephard appealed to this court.

This case, therefore, came before this court neither on the claim or appeal of the alleged owner of the vessel, nor on the claim or appeal of the alleged owner of the cargo, but

on the appeal of persons who had attached—legally or otherwise—the vessel, &c., and cargo, at Newport, as judgment creditors of P. L. Pearce, of New York, by virtue of process of attachment issued out of the Supreme Court of Rhode Island against Pearce.

The facts on which their claim arose, as derived from a full and accurate printed statement prepared by Mr. Coffey, late Assistant Attorney-General, and now special counsel of the United States in the matter, were essentially as follow:

The bark, then on a voyage *somewhere*, was forced by weather, as already mentioned, into Newport, July 11th, 1861.

On the 27th of June, 1861, Pearce, of New York, confessed judgment to H. P. Booth, in the Supreme Court, City and County of New York, for $11,128.56.

On the 19th of July, 1861, after the arrival of the bark at Newport, Ward, Shephard, and Booth, partners, trading as Ward & Co., of New York, the appellants in this case, issued a writ out of the Supreme Court of Rhode Island, at Newport, against Pearce, also of New York, for his arrest, and, for want of his body, for the attachment of his goods, &c., to the value of $500. On the 20th of July, 1861, the sheriff returned that on that day he had attached the bark and cargo, the goods and chattels of Pearce. The account for which this suit was brought was for $300 cash furnished Captain Cunningham, of bark Reindeer, to pay off crew, on 13th July, 1861, and $50 cash to Captain Cunningham, on 15th July, 1861, in all $350, advanced *after* the arrival of the vessel at Newport. On the third day of August Term, 1861, the plaintiffs obtained judgment by default for $350 debt, and costs, taxed at $9.90.

The Reindeer was a vessel of 248 tons, with one deck and three masts, 100 feet long, 35 feet 3 inches broad, and 11 feet deep. She was owned by Pearce, of New York, and was commanded by W. H. Cunningham, of the same place. Pearce was a ship chandler and commission merchant in New York during the winter of 1860–'61, and had the vessel stripped, calked, resheathed, and refitted previous to her

departure on a projected voyage. She was also built with a rider,—an arrangement for laying an extra deck. Pearce employed J. E. Ward & Co., of New York (the claimants in this case, by virtue of their attachment of the vessel and cargo as above stated), to advertise and despatch her. Under these auspices she cleared and sailed for Havana on the 26th of January, 1861, where she arrived about the 20th of February following, consigned to Perez & Martinez, of that place.

J. E. Ward & Co. shipped on her to Havana, among other things, 14,700 lbs. of *tasajo*, or dried beef, and a box of hardware. Her outward manifest exhibited, besides, twenty-two packages of hardware.

The shipping articles, signed at New York, dated 26th of January, 1861, described the bark Reindeer as "now bound from the port of New York to one or more ports in Cuba; from thence to one or more ports in Europe, *if required*, and back to a port of discharge in the United States, or from Cuba back to the United States." The crew-list appended showed the captain, two mates, and seven men, of whom four deserted in Cuba, whose places were there filled. The captain and the rest of the crew remained all the time with the vessel, and were on her when she arrived at Newport.

The four sailors shipped in Cuba were shipped "to go a voyage to Falmouth, from thence to one or more ports of Europe, and back to a port of discharge in the United States."

Pearce, the owner of the vessel, arrived in Havana about the middle of March, and remained there until the 6th of May following.

The history of the vessel at Havana was thus: She laid at Havana from the 20th of February to the 22d of June, 1861. One of the consignees, Martinez, stated that Pearce went there *to sell* the vessel; that he *made a contract* to sell her to Tejedor for $7000, which Tejedor did not carry out; but that on the 10*th of May* Tejedor *chartered* the vessel, by charter-party, from Perez & Martinez, after Pearce had left Havana, for the sum of $8500, of which Tejedor paid $4000. Of this, Martinez testified that $1500 was for detention of the vessel from 23d of March until 10th of May. A charter-

party was produced, dated 23*d March*, 1861, signed by Captain Cunningham, "on behalf of P. L. Pearce, owner of the said vessel, and Perez & Martinez, *according to instructions handed to them by said owners*," chartering the vessel to Gregorio Tejedor for three years, for which Cunningham acknowledges "to have received this day from Gregorio Tejedor" $8500, giving Tejedor exclusive disposal of vessel, master, and crew, and right to place his own supercargo on board, he to bear all expenses and pay repairs.

On the 22d of June, 1861, the Reindeer cleared at Havana "for Falmouth, England, and for orders."

Having set sail from Havana on that day, the captain, in his protest, swore, "that on Tuesday, the 2d day of July, 1861, at sea, in about latitude 31°, longitude 69°, during a squall, the ship was caught aback, and, having gained sternway, wrenched the rudder-head and carried away the foreyard, when, finding the ship unfit to perform the voyage, squared away for Newport, Rhode Island, where we arrived July 11."

The location of the vessel, as above stated, when the captain was thus compelled to put into Newport, showed her, according to Maury's Geography of the Sea,* to have been on the route to the west coast of Africa.

On the day after her arrival at Newport, the captain borrowed of T. & J. Coggeshall $30 to pay the crew; on the 15th July, $60, and on the 18th, $50, for the same purpose; making a bill, with other advances, of $186.83. The crew were then discharged, and all disappeared, none of them being produced as witnesses by claimant, or otherwise accounted for. The captain drew a sight draft on Pearce, to reimburse T. & J. Coggeshall, *which Pearce paid.*

On the arrival of the vessel at Newport, Pearce wrote the captain (23d July, 1861), directing the bills of lading to be forwarded to him; and he paid the wages and expenses of the voyage.

Martinez testified that on her arrival at Havana, 20th of

* Plate VIII.

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February, 1861, all her cargo from New York was delivered. He also says his house (Perez & Martinez) loaded her afterwards for Tejedor; that everything was put on board with permits from the custom-house; that he got the permits himself from the custom-house in every instance; and that he was on the wharf when the goods were shipped to the vessel in the lighter, and saw every package put on board.

The list of cargo taken from the vessel showed a quantity of articles *not on the manifest.* These were casks of high-colored paint, pickled fish, coarse salt, two barrels of lime, and four jars of chloride of lime, cases of medicines, medicinal herbs and lint, coarse sponges, one demijohn of disinfecting fluid, sixty-five water-pipes, part full and part empty, which appeared to have been used as *fresh*-water pipes, and a quantity of flag matting.

Her *manifested* cargo was of 117 pipes of rum, 65 half pipes of rum, 16 pipes of biscuit, 8740 lbs. of *tasajo*, or dried beef, a large quantity of which she had brought from New York, one box of hardware, and 19 packages of the same, wine, brandy, gin, candles, cigars, and 200 oars. Part of the cargo consisted of casks and packages of saucepans, cooking-pans with covers, iron spoons, thirty mess or camp-kettles, three casks, each containing iron chains from $\frac{1}{4}$ to $\frac{3}{8}$ of an inch in diameter, of such length that one or two chains occupied a cask, padlocks, and *machats*, or war-knives. On the ship's manifest these were described as "one bale hardware," "nineteen packages hardware."

The marshal of the United States, Sanford, found on board the vessel, when he seized her at Newport, a package purporting to be a sealed letter, containing several papers, among them a paper issued from the custom-house at Havana upon what is called a "sea letter;" a letter used for the protection of vessels against the examination of a man-of-war at sea, not to be opened by the captain, but only by an officer of the customs, or an officer of a man-of-war. This "sea letter," dated 22d of June, 1861, the day of the bark's departure from Havana, declared the destination of the Reindeer to be St. Antonio. St. Antonio is an unimportant

island in the Cape de Verd Group, in a line from Havana to the western coast of Africa. The other papers were custom-house permits for embarking certain articles on the vessel, one dated 22d of May, and the other 19th of June. Both declared her to be bound for St. Antonio, and both were obtained by Perez & Martinez, who loaded the vessel for Tejedor.

The manifest of cargo from Havana to Falmouth reported "two passengers, cabin," Don Pedro Garcia and Don H. A. Pinto. These persons came with the vessel to Newport. Garcia had been captain of a coasting vessel in Cuba, and said that he had been to the coast of Africa after slaves, but was now a passenger. Pinto first said that he was on board as supercargo, which he afterwards repeated; but after he was arrested and put in jail, he denied that he was anything but a passenger.

Mr. Gillet, for the appellant: We admit that Tejedor, by not appealing, acquiesced in the decision of the Circuit Court, and that *his* claims must be laid out of view on this hearing. He conceded, so far as the present appellants are concerned, that the vessel and cargo belonged to Pearce, and was lawfully attached, and that he has no claim upon either.

The questions are, therefore, now between the United States, claiming through the marshal's seizure under the libel, and that of the sheriff and creditors upon their prior seizure under the attachments.

1. We contend upon these that there was no sufficient evidence to show a fitting out, &c., of the vessel in New York. Whatever fitting out and clearance there was by any one for any place, was at Havana by Perez & Martinez for Tejedor, a Spanish subject, residing at Havana. It is not even certain that the voyage was for the slave-trade at all. The history of objects and motives in Cuba is not well proved. [The counsel here exfoliated and enforced these views, commenting on and interpreting, as he conceived it, the evidence.]

2. The vessel and cargo were in possession of the State

Court of Rhode Island, and that court had a right to retain the custody. The principle that the court, whose process first seizes property, cannot be interfered with by another jurisdiction, was settled by *Taylor* v. *Carryl* in this court.* For this reason there is no jurisdiction.

3. The offence, such as it is, so far as Pearce is concerned, is charged to have been committed in New York. Yet the vessel is seized in Rhode Island, where no offence is committed at all, nor is alleged to have been. Jurisdiction fails here, too.

Mr. Coffey, special counsel of the United States, contra: No doubt, Havana was the place where most of the fitting out was done. This, however, was to evade detection. The voyage was begun in New York. Much of that same "14,700 pounds of *tasajo*," or dried beef, that same "box," and those same, or very nearly those same "twenty-two packages of hardware," which were shipped *to* Havana from New York, were found on the vessel at Newport, and after they had been shipped from Havana to some other place; *what* other place we shall consider directly. Further than that, the same sailors (four excepted), who left New York January 26, 1861, for Havana, are found on board at Newport (on July 11th), after the voyage to Havana had been ended, and the vessel at rest there for four months. This shows the continuity of the voyage.

To what place was this voyage? Maury's Geography of the Sea shows that the vessel was in the direct course to Africa when compelled to put into Newport. The cargo was all of it suited to the slave-trade. Much of it was scarce suited to anything else. Machats, or war-knives, innocently described as "hardware;" "sponges," an article used to wash slaves after being packed under the hatches; "vinegar," given to them to rinse their mouths; "medicines," for these poor beings; disinfecting fluids, chloride of lime, mess-kettles, casks of *long* iron chains, with padlocks, as indicative

* 20 Howard, 583.

of the purpose of the voyage as manacles or handcuffs would be, are for the slave-trade specially. How can such articles be vindicated as a *cargo to Falmouth*, England, especially as coming from Cuba? *Tasajo* is imported from Buenos Ayres, and is a food specially for slaves. St. Antonio was more truly described as a destination, since it was in the direct line of the true destination; but it was not itself that destination. St. Antonio is a poor port of the Cape de Verds; insignificant and insecure at once; a place for which such a cargo would have been wholly too large, and as much unsuited. The extent of the repairs show a long voyage. Garcia and Pinto, though entered as passengers, confessed that they were not so; though they afterwards tried to lie themselves out of the confession, when the vessel was seized. Undoubtedly they were managers of the voyage.

The charter-party was a fraud. The testimony of Martinez brought to sustain it, shows that Tejedor paid $1500 more for the use of the vessel for three years, than Pearce asked for the whole title; and nearly three times as much as the vessel brought when sold at Newport. Martinez testifies that Pearce "made a contract to *sell* her to Tejedor." No doubt this was the scheme; but when the vessel was compelled to put into Rhode Island, and was *seized*, it became plain that this plan would not stand; a sale being a nearly invariable badge of a slaver voyage. A charter-party was resorted to, and an *attachment by creditors*.

It is not worth while to discuss the law of priority between State and Federal liens; for the marshal of the United States took the vessel as soon as she entered Newport; and,

2. The attachment, as we have signified, is as much fraudulent as every other part of the scheme. The case comes here confessedly on the appeal of the attaching creditors. The attachment was for a sum of $350, and $9.90 costs. Is it to vindicate a right to *this* sum that an appeal is taken from the Circuit Court of Rhode Island to this high tribunal? that counsel are made to wait the "law's delay," for half a winter in the Federal metropolis? Will counsel assert this? Pearce was plainly *owner*.

But if the attachment were not fraudulent, the United States would have priority; for a forfeiture made absolute by statute, relates back to the time of the commission of the offence. This is ancient and settled law.*

It is settled as well, that the district where the seizure is made has jurisdiction of a proceeding *in rem.*†

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of Rhode Island, in a cause of seizure and forfeiture.

The libel of information against the bark Reindeer and her cargo, was filed in the District Court on the seventh day of August, 1861, and the transcript shows that it contains twenty counts, founded upon various provisions contained in the several acts of Congress, prohibiting the slave-trade. But the material charges to be considered in this investigation are the following:

1. That the vessel was, on the twenty-sixth day of January, 1861, by some person, being a citizen of the United States, or residing within the same, for himself or for some other person, either as master, factor or owner, fitted, equipped, and prepared within the port of New York, for the purpose of carrying on trade or traffic in slaves to some foreign country, or for the purpose of procuring from some foreign kingdom, place or country, the inhabitants thereof to be transported to some foreign country, port or place, to be sold and disposed of as slaves.

2. That the vessel being owned by a citizen of the United States, was by him at the time aforesaid, for himself as owner, fitted, equipped, loaded, and prepared in the port of New York, for the purpose of procuring negroes, mulattoes, or persons of color, from some foreign kingdom, place, or country, to be transported to some other port or place, to be

* Roberts *v.* Wetherall, 1 Salkeld, 223; S. C., 12 Modern, 92; United States *v.* Grundy, 3 Cranch, 338; Gelson *v.* Hoyt, 3 Wheaton, 246.

† United States *v.* The Betsy, 4 Cranch, 452.

held, sold, or otherwise disposed of as slaves, contrary to the form of the statute in such case made and provided.*

Process was forthwith issued and duly served on the same day, and on the twenty-eighth day of the same month, Gregorio Tejedor appeared as claimant. Referring to the claim as exhibited in the record, it will be seen that he averred under oath that he was the true and *bonâ fide* owner of the cargo and the charterer of the vessel, and the record also shows that he was allowed to make defence. Claim was also duly filed by the appellants. They allege in substance and effect, that the vessel was owned by one Pierre L. Pearce, and they base their claim to the vessel and cargo upon the ground that the first-named appellant, as the sheriff of the county of Newport, held the same, at the time of the seizure by the marshal, under certain writs of attachment issued in favor of the other appellants against the owner of the vessel from the State court, and consequently, they insist that the District Court had no jurisdiction of the case.

No claim was ever filed by the owner of the vessel or by any other person in his behalf. Testimony was taken on both sides in the District Court, and after the hearing, a decree was entered condemning both the vessel and cargo as forfeited to the United States. Claimant of the cargo and the present appellants appealed to the Circuit Court of the United States for that district.

Subsequently, they were heard in the Circuit Court upon the same evidence, and after the hearing, a decree was entered affirming the decree of the District Court. Whereupon, the claimants under the attachment suits appealed to this court, and now seek to reverse the decree, upon the ground that the possession of the sheriff was prior to that of the marshal, and that such prior possession has the effect to defeat the jurisdiction of the Federal courts.

I.—1. Parties who have not appealed, are not entitled to be heard in this court, except in support of the decree in the

* 1 Stat. at Large, 347; 3 Id. 451.

court below. They cannot ask for a reversal in the appellate court, and consequently the only questions really before the court are those presented by the appellants as attaching creditors of the owner of the vessel. Appeal not having been taken by the claimant of the cargo, he must be understood as having acquiesced in the correctness of the decree entered by the Circuit Court; and it has already been stated that the owner of the vessel never made any claim. Remark should be made, that during the hearing in the District Court, the Vice-consul of the Queen of Spain, resident at Boston, professing to intervene "for the Government of her Catholic Majesty," filed a claim for the vessel and cargo as the property of Gregorio Tejedor, but it does not appear that the claim was ever prosecuted, and inasmuch as no appeal was taken, either to the Circuit Court or to this court, it is unnecessary to comment further upon that subject.

2. Appellants allege that Pierre L. Pearce, of the city of New York, was the owner of the vessel, and the proofs fully sustain the allegation. Proofs also show that the bark was a vessel of two hundred and forty-eight tons, with one deck and three masts. Her register shows that she was a hundred feet in length, and thirty-five feet in breadth, and that she was eleven feet in depth; and the proofs also show that her construction and arrangement were well suited for the illegal traffic in which it is alleged she was engaged. Prior to the sailing of the vessel, she was placed on the dry-dock and calked, resheathed, and otherwise repaired and fitted for the projected voyage. After being fully repaired, she was advertised for a voyage to Havana by James E. Ward & Co., shipping and commission merchants, acting as the agents of the owner. Under these auspices she cleared from the port of New York, and sailed for Havana, on the twenty-sixth day of January, 1861, where she arrived on the twentieth of February following.

Her shipping articles describe the voyage as one from the port of New York to one or more ports in Cuba, from thence to one or more ports in Europe, *if required*, and back to a port of discharge in the United States, or from Cuba back

to the United States. Ship's company, as appears by the crew-list, consisted of the master, William H. Cunningham, two mates and seven seamen, all of whom were on board at the time of the seizure, except four of the seamen who deserted in Cuba, and whose places were immediately supplied by the master. They were shipped for a voyage from Havana to Falmouth, from thence to one or more ports of Europe and back to a port of discharge in the United States.

Counsel of the United States contend that the vessel was evidently fitted, equipped, and otherwise prepared and caused to sail from the port of New York to Havana, with the ultimate purpose that she should proceed to the west coast of Africa to engage in the slave-trade. As supporting that theory, they refer to the construction and arrangement of the vessel, and to the fact that the crew were shipped not for Havana, but for a voyage from New York to one or more ports in Cuba, and from thence to one or more ports in Europe, and back to a port of discharge in the United States, or from Cuba back to the United States; and they also refer to the repairs put upon the ship, as tending to show that she was intended for a long voyage.

Reference is also made to the fact that the owner, although in the shipping business himself, employed J. E. Ward & Co. to put the vessel up, and also to the fact that they advertised and despatched her as his agents. They shipped part of the cargo, and the manifest shows that their shipment included one box and twenty-two packages of hardware, and fourteen thousand seven hundred pounds of *tasajo*, or dried beef, which it is proved comes from Buenos Ayres, and is not an article of shipment from New York to Havana, but is an article imported into Cuba from South America, and is largely used for feeding negroes.

The vessel laid at Havana over four months before she received her cargo. She was consigned to the house of Perez & Martinez, and the latter testifies that all her cargo from New York was duly unladen and delivered. During all that time the master and the crew remained on board, drawing full wages, except the four who deserted, and their

places were immediately supplied. Pearce, the owner of the vessel, arrived at Havana on the fifth of March, 1861, and the proofs show that he remained there until the sixth day of May following.

3. Theory of the claimant of the cargo in the court below, was that the owner went there to sell the vessel, and that he actually made a contract to sell her to the claimant for the sum of seven thousand dollars, which was not carried into effect; that the claimant failing to make the purchase, subsequently chartered the vessel for the term of three years, for the sum of eight thousand five hundred dollars. He produced a charter-party, which is to that effect, bearing date on the twenty-third day of March, 1861, executed while the vessel was laying at Havana.

Expenses for repairs, wages of the master and crew, and expenses for provisions and all other expenses, were to be borne by the charterer, but there was no change in the shipping articles, or in the crew-list, or in any of the ship's papers. On the contrary, the voyage went on as it was begun at New York, and the same officers and crew remained on board till the vessel was seized as hereinafter explained. One of the consignees of the vessel testifies that his firm, Perez & Martinez, afterwards loaded the vessel for the alleged charterer, and he states that the entire cargo was put on board under permits from the custom-house, but the list of the cargo taken from the vessel, shows that a large quantity of articles, specially suited to the slave-trade, were not on the manifest, and consequently it is highly improbable that they were put on board under the sanction of public authority.

Articles not on the manifest embrace sixty-five water-pipes, casks of high-colored paint, pickled fish, coarse salt, two barrels of lime, four jars of chloride of lime, cases of medicines, medicinal herbs and lint, coarse sponges, and one demijohn of disinfecting fluid. Her manifested cargo, also, is of the same criminating character. Among the articles are, one hundred and seventeen pipes of rum, and sixty-five half pipes, sixteen pipes of biscuit, eight thousand seven hundred

and forty pounds of *tasajo*, and one bale and nineteen packages of hardware, besides wine, brandy, gin, and two hundred oars. Part of the cargo, innocently described in the manifest as hardware, consisted of saucepans, cooking-pans, casks containing iron chains, padlocks, and war-knives.

All of these articles are proved to be used in the slave-trade, and it is difficult to resist the conclusion, that they were all exported from the port of New York.

On the 22d day of June, 1861, the vessel cleared at Havana for Falmouth, England, and for orders. Protest of the master, dated at Newport, R. I., on the 12th day of July, 1861, states, "that on Tuesday, the second day of that month, at sea, in about latitude thirty one degrees, longitude sixty-nine degrees, during a squall, the ship was caught aback, and having gained sternway, wrenched the rudderhead and carried away the foreyard, when, finding the ship unfit to perform the voyage, squared away for Newport," where the vessel arrived on the eleventh of the same month.

Suggestion on the part of the United States is, that the location of the vessel, as described in the protest at the time when she was obliged to abandon the voyage and sail for a port of refuge, shows that she was on the direct route to the coast of Africa; and it must be admitted that there is great force in the suggestion.

4. Libellants deny that the charter is a *bonâ fide* instrument, and as showing that it cannot be so regarded, they refer to the fact that the alleged charterer agreed to give fifteen hundred dollars more for the charter than the owner asked for a full title of the vessel. Theory of the libellants is that the whole transaction is a simulated one, and that the charter was manufactured to conceal the real fact that the owner had sent his vessel to Havana for the purpose of completing her fitment for the contemplated slave-trading voyage. They insist that his original design was to set up the theory of a sale, but that he was obliged to abandon that theory, lest he should destroy the claim of the appellants under their attachments.

Support to the theory that the charter-party is not a *bonâ*

fide instrument is certainly derived from the evidence in the case, that fourteen packages of stores for the vessel were shipped at New York, on the 10th of May, 1861, by the order of the owner, and consigned to the master. None of the packages were manifested, and the directions were that they should not be, and they were not landed at Havana, but were transhipped directly on board the Reindeer. Strong confirmation of that theory is also derived from the subsequent conduct of the owner after the seizure of the vessel. Irrespective of any or all previous theories, he at once, on the arrival of the vessel at Newport, assumed to treat the vessel and cargo and the whole enterprise as his own, as appears by his letter to the master, and by his conduct in the payment of the wages and expenses of the voyage.

When the vessel was seized, there was found on board by the marshal a sealed package, containing what is called by the witnesses a sea letter. Such a letter is designed, as represented by one of the witnesses, for the protection of the vessel in case she should be boarded by an officer of the customs, or an officer of a man-of-war. This sea letter was dated the 22d day of June, 1861, and stated that the destination of the vessel was not to Falmouth but to St. Antonio, one of the Cape de Verd islands, and the custom-house permits found on board contained the same representation.

On the other hand, the voyage in the manifest is described as one from Havana to Falmouth, and it reports two "passengers, cabin, Pedro Garcia and Hato A. Pinto." They were on board the vessel at the time of the seizure, and the one first named admitted that he had once been to the coast of Africa for slaves, but insisted that he was a mere passenger. Pinto at first admitted that he was supercargo; but afterwards, when he was arrested, denied that he was anything but a passenger. Neither of these persons was produced as a witness by the claimants, and no satisfactory explanation is given why they were not called.

Claimants not only failed to call either of the supposed passengers who were on board, but they have neglected to call the master or any one of the crew, and the evidence

shows that the master has absconded. They have introduced no one who knew what the real destination of the vessel was except one of the consignees, and his testimony is unsatisfactory, and, in many respects, utterly incredible.

5. Unusual as was the conduct of the owner of the vessel, in omitting to present any claim for the same, it was even more so in the course adopted by him to enable the attaching creditors to obtain judgment against him for a debt contracted only four days before he was sued. On the day after the arrival of the vessel, the master borrowed thirty dollars of Messrs. T. & J. Coggeshall to pay the crew; and on the fifteenth of July following, he borrowed of the same parties the sum of eighty dollars; and on the eighteenth of the same month the further sum of fifty dollars for the same purpose. He paid the crew, and they were discharged; and thereupon he drew a sight-draft on the owner to reimburse the lenders, and the amount was promptly paid. Attaching creditors, James E. Ward & Co., sued out a writ of attachment against the owner of the vessel, on the 19th day of July, 1861, alleging the damages in the sum of five hundred dollars; but the amount for which the suit was brought is only for the sum of three hundred and fifty dollars, and consists of two items, one dated July the thirteenth, and the other July the fifteenth, and both are for cash advanced to the master of the vessel to pay off the crew.

Plaintiffs in that suit, it will be remembered, were the agents of the owner in putting up and despatching the vessel at the inception of the voyage, and they were the shippers of the hardware and the *tasajo*, as appears by the manifest. Return was made upon the attachment suit on the 20th day of July, 1861, and the proofs show that the defendant in the suit refused to allow counsel to continue the case, and consented that the plaintiffs should have judgment. Taken as a whole, the circumstances attending that suit and its prosecution afford strong grounds to infer that the purpose of the suit was to furnish the means of defeating the jurisdiction of the District Court.

Both the District and the Circuit Courts were of the

opinion, that the facts and circumstances to which reference has been made afford a clear presumption that the allegations of the libel are true, and in that view of the case we entirely concur. Doubt cannot be entertained that the evidence of guilty purpose, from the inception of the voyage to the time when the vessel was compelled by stress of weather to sail for Newport, is abundantly sufficient to overcome every presumption of innocence to which any such voyage can be entitled, and to establish the truth of the charges under consideration as contained in the libel.

Suits of this description necessarily give rise to a wide range of investigation, for the reason, that the purpose of the voyage is directly involved in the issue. Experience shows that positive proof in such cases is not generally to be expected, and for that reason among others the law allows a resort to circumstances as the means of ascertaining the truth. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying that rule to the present case, we have no hesitation in coming to the conclusion that the finding in the court below was correct.

II. Appellants contend, in the second place, that the District Court had no jurisdiction of the case. 1. Because the vessel and cargo, as they insist, were in the custody of an officer of a State court at the time the monition was served by the marshal. 2. Because the wrongful acts, if committed at all, were committed in the District of New York, and not in the district where the libel was filed.

Three answers are made by the United States to the first objection to the jurisdiction of the court.

First. They deny the fact, that either the vessel or cargo was ever in the exclusive possession of the officer of the State court.

Secondly. They insist that the attachment suit was a collusive one between the appellants and the owner of the vessel, and that the same was only prosecuted as the means of defeating the jurisdiction of the Federal courts.

Thirdly. They contend that the possession of the sheriff under civil process from a State court, as supposed by the appellants, will not prevent the operation of the laws of the United States in suits of forfeiture, or oust the admiralty jurisdiction of the Federal courts in a case like the present, where the forfeiture is made absolute by statute, because in such a case the forfeiture relates back to the time of the commission of the wrongful acts, and takes date therefrom, and not from the date of the decree.

1. Undoubtedly it was decided by this court in the case of *Taylor et al.* v. *Carryl*,* that where a vessel had been seized under a process of foreign attachment issuing from a State court, the marshal, under process from the admiralty, issued from the District Court of the United States, in a libel for seamen's wages, could not take the property out of the custody of the sheriff; but in that case the sheriff had the prior and exclusive possession of the property.

The undisputed facts, however, in this case are otherwise. Immediately on the arrival of the vessel at Newport the collector placed a custom-house officer on board of her, and that officer was in the actual possession of the vessel and cargo when the attachment was made. Both vessel and cargo were then in the custody of the United States, and so in fact remained until the same were sold by the marshal by the order of the Circuit Court. By order of the district attorney, the collector, some days before the libel was filed, made a formal seizure of the vessel for a violation of the slave-trade acts; and at that time the revenue officer who had taken possession of the vessel before she was attached, still had her in custody, and he remained in possession of her until the sale, when the proceeds were paid into the registry of the court. Under these circumstances it is clear, we think, that the case of *Taylor et al.* v. *Carryl* does not apply, and that the seizure was rightfully made.

2. Our conclusion also is, from the evidence, that the suit of the appellants was a collusive one; and upon that ground,

* 20 Howard, 583.

also we are inclined to hold that the objection of the appellants must be overruled. Having come to that conclusion, it is unnecessary to examine the third answer presented by the United States to this objection.

III. Remaining objection of the appellants to the jurisdiction is, that the wrongful acts, if any, were committed out of the district where the libel was filed. But there is no merit in the objection, as the rule is well settled, that libels *in rem* may be prosecuted in any district where the property is found. Such was the rule laid down by this court in the case of *The Propeller Commerce*;* and it is clear, beyond controversy, that the present case is governed by the rule there laid down.

The decree of the Circuit Court is therefore

AFFIRMED.

ALBANY BRIDGE CASE.

COLEMAN filed a bill in equity in the Circuit Court for the Northern District of New York, to enjoin the Hudson River Bridge Company from building a bridge over the Hudson River at Albany, under an authority which had been granted by the Legislature of the State of New York. The Circuit Court dismissed the bill. On appeal here the whole matter—as well the general question of the constitutional right of a State to pass a law authorizing the erection of bridges over navigable rivers of the United States, as the more special question, whether the navigation of the Hudson would be practically obstructed by this bridge, as it was proposed to erect the same—was fully and most ably argued by *Mr. Secretary of State Seward, and the Honorable Mr. J. V. L. Pruyn, M. C., in favor of the right to build, and by Messrs. Carlisle and Senator Reverdy Johnson, contra.* But the court being equally divided, no opinion on any point was given, and the decree so stood a

DECREE AFFIRMED OF NECESSITY.†

* 1 Black, 581.

† For the nature and effect of a decree of this sort, see Krebbs *v.* Carlisle Bank, 2 Wallace, Jr. 49, note.

Statement of the case.

MRS. ALEXANDER'S COTTON.

1. The principle, that personal dispositions of the individual inhabitants of enemy territory as distinguished from those of the enemy people generally, cannot, in questions of capture, be inquired into, applies in civil wars as in international. Hence, all the people of any district that was in insurrection against the United States in the Southern rebellion, are to be regarded as enemies, except in so far as by action of the Government itself that relation may have been changed.
2. Our Government, by its act of Congress of March 12th, 1863 (12 Stat. at Large, 591), to provide for the collection of abandoned property, &c., does make distinction between those whom the rule of international law would class as enemies; and, through forms which it prescribes, protects the rights of property of all persons in rebel regions who, during the rebellion, have, in fact, maintained a loyal adhesion to the Government; the general policy of our legislation during the rebellion having been to preserve, for *loyal* owners obliged by circumstances to remain in rebel States, all property or its proceeds which has come to the possession of the Government or its officers.
3. Cotton in the Southern rebel districts—constituting as it did the chief reliance of the rebels for means to purchase munitions of war, an element of strength to the rebellion—was a proper subject of capture by the Government during the rebellion on general principles of public law relating to war, though private property; and the legislation of Congress during the rebellion authorized such captures.
4. Property captured *on land* by the officers and crews of a naval force of the United States, is not "maritime prize;" even though, like cotton, it may have been a proper subject of *capture* generally, as an element of strength to the enemy. Under the act of Congress of March 12th, 1863, such property captured during the rebellion should be turned over to the Treasury Department, by it to be sold, and the proceeds deposited in the National Treasury, so that any person asserting ownership of it may prefer his claim in the Court of Claims under the said act; and on making proof to the satisfaction of that tribunal that he has never given aid or comfort to the rebellion, have a return of the net proceeds decreed to him.

IN the spring of 1864, a conjoint expedition of forces of the United States, consisting of the Ouachita and other gunboats, with their officers and crews, under Rear Admiral Porter, and a body of troops under Major-General Banks, proceeded up the Red River, a tributary of the Mississippi, and which empties into that river three hundred and thirty-

four miles above its mouth, as far as Shreveport, in the northwestern corner of Louisiana. The Southern insurgents were, at this time, in complete occupation of the district. About the 15th of March these Government forces captured Fort De Russy, a strong fort, which the insurgents had built, about half way between Alexandria and the mouth of Red River. The insurgents now evacuated the district in such a way that most of that part of it on the river fell under the control of the Union arms. This control, however, did not become permanent. The insurgents rallied; and returning, reinstated themselves. The Union troops fell back, leaving the district occupied as it had been before they came. The actual presence and control of the Government forces lasted from the middle of March to near the end of April,—something less than eight weeks. During it, an election of delegates to a Union Convention, appeared to have been held in or about Alexandria, under the orders and protection of General Banks, though the evidence of what was done in the matter was not clear. "The community," one witness testified, "was almost unanimous against secession when it commenced, and have so continued." But of this they gave no overt proofs; none at least that reached this court.

During the advance of the Federal forces, and about the 26th of March, a party from the Ouachita—acting under orders from the naval commander—landed on the plantation of Mrs. Elizabeth Alexander, in the Parish of Avoyelles, a part of the region thus temporarily occupied, and upon the river. They here took possession of seventy-two bales of cotton which had been raised by Mrs. Alexander on the plantation, and which, having escaped a conflagration which the rebels, on the advance of the Government forces, had made of the crop of the preceding year, were stored in a cotton-gin house, about a mile from the river. The cotton was hauled by teams to the river bank, and shipped to Cairo, in Illinois. Being libelled there, as prize of war, in the District Court of the United States for the Southern District of Illinois, and sold *pendente lite*, Mrs. Alexander put in a claim for the proceeds, and the court made a decree giving them

to her. This decree being confirmed in the Circuit Court, the United States appealed here.

The question raised before this court was, whether this cotton was or was not properly to be considered as maritime prize, subject to the prize jurisdiction of the courts of the United States.

As respected the nature of the Red River and the character of the vessels used in the conjoint expedition, it appeared that seagoing vessels do not navigate it, the same not affording sufficient water for them; that no other vessels than steamboats of light draft, engaged in the transportation of passengers and freight, usually navigate it; that the gunboats so called, used on this expedition, were of light draft, similar, in many particulars, to steamboats, many of them having been steamboats altered to carry guns and munitions of war generally, though not previously used, nor well capable of being used at sea for any purpose; that guns were mounted on them in order that such guns might be used in connection with and in subordination to the army in its active operations against the enemy in the small streams of the West and Southwest, away from the seaboard.

As regarded Mrs. Alexander's personal loyalty the evidence was not very full. She had assisted somewhat to build Fort De Russy, which was within a few miles of her own plantation, but, according to the testimony, did this only on compulsion. She was equally kind, it was testified, to loyal persons and to rebels, when either were sick or wounded. She had particular friends among persons of known loyalty; but there were one or two Confederate officers who came to her house,—the testimony being, however, that they were perhaps attracted thither neither by Mrs. Alexander's politics nor by her cotton, but by the beauty of some "young ladies" who resided with her, and whom they went to "visit."

Three weeks *after* the cotton had been seized, Mrs. Alexander took the oath required by the President's proclamation of amnesty, of December 8, 1863; a proclamation which gives to persons who took the oath "full pardon," "with

Statement of the case.

restoration of all rights," except as to slaves and "property, cases where rights of third persons shall have intervened." But it was upon the condition that persons should thenceforward "keep their oath inviolate."* Mrs. Alexander never left the territory on which her plantation was situated, nor it. The estate was her own, and she had resided on it since 1835. She was about sixty-five years old at the time of these events.

Such were the *facts*. In order, however, perfectly to comprehend the case as it stood before the court, it is necessary to make mention of certain acts of Congress bearing on it.

Congress, by act of August 6th, 1861,† to confiscate property used for insurrectionary purposes, declared, that if any person should use or employ any property in aiding, abetting or promoting the insurrection, or consent to such use or employment, such property should "be lawful subject of prize and *capture* wherever found."

And by act of July 17th, 1862,‡ to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, &c., it declared (§ 6), that "all the estate and property" of persons in rebellion, and who, after sixty days public warning [which warning the President gave by proclamation], did not return to their allegiance, *liable to seizure;* and made it the duty of the President to "*seize*" it; prescribing the mode in which it should be condemned.

And by a third act, that of March 12th, 1863,§ "to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts," &c., made

* The oath now made by Mrs. Alexander, April 19, 1864, was, that she would "henceforth faithfully support, protect, and defend the Constitution of the United States, and the Union of the States thereunder;" and would, "in like manner, abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress, or by decision of the Supreme Court;" and would, "in like manner, abide by and faithfully support all proclamations of the President made during the existing rebellion, having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court."

† 12 Stat. at Large, 319. ‡ Id. 591. § Id. 821.

it the duty, under penalty of dismission, &c. (§ 6), of "every officer or private of the regular or volunteer forces of the United States, or *any officer, sailor or marine in the naval service* of the United States, who may take or receive any such abandoned property, or *cotton*, sugar, rice or tobacco from persons in such insurrectionary districts, or have it under his control, to *turn the same over to an agent*" to be appointed by the Secretary of the Treasury, under whose charge the matter is put by the act, and who accordingly issued regulations in regard to such property. The act provides, however, that none of its provisions shall apply "to any lawful maritime prize by the naval force of the United States." This act, it may be added (§ 3), provides that "any person claiming to have been the owner of such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the said court of his ownership, &c., and that he has never given any aid or comfort to the present rebellion, receive the residue of such proceeds after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale."

With these acts there may, perhaps, for the sake of absolute completeness, be presented the act of July 17th, 1862, for the better government of the navy,* enacting (§ 2), "that the proceeds of all ships and vessels, and the goods taken on them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel making the capture, be the sole property of the captors, and when of inferior force be divided equally between the United States and the officers and men making the capture;" and also that of 2d July, 1864,† *passed after this capture*, declaring "that no property, seized or taken upon any of the *inland* waters of the United States by the naval forces thereof, shall be deemed maritime prize," but shall be turned over, as provided in the already mentioned act of March 12th, 1863.

* 12 Stat. at Large, 606. † 13 Id. 377.

Argument for the Government.

Mr. Assistant Attorney-General Ashton, and Mr. Eames, for the United States:

1. At the time when the combined expedition entered this region, in March, 1864, and when it left it in May, eight weeks afterwards, it was completely in enemy possession and control. Rebel power, civil and military, held it. The region was, therefore, *enemies'* country, and the people were *enemies*, irrespectively of the loyalty or disloyalty of individuals. The *Prize Cases* in this court, and among them *The Amy Warwick*, adjudge this.* The fact that there was momentary *military* occupation of the region in part by the co-operating army of the United States on the day of this capture, did not change this enemy character;† for the possession of the United States was unfirm, as shown by the event. After constant military activity, the rebel power was reinstated. Independently of all this, insurrectionary and hostile character was fixed upon the region and property by different acts of Congress, including the "Abandoned and Captured Property Act" of March 12, 1863, which made the property of all people in the region "liable to seizure;" and made it the duty of the President to "seize" and have it condemned.

2. The property, though private property, was liable to seizure and confiscation, it being a great commercial staple of the enemy, the product of his own soil, grown and gathered in time of war; in peace his greatest, and in rebellion his only resource. It is matter of common knowledge that cotton has been the means by which the rebel confederation—"this government" of Davis—has procured money or munitions of war from England and France at all.

3. *It is lawful prize of war, though made by the navy on land.* The prize jurisdiction of courts of admiralty in England has always been exercised in cases of belligerent naval capture on land, as much as in cases of naval capture on the high seas; and this, too, whether such capture on land be made by the naval force acting alone or in co-operation with the

* 2 Black, 693; Id. 674. † The Circassian, *supra*, p. 135.

army. Enemy property so captured has always, in England, been condemned as prize of war.

This jurisdiction was declared by the Court of King's Bench, A.D. 1781, in the two great cases of *Le Caux* v. *Eden** and *Lindo* v. *Rodney;* Lord Mansfield delivering the judgment of the court in the latter case. The earliest British authorities are there cited and reviewed. Since these two judgments, no part of the law laid down in them has been disputed in England; but, on the contrary, it has been affirmed by the courts of common law, as in *Lord Camden* v. *Home*,† and *Smart* v. *Wolff*,‡ and has been accepted and applied to naval captures on land by Lord Stowell and other judges in the High Court of Admiralty in a series of cases.§ We may refer, also, to the case of *Alexander* v. *The Duke of Wellington*,‖ in the Chancery of England.

In the United States, this British view of the prize jurisdiction of the Court of Admiralty in England over such naval captures on land, has been recognized by this court in *Brown* v. *United States*,¶ and in *Jennings* v. *Carson*,** where Marshall, C. J., delivered the opinion.

But the District Courts of the United States have all the jurisdiction of the British courts of admiralty, both in prize and on the instance side. The case of *Glass* v. *Sloop Betsy*,†† decided by this court A. D. 1794, put this point at rest. Its authority, never seriously questioned as to this point, has been recognized in *Talbot* v. *Jansen*,‡‡ and in *The Brig Allerta*.§§ Judge Story, who is known to have been the author of the note in the Appendix to 2d Wheaton on "The Principles and Practice in Prize Cases," apparently takes the view which we here maintain.

* Douglas, 594, 620. See, also, Mitchell *v.* Rodney, 2 Brown, P. C. 423.

† 4 Term, 382. ‡ 3 Id. 323.

§ The Cape of Good Hope, 2 Robinson, 274; Thorshaven, Edwards, 102; The Island of Trinidad, 5 Robinson, 85; Stella del Norte, Id. 311; The Rebekah, 1 Id. 277; The Buenos Ayres, 1 Dodson, 28; The Capture of Chinsurah, 1 Acton, 179; French Guiana, 2 Dodson, 151; Geneva, Id. 444; Tarragona, Id. 487; Cayenne, 1 Haggard, 42, note; Anglo-Sicilian Captures, 3 Id. 192; The Army of The Deccan, 2 Knapp, P. C. 152, and note.

‖ 2 Russell & Mylne, 35. ¶ 8 Cranch, 137. ** 4 Id. 2.

†† 3 Dallas, 6. ‡‡ Id. 133. §§ 9 Cranch, 359.

Argument for the claimant.

Messrs. Corwine and Springer, contra:

1. Fort De Russy was captured by the Government forces about the middle of March, and our forces held complete possession — though temporary — for about eight weeks. During this time, an election took place for delegates to a State Convention; which Convention was afterwards held, and a new Constitution formed for that State. Coming after the army had driven the enemy from all that part of Louisiana, and had taken possession of it,—so that her loyal citizens could hold a civil election at which they expressed their constitutional voice for delegates to a State Convention,—the flotilla, commanded by Commodore Porter, which came there to assist General Banks in clearing out the rebel army, seized the cotton in question. Is it possible to affirm of it that it was seized in a country then *enemies'* ?

The circumstances of the United States and these insurgent States are peculiar, and different from any presented in the books. In the first place, bands of men have formed combinations to resist the *authority* of the United States in portions of its territory. They deny and will not recognize the laws and authorities of the United States, and have taken up arms to enable them to hold our territory forcibly, to the exclusion of our law officers. We are opposing this rebellious force by armed force, in order that we may reassert our Government's constitutional authority over this territory. As fast as we can repossess ourselves of this territory, which we are constantly doing in greater or less quantity, we invite the people to resume their political and civil rights, and we extend to them the protection of law, supported by our military power. We have done this in West Virginia and in many other places, and those countries are now in the full enjoyment of their political and civil rights. Yet those territories and their people were as much under rebel rule and dominion at one time as is now that part of Louisiana under consideration. The enemy has been frequently in the territory of West Virginia—at this date, February, 1865, the best secured of any—in as strong force as he now is in Louisiana. The duration of his possession has no-

thing to do with the rights of the people *restored* to them by the act of our Government in resuming its lawful authority over the country. The moment the people were relieved from rebel military rule, the political and civil power of the usurpers was broken, and the jurisdiction and authority of the United States was supreme. It gave to the loyal citizen that *dominion* over his property, accompanied with *rights of property*, such as he enjoyed before this rebel rule intervened.

We have, therefore, only to inquire whether we held that part of Louisiana as reconquered territory for the time we were in possession? Was rebel rule at an end for that time? *While* we maintained the exclusive possession, we held it by a *valid title;* and it does not matter whether there was a full legal resumption of political and civil authority. It was such conquest and such possession as have been held by all authorities, and by our own Government, valid, and as entitling the loyal citizen to the enjoyment of his rights of citizenship and property. No act of the sovereign afterwards, whether the country is lost again by force of the enemies' reconquest, or by treaty and cession, can change it. The rights which accrued to the citizen by the resumption of this authority by his sovereign have become fixed; and if the subject-matter is within the reach of our courts, he may successfully assert them. The legal disabilities which were cast upon him and his property by the forcible and fraudulent occupancy of the country by insurgents, were removed the moment the United States wrested the territory from them and reasserted its authority.* It is a matter of common knowledge that vast amounts of property, reaching in value millions of dollars, were released by this single month's possession of our authorities, and that it found its way into the loyal portions of the United States by the simple volition of its owners. The legality of the title thus acquired has never been questioned. This case does not differ from those cases in any respect, except that these naval boats, instead of Government trans-

* Halleck's International Law, 789, and authorities there cited.

ports, took out this claimant's cotton. Both were taken out while we held this *exclusive* possession, and there was no enemy there to oppose. The navy might as well have captured that cotton of citizens while afloat, or after it reached its destination in the loyal States, as to have taken Mrs. Alexander's cotton. The legal status of the cotton when it reached the loyal States was no better than it was while on Red River, within our lines and jurisdiction. The principle which made the title valid in one place lost none of its power, in that respect, in the other place. *It was the occupancy and resumption of authority by the United States, in that country, which made the title in the loyal citizen valid.* There was no "illegal traffic," such as this court referred to in *The Amy Warwick*, cited by Mr. Assistant Attorney Ashton, which stamped this cotton as "enemies' property." It was not at that time within the control of the enemy, so that he could use it for war purposes. It is wholly freed from that difficulty.

The rule being *that the test is the predicament of the property*, not the sentiment or acts of the owner, the court will look at such predicament only. If the owner is not under the jurisdiction and control of the enemy, then his property, being at the time of the alleged capture free from that control, is not in the *predicament* which makes it *ex necessitati rei*, enemy property.

If there were no positive law authorizing the court to recognize and enforce these rights with respect to the territory of which we are daily repossessing ourselves, the rule which we are contending for should be declared by this court as a matter of public policy, growing out of the necessities of our peculiar political situation. As one consequence of this rebellion, rules of property and of personal rights have been and must be declared by the courts, for which there is no clear judicial or legislative precedents. As there should be no right without a remedy, so the courts will not suffer our loyal people, who have been, themselves and their property also, placed in peril by this unfortunate conjunction of political circumstances, for which they are in nowise responsible,

to go away without redress. When delivered from these perils by the act of the Government, they and their property should be subjects of fostering care by all departments of the Government, where no rights are to be violated and no well-defined principles ignored. The frequency with which these cases must recur, and the vast magnitude of the interests involved, will not fail to commend them all to the favorable consideration of the court. In *Mitchell* v. *Harmony** this court said: "Where the owner (of property) has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country or in his own."

It is impossible to fix disloyalty on Mrs. Alexander. She took the oath of allegiance at the earliest practicable date. There was no one to administer it to her before the date when she actually took it. Her loyalty saves her property from the operation of the act of 6th of August, 1861, confiscating property used for insurrectionary purposes; and from that also of July 17, 1862, authorizing the President to seize and confiscate the property of rebels. It would be unreasonable to ask, that a *widow*, sixty-five years old, of infirm health, probably, who has lived in one spot—a plantation, in a rural parish—for thirty years, should leave the only home she has on earth, and follow the army of the United States, under penalty of being declared judicially a "rebel," and of having her estate confiscated. In such a case, the question of loyalty is to be tested by *animus* and acts. Here all establish loyalty.

Neither does her case come within the Abandoned Property Act of March 12, 1863. It is no part of this case that Mrs. Alexander ever abandoned her plantation. On the contrary, much of the argument of the other side proceeds on a supposition—a true one—that she remained on it; and so remained in an enemy's country.

2. If the property is not enemy's property at all, it matters not whether it be one sort of product or another. It is

* 13 Howard, 115.

to be protected, being *private*. "Private property on land is now," says Halleck,* "as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest."

There are exceptions to this rule, it is true. 1st. Confiscations, or seizures by way of penalty for military offences; 2d. Forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and, 3d. Property taken on the field of battle, or in storming a fortress or town.† But there is no pretence that the seizure here is on any such grounds.

If the property were on general grounds liable to seizure, Mrs. Alexander's having taken the oath, should save it. The good faith of the Government is involved. She took the oath of allegiance, in accordance with the invitation of the President's proclamation, December 8, 1863. She is entitled to an honest and faithful compliance on the part of the Government, with all the terms of pardon and exemption as to herself and her property of that proclamation. It is not acting in good faith with her to take her property and treat it as *enemy* property, when she so promptly responded to this Executive invitation. That proclamation, having been issued by the President of the United States, in so far forth as it held out inducements and made promises, and persons acted under and in pursuance with it, constitutes a legal contract, which shall be alike binding on the Government and such persons. The moment she took the oath prescribed by that proclamation, she was entitled to the full benefit of the "restoration of all rights of property," as therein promised, so far as this cotton is concerned.

3. *There can be no valid capture by the navy of enemy property on land.* What, in the first place, is this Red River? It is a wholly inland stream. Its mouth is more than three hundred miles from the ocean. But this cotton was not *on* the river even. It was a mile *away from it*, stored in a cotton-

* International Law, p. 456. † Id. 457.

gin house. There is no decision of this court recognizing right of capture by the navy in such cases. The act of July 2, 1864, forbids it. There are some decisions of courts other than this, which, it is contended, go to the necessary extent. But none of them, we think, really do. *Jennings* v. *Carson* simply decides, that the District Court has admiralty and maritime jurisdiction, and makes no reference to the jurisdiction in captures made on land. The same observation is true of *The Brig Allerta*, of *Glass* v. *The Sloop Betsey*, and of *Talbot* v. *Jansen*, cited on the other side.

Counsel argue that the general jurisdiction in maritime and admiralty, which these cases decide as belonging to the District Court, draws after it the jurisdiction of land captures, because it has been recognized in the Prize Courts of England. But the Prize Courts of England derive this peculiar jurisdiction from municipal statutes. To give the court jurisdiction of captures on land, in any other case, it must appear that the property so captured belonged in some way to a capture made on the sea, as in the case of *Lindo* v. *Rodney*. And what sort of a "navy" were these inland boats?

As to the English cases cited by Judge Story in his Essay in 2 Wheaton, it is enough to say, that the case of *Le Caux* v. *Eden*, is the leading one, and that finally went off on the proposition that the treaties, laws of England, and the orders of the Admiral, justified the seizure of the property on land. Lord Mansfield, who decided the case, in the note to it, put his decision on that ground; the facts of the case did not require him to go further. He also held that when property is once captured on the high seas, and it is unlawfully carried ashore, the captors may recapture it on the land.

It is worthy of remark that *Lindo* v. *Rodney*, and *Alexander* v. *The Duke of Wellington*, cited to sustain the position that lawful captures may be made on land by naval forces, both disclose the important fact that that jurisdiction is derived from municipal law. Lord Mansfield cites and relies upon treaties, acts of Parliament, &c., to sustain this jurisdiction. The statutes are 17 Geo. II, c. 34, § 2, and 29 Geo. II, c. 34, § 2, in which power is given to the Lords of the

Admiralty, to grant commissions, &c., "for attacking or taking with such ship, or with the crew thereof, any place or fortress *upon the land*," &c. Having cited them, Lord Mansfield says, "Upon *these* authorities, there can be no doubt of the right to make land captures." And so in the case of *Alexander* v. *The Duke of Wellington*, it appears that the proceedings sought to be reviewed, were in pursuance to the statute 54 Geo. III, c. 86, § 2, where land captures by the *army* are provided for, and prize-money awarded the officers and men engaged in the capture as booty.

No case has ever arisen in this country which has made it necessary to decide the question broadly. This court, in *Brown* v. *United States*, cited on the other side, rather disclaims the doctrine that captures, as prizes of war, could be made on land, without further legislation by Congress.

The CHIEF JUSTICE delivered the opinion of the court.

This controversy concerns seventy-two bales of cotton captured in May, 1864, on the plantation of Mrs. Elizabeth Alexander, on the Red River, by a party sent from the Ouachita, a gunboat belonging to Admiral Porter's expedition. The United States insist on the condemnation of the cotton as lawful maritime prize. Mrs. Alexander claims it as her private property. The facts may be briefly stated.

In the spring of 1864, a naval force of the United States, under Rear Admiral Porter, co-operating with a military force on land, under Major-General Banks, proceeded up Red River towards Shreveport, in Louisiana. The whole region at the time was in rebel occupation, and under rebel rule. Fort De Russy, about midway between the mouth of the river and Alexandria, was captured by the Union troops about the middle of March. The insurgent troops gradually retired until a considerable district of country on Red River came under the control of the national forces. This control, however, was of brief continuance. An unexpected reverse befell the expedition. The army under General Banks was defeated, and was soon after entirely withdrawn from the Red River country. The naval force, under Admiral Porter,

necessarily followed, and rebel rule and ascendency were again complete and absolute. The military occupation by the Union troops lasted rather less than eight weeks. Its duration was measured by the time required for the advance and retreat of the army and navy. The Parish of Avoyelles was a part of the district thus temporarily occupied; and the plantation of Mrs. Alexander was in this parish, and upon the river. The seventy-two bales of cotton in controversy were raised on the plantation, and were stored in a warehouse about a mile from the river bank. A party from the Ouachita, under orders from the naval commander, landed on the plantation about the 26th of March, and took possession of the cotton. It was sent to Cairo; libelled as prize of war in the District Court for the Southern District of Illinois; claimed by Mrs. Alexander; and, by decree of the District Court, restored to her. The United States now ask for the reversal of this decree, and the condemnation of the property as maritime prize.

After the seizure of the cotton, Mrs. Alexander took the oath required by the President's proclamation of amnesty. The evidence in relation to her previous personal loyalty is somewhat conflicting. She had furnished mules and slaves, involuntarily as alleged, to aid in the construction of the rebel Fort De Russy. She now remains in the rebel territory. Before the retreat of the Union troops, elections are stated to have been held, under military auspices, for delegates to a constitutional convention about to meet in New Orleans.

These facts present the question: Was this cotton lawful maritime prize, subject to the prize jurisdiction of the courts of the United States?

There can be no doubt, we think, that it was enemies' property. The military occupation by the national military forces was too limited, too imperfect, too brief, and too precarious to change the enemy relation created for the country and its inhabitants by three years of continuous rebellion; interrupted, at last, for a few weeks; but immediately renewed, and ever since maintained. The Parish of Avoyelles,

which included the cotton plantation of Mrs. Alexander, included also Fort De Russy, constructed in part by labor from the plantation. The rebels reoccupied the fort as soon as it was evacuated by the Union troops, and have since kept possession.

It is said, that though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States, must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

We attach no importance, under the circumstances, to the elections said to have been held for delegates to the constitutional convention.

Being enemies' property, the cotton was liable to capture and confiscation by the adverse party.* It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of the war,"† and as excluding, in general, "the seizure of the private property of pacific persons for the sake of gain."‡ The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies.

In the case before us, the capture seems to have been jus-

* Prize Cases, 2 Black, 687. † 1 Kent, 92. ‡ Id. 93.

tified by the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history, that rather than permit it to come into the possession of the national troops, the rebel government has everywhere devoted it, however owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion.

And the capture was justified by legislation as well as by public policy. The act of Congress to confiscate property used for insurrectionary purposes, approved August 6th, 1861, declares all property employed in aid of the rebellion, with consent of the owners, to be lawful subject of prize and capture wherever found.* And it further provided, by the act to suppress insurrection, and for other purposes, approved July 17, 1862,† that the property of persons who had aided the rebellion, and should not return to allegiance after the President's warning, should be seized and confiscated. It is in evidence that Mrs. Alexander was a rebel enemy at the time of the enactment of this act; that she contributed to the erection of Fort De Russy, after the passage of the act of July, 1862, and so comes within the spirit, if not within the letter, of the provisions of both.

If, in connection with these acts, the provisions of the Captured and Abandoned Property Act of March 12, 1863,‡ be considered, it will be difficult to conclude that the capture under consideration was not warranted by law. This

* 12 Stat. at Large, 319. † Id. 591 ‡ Id. 820.

last-named act evidently contemplated captures by the naval forces distinct from maritime prize; for the Secretary of the Navy, by his order of March 31, 1863, directed all officers and sailors to turn over to the agents of the Treasury Department all property captured or seized in any insurrectionary district, excepting lawful maritime prize.*

Were this otherwise, the result would not be different, for Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist. Whatever might have been the effect of the amnesty, had she removed to a loyal State after taking the oath, it can have none on her relation as enemy voluntarily resumed by continued residence and interest.

But this reasoning, while it supports the lawfulness of the capture, by no means warrants the conclusion that the property captured was maritime prize. We have carefully considered all the cases cited by the learned counsel for the captors, and are satisfied that neither of them is an authority for that conclusion. In no one of these cases does it appear that private property on land was held to be maritime prize; and on the other hand, we have met with no case in which the capture of such private property was held unlawful except that of Thorshaven.† In this case such a capture was held unlawful, not because the property was private, but because it was protected by the terms of a capitulation. The rule in the British Court of Admiralty seems to have been that the court would take jurisdiction of the capture, whether of public or private property; and condemn the former for the benefit of the captors, under the prize acts of Parliament, but retain the latter till claimed, or condemn it to the Crown, to be disposed of as justice might require. But it is hardly necessary to go into the examination of these English adjudications, as our own legislation supplies all needed guidance in the decision of this case.

* Report of the Secretary of the Treasury on the Finances, December 10, 1863, p. 438.

† Edwards, 107.

There is certainly no authority to condemn any property as prize for the benefit of the captors, except under the law of the country in whose service the capture is made; and the whole authority found in our legislation is contained in the act for the better government of the navy, approved July 17th, 1862. By the second section of the act,* it is provided that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall be the sole property of the captors, or, in certain cases, divided equally between the captors and the United States. By the twentieth section, all provisions of previous acts inconsistent with this act are repealed. This act excludes property on land from the category of prize for the benefit of captors; and seems to be decisive of the case so far as the claims of captors are concerned.

As a case of lawfully captured property, not for the benefit of captors, its disposition is controlled by the laws relating to such property. By these laws and the orders under them, all officers, military and naval, and all soldiers and sailors, are strictly enjoined, under severe penalties, to turn over any such property which may come to their possession to the agents of the Treasury Department, and these agents are required to sell all such property to the best advantage, and pay the proceeds into the National Treasury. Any claimant of the property may, at any time within two years after the suppression of the rebellion, bring suit in the Court of Claims, and on proof of ownership of the property, or of title to the proceeds, and that the claimant has never given aid or comfort to the rebellion, have a decree for the proceeds, deducting lawful charges. In this war, by this liberal and beneficent legislation, a distinction is made between those whom the rule of international law classes as enemies. All, who have in fact maintained a loyal adhesion to the Union, are protected in their rights to captured as well as abandoned property.

It seems that, in further pursuance of the same views, by

* 12 Stat. at Large, 606.

an act of the next session, Congress abolished maritime prize on inland waters, and required captured vessels and goods on board, as well as all other captured property, to be turned over to the Treasury agents, or to the proper officers of the courts. This act became a law a few weeks after the capture now under consideration, and does not apply to it. It is cited only in illustration of the general policy of legislation, to mitigate, as far as practicable, the harshness of the rules of war, and preserve for loyal owners, obliged by circumstances to remain in rebel States, all property, or its proceeds, to which they have just claims, and which may in any way come to the possession of the Government or its officers.

We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the act of March 12th, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now be paid into the Treasury of the United States, in order that the claimant, when the rebellion is suppressed, or she has been able to leave the rebel region, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the act, have the proper decree.

The decree of the District Court is reversed, and the cause remanded, with directions to

DISMISS THE LIBEL.

TOBEY *v.* LEONARDS.

1. Positive statements in an answer to a bill in equity—the answer being responsive to the bill—are not to be overcome, except by more testimony than that of one witness; but by such superior testimony they may be overcome; and where, as was the fact here, *seven* witnesses asserted the contrary of what was averred in such answer, the answer will be disregarded.

Statement of the case.

2. A man may lawfully transfer all his interest in property which is about to become the subject of suit, for the purpose of making himself a witness in such suit; and while his testimony is to be carefully, and, perhaps, suspiciously scrutinized, when contradicting the positive statements made by a defendant in equity responsively to the complainant's bill, such testimony is still to be judged of by the ordinary rules which govern in the law of evidence, and to be credited or discredited accordingly.
3. The introduction of children as witnesses in an angry family quarrel rebuked by the court.

THIS was a suit relating to certain transactions of a man of advanced years, and of somewhat marked characteristics and temper, named *Jonathan* Tobey, a farmer and old resident, as his father, whose name he bore, had been before him, of the neighborhood of New Bedford, in Massachusetts.

Mr. Tobey, it seemed, had, through a long life, been an active person in county affairs of the region round New Bedford; a road contractor for the county, &c. &c. As one consequence, either of this fact, or of a temper naturally inclined to controversies, he was not unfrequently in suits; and among other suits had a bitter one—prolonged through twenty-five years—with his county.* "It occasioned considerable feeling. There was a good deal of discussion about it. Tobey issued one or more pamphlets for distribution. He had some very warm personal supporters, and there were some who were opposed to him. He was a noted man." The present controversy, although it had nothing to do with county concerns, seemed to have excited more interest in the neighborhood of its origin than, as a private controversy, properly belonged to it. One cause for this was, perhaps, that it had the element of a family quarrel. Tobey, Senior, or, as he is otherwise above styled, *Jonathan* Tobey, in order to be himself a witness in the cause, had sold all his interest in the subject of suit, once his own, to a son named *Stephen* Tobey, who was now suing his own brother-in-law, one

* Tobey *v.* County of Bristol, 3 Story, 800; the last case apparently ever decided by Story, J. Tobey, it was said, had removed from Massachusetts to Rhode Island, in order that he might sue in the Federal court, and get his case before, what all admitted, was an unprejudiced tribunal.

Statement of the case.

Horatio Leonard, and a certain *Nehemiah* Leonard, father of this brother-in-law Horatio. Numerous members of the family of Tobey,—William Tobey, Leonard Tobey, Joshua Tobey,—came to the support of their brother or kinsman; Mrs. Hannah Tobey, at the age of seventy, coming with them; while minors from the house of Leonard—Master Horatio Herbert Leonard, Master Stephen Henry Leonard, and Miss Laura Anna Leonard—the last *at the age of eleven*—testifying to what had been said in "the nursery"—were produced in support of theirs. Twenty witnesses were called to impeach Tobey, Senior's, character, including, as the counsel for the defendants noted in their brief, "mayors, members of the legislature, councillors, justices of the peace and of the quorum, county commissioners, deputy sheriffs, city marshals, aldermen, assessors, city treasurers and collectors, trustees of the lunatic State hospitals, keepers of the jails, and overseers of the house of correction;" while these were met, by twenty, and *seven* added, not less worthy of belief, as Tobey's counsel seemed to signify, in the fact, that their judgment and integrity had evidence quite as good as the preamble of a patent, and that *their* posts of honor had been the private station. These all testified that Tobey, Senior, was entirely worthy of belief; and some descriptions which he gave of the boundaries of his generally described "homestead" hereinafter mentioned, and which descriptions of his it was attempted to attack, seemed to have been more accurately conceived by him and told, than they were either conceived of or told by others who denied them.

The suit, therefore, was somewhat special in its circumstances; and in its questions of fact—the form into which it was resolved by this court—presented conflict in the evidence.

The outline case on which the proceeding, one in equity, rested—as derived from the record, and from the statement of the learned Justice (Wayne), who presented the whole with great detail and clearness before giving the judgment of the court—was essentially as follows:

In 1830, Tobey, Senior, owned certain real estate situated

in New Bedford and Fairhaven; part patrimonial, part acquired by purchase. For the two preceding years he had been engaged in building a county road, and had been obliged to obtain loans for that purpose; and, among others, one of $5000 of Mr. William Rotch, Junior, a gentleman of fortune, who had wanted him to make the county road by a special route, and who seems to have been kindly disposed to him. Finding, in 1830, that he could not obtain payment of the county of what he claimed, except by a long litigation, he made, without request, a mortgage to Mr. Rotch to secure this indebtedness. The mortgage conveys "my homestead farm, situate in the said New Bedford, being the same which I hold by virtue of the last will and testament of my father, Jonathan Tobey." After the making of this mortgage, he bought, in 1837, a wood-lot of one Sweet; and, in 1839, obtained title to another tract of land from the commonwealth. In 1846 he conveyed *all* his real estate in New Bedford and Fairhaven to one of his sons named Stephen, and another son, Leonard, in mortgage, to secure a debt which had been due for a long time to this son—as it seemed, a dutiful one; Leonard, in 1848, assigning all his interest in the mortgage to his brother Stephen. In 1849, Mr. Rotch made peaceable entry upon the premises mortgaged to him, for the purpose of foreclosing his mortgage. From 1830 down to the filing of this bill, old Mr. Tobey remained in possession of all the property referred to in both mortgages, and used and occupied them as his own. He never paid any interest or any part of the principal of the Rotch mortgage, and never paid any rent for the premises; and, during the lifetime of Mr. Rotch, was never called upon so to do. In 1858, the administrators of Mr. Rotch, then lately deceased, brought an action of ejectment against him to remove him from the mortgaged premises. When this action was about to ripen into a judgment, efforts were made by Tobey, the father, and his son, Stephen, to raise money to buy the mortgage; it being known by them that it could be bought for considerably less than the amount of it. Among others, Tobey, Senior, applied to his son-in-law.

Statement of the case.

Horatio Leonard, to obtain, through *him*, assistance of his father, *Nehemiah* Leonard. The Leonards ascertained that the mortgage could be bought for $2500, and that they then could have a year to pay it in. They then informed old Mr. Tobey, *as was alleged by them*, *the Tobeys*, that if they, the Tobeys (father and son Stephen), could provide for the payment of this amount before it would fall due, and would give as security all Tobey, Senior's, real estate, and would transfer Stephen's interest under his mortgage, they would help them by purchasing the Rotch mortgage. The Leonards, it was certain, did purchase for themselves, or for somebody else, the mortgage of Mr. Rotch.

At the time of the negotiation it was proposed, according to the statement of the Tobeys, that Tobey, Senior, and his son Stephen, should cut $1000 of wood off the place towards the debt. Tobey, Senior, was at this time sick, and Horatio Leonard got the deeds from the Tobeys to him drawn up. It had been agreed, *as was said by the Tobeys*, that a writing should be also drawn up, stating the terms upon which the property should be reconveyed. *No such writing was ever made.* Leonard, according to the account given by the Tobeys, insisted on having absolute deeds and quit-claims, with a release of dower by the wife of Jonathan Tobey, an aged woman, of Tobey's other property, as well as of the homestead, in order, as he said, that the title might be clear on its face, and that he might borrow money, if he wanted to do so; and such deeds were made. After the deeds passed, on the same day, Horatio Leonard applied to his father-in-law, old Mr. Tobey, for a bill of sale of all the stock and farming utensils on the farm, which was given him.

After this, Stephen Tobey began to cut wood, and cut about one hundred cords. Horatio Leonard also sold to one Hawes standing wood to the amount of $840. In June, Horatio Leonard became embarrassed in business; and his father, Nehemiah, undertook to aid him. To secure himself in so doing, he took the Tobey estate from his son and sold it. Old Tobey and his son Stephen then made application

for a reconveyance to them of this property, in accordance with what they called or deemed their right, offering to pay; as they said that it had been agreed they should have a right to do.

Upon this application, Leonard, the father, refused to convey to the Tobeys, except on payment of $5000; and, upon their refusal to take the land upon these terms, he sold it to the defendants, R. & J. Ashley, for that sum; *they* agreeing to convey to one Spooner a portion of the estate.

Stephen Tobey, who, by his father's transfer to him, was sole party in interest, now filed his bill in the Circuit Court of the United States for the Massachusetts District, against all these parties; that is to say, against Leonard, father and son, Ashley, Spooner, for a reconveyance, as above said; for compensation in waste and damage in cutting and removing the wood and grass,—the complainant offering to perform what he called his part of the agreement, by paying such sums of money and doing such other acts as the court should deem equitable and just.

The Leonards, father and son, filed separate answers *responsive to the bill, and denying positively and specifically its allegations.* But the testimony of seven unimpeached witnesses, Messrs. Jones Robinson, Edward Chase, George Barney, Sampson Reynolds, Alden Lawrence, Leonard Tobey, and William Tobey, tended to show, or did show, admissions by the Leonards that the transaction was a mortgage only, or in the nature of one.

On the other hand, the testimony of T. M. Stetson, Esq., a young professional gentleman of good character in New Bedford, who had been counsel of the elder Tobey and was more or less familiar with the case, and with the understanding of both Tobey and Leonard, as expressed to *him* at *certain times and places*, and under circumstances not, perhaps, the best to educe the fullest ideas of the parties, went to a different conclusion. It appeared, however, as a fact, that after Leonard, the son, had got a conveyance from the Tobeys, he wished his father-in-law, Tobey, Senior, to devise the property to him in his will; a draft of which he

caused to be prepared to this effect without Mr. Tobey's knowledge.

The other defendants in the case, the Ashleys, Spooner, and Hawes, also filed answers, denying the allegations, but leaving it reasonably plain that they were not purchasers from the elder Leonard, without notice of the claim of Tobey.

Some defence was made, too, in supplemental answers setting up a conditional conveyance by Tobey, Senior, to one Clap, and some similar conveyance to the Wareham Bank.

The Massachusetts Statute of Frauds thus enacts: "No trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or by his attorney."

The court below dismissed the bill, the presiding judge giving an opinion at length. On appeal, the case was ably argued here by *Messrs. Sydney Bartlett and Thaxter, for the appellant, Tobey, and by Messrs. Olney and Thomas, contra;* the argument turning, in part, on the point how far the case was affected by the Massachusetts Statute of Frauds; a matter thought by this court unnecessary to be considered by it.

Mr. Justice WAYNE, having stated the pleadings, delivered the opinion of the court:

This cause has been argued with ability, and we are brought to the consideration of it with every advantage, in any way applicable to the rights of the parties in a court of equity, by the written opinion of our brother who tried it, and gave the decree in the Circuit Court.

The allegation is that the purchase made by the Leonards of the Rotch heirs was in behalf and for the benefit of the Tobeys, and that the conveyances by the Tobeys were made as security for the payment by them of the notes for twenty-five hundred dollars, given to the Rotch heirs. This is the issue between the parties, and the question is which of them is sustained by the proofs.

"Denials in answer to a bill in equity to the extent of their relation to facts within the knowledge of the respondent, when they are responsive to the allegations of the bill of complaint, must be received as evidence. Courts of equity cannot decree against such denials in the answer of the respondent on the testimony of a single witness. On the contrary, the rule is universal, under such circumstances, that the complainant must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. The rule stands upon the reason, that when a complainant calls upon the respondent to answer allegations, he admits the answer to be evidence; and if it is testimony in the case, it is equal to the testimony of any other witnesses, and the complainant cannot prevail if the balance of proof is not in his favor; he must have circumstances in addition to his single witness in order to turn the balance."*

This, no doubt, is the general rule of chancery;† but it is one which does not, in the present case, apply, for here *seven* unimpeached witnesses state that in business interviews either with Horatio or Nehemiah Leonard, in relation to their purchase of the homestead farm, or to matters in some way connected with it, the defendants, one or the other of them, said, in language which could not be mistaken, that the purchase of the Rotch mortgage had been made to assist Jonathan Tobey to pay the debt due upon it. We proceed to state this testimony, and the impressions made upon us by it.

Horatio Leonard said to the witness *Jones Robinson*, that he himself and his father had given a note for it payable in a year for $2500, and that the complainant and his father must get the wood off to meet it, and that he only wanted them to pay the note and to pay himself for his trouble; and added it was to be paid for from the wood, and if there was not enough, that he should sell some of the real estate.

* Opinion in this case on the circuit per Clifford, J. See, also, Clarke *v.* Van Tiersdyke, 9 Cranch, 160; Hughes *v.* Blake, 6 Wheaton, 468; cited by the learned justice.

† Parker *v.* Phetteplace, 1 Wallace, 684.

Another witness, *Edward Chase*, swears that Horatio Leonard said to him, after relating the circumstances of the purchase of the Rotch mortgage, in connection with the impoverished condition of the Tobeys, that he had taken hold to help them.

George Barney, a third witness, says that he had a conversation with Horatio Leonard; that he mentioned that he had purchased the farm formerly owned by Jonathan Tobey, &c., with an intention *to sell it back to the owner;* that he had done so to prevent it from going into the hands of strangers, and to keep a home for the old people, and *that he was to be repaid* the money spent in purchasing the farm.

Sampson Reynolds, a fourth witness, swears, that Nehemiah Leonard said to him that his son had married Jonathan Tobey's daughter, and that he had a notion to take up the Rotch mortgage, cutting and selling wood enough to pay off the debt, and letting the old man have a home there as long as he lived.

Alden Lawrence, a fifth, testifies that Nehemiah Leonard said to him, that he had taken the property for the accommodation of the old gentleman, as he was liable to be turned out of house and home at any time; took it to preserve a home for the old folks; and the witness understood him to say "that he calculated to take the wood, and would then turn the property back."

Leonard Tobey, the brother of the complainant, and a sixth witness, deposes that he called upon Nehemiah Leonard, who, after expressing his regret that there should be a misunderstanding between his son Horatio and Jonathan Tobey, said, in substance, that he would use his influence to get Horatio to convey the mortgage to his father and brother, and that he was willing to give up the place if the money was refunded. He also said that Jonathan Tobey came to him as a last resort; that the arrangement was that Horatio should see that wood enough was cut to meet the notes at maturity.

William Tobey, the seventh witness, testifies that he was intimately acquainted with Horatio Leonard for seven years,

including the year 1859, and that he called upon him at his place of business in Boston in reference to the matter, and said he had made a proposition to Stephen Tobey, that himself and Stephen should buy the claim of the Rotch heirs; Stephen to put in his claim; that they should be interested and improve the farm and occupy it together; and that, if Stephen should die *without heirs, his interest should be willed to the children of Horatio.* He added, that Stephen would not agree to it, and seemed to have a feeling that it was meant to take advantage of him. "He expressed the wish that I would go to New Bedford and bring about the arrangement, saying that he would pay my expenses. He said his motives were pure, that he did not know it would be of any use to him, but thought it would be to his children; that it would be a good home for Stephen, and his father and mother, and that he wanted the farm to remain in the family." In reply to one interrogatory, the witness answered, that, after speaking of other matters relating to the purchase of the farm, Nehemiah Leonard added, that he had at first refused to assist in raising the money to buy it; that he had finally agreed to it from the friendly feeling he had for the Tobeys, and his only object for complying with their wishes and his son's request was to benefit the family. He also said that Jonathan Tobey came to him as a last resort, and that the arrangement was that Horatio should see that wood enough was cut to meet the notes at maturity.

The testimony of the preceding seven witnesses must be considered, in connection with that of Jonathan Tobey, who had sold out all his interest in the property to his son, the complainant, to *enable himself to be a witness upon the trial of the cause.*

Our first remark is, that such a sale for such a purpose is allowable, and that its lawfulness has been sanctioned by this court* even when the sale was to a party who had no previous interest. We say next that the attempt by the

* Babcock *v.* Wyman, 19 Howard, 289.

defendants to discredit Jonathan Tobey as a man of truth is a failure, in fact, from all that the witnesses, introduced for such purpose, had said or could say about him, and that all that they did say has been rebutted by the evidence of witnesses more numerous than the former and as respectable. Some of them had known Tobey for years in the social relations of his life and in his public business; all of them swore without any qualification that they believe him to be a correct man, and that they would believe him upon his oath. No point of his testimony in this case is contradicted by any witness, and all that he has said is in harmony with the motive which could only have induced him to place himself in a position to aid in the restoration of his son to his rights, to whom he owed a debt of six thousand dollars with long years of interest, against the contrivance of a son-in-law to whom he owed nothing; and who had succeeded in getting all of the estate of both for a very insufficient consideration, without the payment of a cent in fact. Tobey's statement of his agreement with the Leonards to give them a quit-claim for his entire estate, has not been disproved either directly or inferentially by circumstances or by any witness, and has only been denied by the defendants in their answers. He has neither qualified nor modified the facts to which he has sworn in his replies to the questions put to him in behalf of the complainant, or to such as were asked by the defendants. His answers as to the lands which he owned, besides those included in the Rotch mortgage, correspond with the subsequent surveys with as much exactness as the circumstances of his manner of acquiring them permitted. It is appropriate to say that his account is not contradicted in the answers of the defendants to the bill, excepting the effort made by them to enlarge the quantity of the real estate to be attached to the homestead farm, contrary to its boundaries, as it had been conveyed to Horatio Leonard by the Rotch heirs. Tobey's narrative of his connection with William Rotch, how he became indebted to him for his advances of money to construct a county road which Mr. Rotch wanted to be made, to give him a shorter and better route from his

place to Boston, of Mr. Rotch's offers to advance him money as he might need it, if he would undertake the construction of the road, and after he had completed it of the litigation for the sum due to him under the contract, and of his losses in consequence, are all substantiated by documents which show plainly the causes of his pecuniary embarrassments, and of some of his peculiarities in litigation during a long life, and up to the time when, as Nehemiah Leonard has said, "he came to me as a last resort to get his aid to purchase the Rotch mortgage."

The testimony of such a witness as Jonathan Tobey is to be scrutinized, no doubt, carefully and with great caution, perhaps with suspicion, before it can be allowed to invalidate the denials of respondents of the allegations of a bill in equity. But we have thus faithfully scrutinized it in this instance, in connection with all the testimony introduced by the defendants, and without any impression having been made upon us that Jonathan Tobey had not told the truth in regard to this transaction.

The witness who is most relied upon by the defendants to prove that there had been no stipulation for a bond or written instrument between the parties for a reconveyance of the property to Jonathan Tobey, is T. M. Stetson, Esq., who had been the counsel of Tobey from February, 1858, to December, 1859.

Fairer or more proper testimony, indeed, than that of this gentleman could not have been given. It is marked by forbearance and caution; but, in our opinion, it does not disprove that there had been a private arrangement between the parties for a reconveyance of the property to the complainant and his father, when the notes given for the Rotch farm should have been provided for or were paid. Mr. Stetson says that he told Jonathan Tobey and the complainant that he could make no defence in the ejectment suit pending against the plaintiff's title and evidence, and that it had been delayed by his suggestion that it might be settled. That afterwards he met Horatio Leonard, whom

he supposed to be a man of means, and told him he thought he could make it an object to buy the property from the agent of the Rotch heirs. He refused, on account of there having been so many conveyances about the property, and on account of the well-known character of Jonathan Tobey for litigation; but he said if he could have the *whole property without any question or lawsuit*, that he did not know but that he would take it; but that he must have *the whole or none*. The witness told this to Mr. Tobey. "We talked over the position of the suit," says Mr. Stetson, "and Mr. Tobey said that he might as well discontinue his defence. This I told to Horatio Leonard. A few days after, Jonathan Tobey, Stephen Tobey and Horatio Leonard came into my office. Horatio said he had seen the agent for the Rotch heirs, and had learned their price. He said he was not going to get into a lawsuit, and would not buy unless he could get a clear and good title. He also asked me if I considered the Rotch title such a one. I said that I did, with the evidence which they had, but that of course it was better to get releases and quit-claims from every one who thought he had any interest in the property. I then stated that I thought the better way for Leonard to get the whole title was to have the Rotch suit perfected by a judgment and execution levied. Leonard then said that was what he wanted and must have. Jonathan Tobey seemed to wish Leonard to become the owner of the property, and executed his quit-claim for it. Stephen Tobey, after some conversation, executed his release, both being done before the witness." The papers had been drawn by Mr. Stetson before the meeting at his office, and we understand him to say that he does not recollect by whom he was directed to draw them. We also understand him to say that he knew nothing of any private arrangement between the parties for a reconveyance of the property to the Tobeys before or after the quit-claim deeds were given in his office. In fact, Mr. Stetson confines himself to what occurred and was said there, without alluding to any conversation they may have had elsewhere, leaving the fact of an understanding for a reconveyance to the testimony in the

case as that might be. In our view it is not at all likely that such an arrangement would have been mentioned to him by either party, before or when he was advising as counsel, or as the friend or agent of all of them, how a title to the property could be perfected. Such a device to defeat it as that one party was to have a right to a reconveyance of the property, upon paying the notes with interest, which had been given in payment for the Rotch mortgage, and that Horatio Leonard was to have a title in paper to the homestead farm, and all the real estate besides, with all the advantages of using both for his own benefit, with a secret condition to relinquish and reconvey to the Tobeys, would probably have been met by Mr. Stetson with a suggestion that a condition of that kind, under all the circumstances and his position then, would not be consistent with the ethics of his profession, the law requiring as a fairer mode in such a case, that such a condition should be a part of the deed, or if it was to operate as a defeasance, that it must be "made *eodem modo*, as the thing to be defeated was created."*

We conclude that the testimony and corroborating circumstances resulting from it, with other proofs in the record, overrule the denials by the defendants of the allegations.

One of these corroborative proofs is the fact, that after the Leonards had ascertained that the Rotch mortgage could be bought for twenty-five hundred dollars upon time, and had actually bargained with the Rotch heirs for the purchase of it, according to the described boundaries and contents of the homestead as set out in the suit to eject Jonathan Tobey, and ascertained that he was the owner of other real estate not a part of it, and that all of the real estate had been mortgaged to the complainant,—Horatio Leonard, under such circumstances, should have pretended and represented to Jonathan Tobey and his wife that a quit-claim for the property, with his wife's relinquishment of dower, was necessary to give him a clear title to enable him to borrow money upon it; and should then have stated to the Tobeys that he

* Shepherd's Touchstone, 390.

must have conveyances for all of the real estate, as a prerequisite, before he would buy the Rotch mortgage, being then the purchaser of it, with arrangements then going on for him to secure from the heirs of Rotch their title. We think that such a condition was a menace, made at a time when the Tobeys were helpless and deprived of all hope of getting relief; and that Horatio Leonard must have known its effect would be to coerce them to compliance with his terms. Under the circumstances, as they are detailed in the answer of Horatio Leonard, we view it as a contrivance to vest in himself the whole property, under the guise of buying the Rotch mortgage for the benefit of Jonathan Tobey. It is difficult, too, for us to credit the narrative of Horatio Leonard, that an old man, with an aged wife, pressed by embarrassment and distress, as he then was, should have been willing to divest himself of everything that he owned, without the reservation of something to live upon, and somewhere to live, and all this with the view of giving everything that he had in the world to a son-in-law, to keep the homestead in the latter's family, to the exclusion not only of himself and wife, but all his other children, and particularly so of his son, the complainant, to whom he owed at that time six thousand dollars, with long years of interest, and who had been for many years the stay and support of his father and mother. And this aspect of the case, as to the arrangement for a reconveyance of the property to the Tobeys, when Horatio Leonard demanded titles to the whole of the property, is much strengthened by the fact that Horatio Leonard, after having got a title to the homestead farm, and conveyances for everything that the Tobeys had, became so restless concerning the lawfulness of his right to the property, that he made a virtual acknowledgment of Jonathan Tobey's interest in it, by asking the old man to make a will in his favor, and actually employed counsel to draw it, and that without having previously mentioned his intention to Mr. Tobey. Mr. Stetson mentions the fact in his testimony, and the accidental cause of its having been defeated.

We have carefully examined and considered the whole

testimony given by the defendants in the case, but it is without weight sufficient to counterpoise the conclusion to which we tend.

Nor is it inappropriate for us to say, concerning much of the testimony introduced by Horatio Leonard, that, when the father of a family introduces the juvenile members of it as witnesses in such a litigation as *this* has been, it cannot be done without its being considered as a forlorn effort of parental obliquity.

As a result, we concur in the opinion,—That it has been established by the proofs in this case, as the rules of evidence require the denials of the allegations in a bill of equity to be disproved, that the payment made by Nehemiah Leonard and Horatio Leonard, for the purchase of the homestead farm was intended by them to be an advance of money for the benefit of Jonathan Tobey: That the conveyances executed by Jonathan Tobey and his wife to Horatio Leonard, and the release given by the complainant to him, of all his interest in the real estate purporting to have been conveyed by them, were intended by the parties to them, and were so received by Horatio Leonard, as securities for the repayment of the notes with interest, for twenty-five hundred dollars paid by Nehemiah and Horatio Leonard to the heirs of Rotch for the homestead farm, and that the defendant, Horatio Leonard, agreed to reconvey the real estate property attached to it, and all the rest of the real estate conveyed to him, when payment should be made of the sum of money advanced by the Leonards for the benefit of Jonathan Tobey, and such reasonable compensation as might be claimed by them for their agency and aid in the transaction. We are also of opinion,—when the complainant tendered to Nehemiah Leonard the sum necessary to pay the notes with interest, which had been given to the Rotch heirs, at the same time asking for a reconveyance of the property,—that he was entitled to it, and that it should have been made, and that the subsequent sale of it, as it was made, was in fraud of the complainant's rights.

Opinion of the court.

We have carefully considered the answers of R. and J. and R. Ashley, Spooner, and Hawes, to the allegations of the complainant's bill. Notwithstanding their denials of them, their narratives in each of their answers of their purchases of parcels of the real estate in controversy, connected with the testimony, establish the fact, that when they respectively made their purchases of the real estate from Nehemiah Leonard, or from the Ashleys, that each of them had such notice of the rights claimed to all of the real estate by the complainant, and of what had been the rights to it by Jonathan Tobey before he made a sale of it to the complainant, and that neither of them can be protected in a court of equity, as having been *bonâ fide* purchasers without notice.

Our attention has also been given to the supplemental answers of the defendants to the bill of the complainant, relating to a conditional conveyance by Jonathan Tobey, of real estate in the County of Bristol, to secure Clapp from any liability he might incur by indorsing Tobey's paper, and Tobey's release of his interest and transfer of all his rights in a conveyance to the Wareham Bank. In our opinion, this interposes no obstacle to rendering a decree for the complainant.

From the opinion which we have above expressed of the character of the transaction between the Leonards and the Tobeys, it becomes unnecessary for us to discuss the point made by all of the defendants in the cause, that they were not liable to the complainant, as the statute of Massachusetts had declared that no action shall be brought upon any sale of lands, tenements, or hereditaments, or of any interest in or concerning them, unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the judge charged therewith, or by some person by him lawfully authorized.

DECREE REVERSED, and the defendants ordered to reconvey to the complainant all the real and personal estate (Ashleys,

Spooner, and Hawes, to join in the conveyance of the real), on repayment of the $2500, with interest, deducting $840, with interest, received by the defendant, Horatio, for wood standing on the land and sold. The cause remanded, with directions to proceed accordingly.

GRIER and CLIFFORD, JJ., dissented.

MILWAUKIE AND MINNESOTA RAILROAD COMPANY AND FLEMING, APPELLANTS, *v.* SOUTTER, SURVIVOR.

An order of the Circuit Court, on a bill to foreclose a mortgage, ascertaining—in intended execution of a mandate from this court—the amount of interest due on the mortgage, directing payment within one year, and providing for an order of sale in default of payment, is a "decree" and a "final decree," so far as that any person aggrieved by supposed error in finding the amount of interest, or in the court's below having omitted to carry out the entire mandate of this court, may appeal. *Appeal* is a proper way in which to bring the matter before this court.

A DECREE had been made some time since in this court, against the La Crosse and Milwaukie, and the Milwaukie and Minnesota Railroad Companies, the road being then in the hands of a receiver, on a bill in equity, filed in the Federal court of Wisconsin, to foreclose a mortgage given by the former company on its road, &c., to two persons, named Bronson and Soutter (of whom the former was now dead), to secure certain bonds which the former road had issued, on which the interest was unpaid.

The mandate to the court below, ran thus:

"It is ordered that this cause be remanded, &c., with directions to enter a decree for all the interest due, and secured by the mortgage, with costs; that the courts *ascertain the amount of moneys in the hands of the receiver or receivers, from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest, and apply it to the same;* and that if the

money thus applied is not sufficient to discharge the interest due on the first day of March, 1864, *then* to ascertain the balance remaining due at that date. And *in case* such balance is not paid within one year from the date of the order of the court ascertaining it, *then* an order shall be entered, directing a sale of the mortgaged premises."

The court below, acting under this mandate and intending to execute it, did ascertain the amount of interest due, and directed payment within a year, and provided for an order of sale in default of payment; *but that court did not ascertain the amount of money in the hands of the receiver or receivers, or apply any such amount in reduction of interest, or find the balance due on the first of March, or at the date of the order.* The amount of interest was ascertained, and an order of sale provided for in default of payment within one year; nothing more.

From this order of the court below the railroad company took an *appeal* here; which appeal a motion was made, on behalf of Soutter & Bronson, to dismiss.

Mr. Cary, with whom was Mr. Carlisle, in favor of the motion: The order appealed from is not a final decree, nor in the nature of such a decree. The ordinary decree of foreclosure and sale, although not strictly a final decree, has been treated, in the practice of this court, as so far final that an appeal might be taken therefrom. But this is not a decree of foreclosure and sale. It is nothing more in effect than an order settling the amount found due on the mortgage, and a statement or determination of the time when the court will proceed to enter a final decree of foreclosure and sale, provided said amount is not paid. It is not a decree authorizing a sale if that amount is not paid. The court refused to make such a decree. This order, by its terms, requires that another decree shall be made before we are to have execution. To say that such a decree is final is a contradiction in terms. We can have no execution or benefit of this decree until a further and final decree is made. No appeal, therefore, can lie to this court.

Argument against dismissal.

No doubt the railroad company can have relief if it has suffered injustice; but its remedy is by application for *mandamus* to vacate the order below.

Mr. Carpenter, contra: In *Blossom* v. *The Railroad Company*,* it was decided that a mere bidder at a marshal's sale, made on a foreclosure of a mortgage, might by his bid, though no party to the suit originally, so far be made a party to the proceedings in that court as to be entitled to an appeal here; and that, whether or not, this court would not dismiss an appeal by such person on mere motion of the other side, in a case where merits were involved. So, in *Orchard* v. *Hughes*,† this court refused to dismiss an appeal from an order confirming a sale under a decree of foreclosure, and directed that the case should be heard with the appeal from the principal decree in the suit which ordered the sale.

These cases, or the first of them, went further than what was declared in *Perkins* v. *Fourniquet*,‡ which goes far enough for us. There a decree had been made in this court, affirming, "with costs and damages at the rate of 6 per cent. per annum," a decree, in the Circuit Court of Mississippi, for a sum of money; and a mandate was sent below reciting the judgment here, and directing it to be carried into effect. But an execution was issued for the principal sum, with interest at 8 per cent., the legal rate of Mississippi, and damages at 6 per cent., in addition, in all 14 per cent. An appeal was accordingly taken here. One question was, whether the execution had issued under a final "decree," and so one that could be appealed from. Taney, C. J., speaking for the court says, "There was substantially an equity proceeding and final decree after the mandate was filed. It is true, they were summary; and necessarily so, as the matters in dispute under the execution were brought before the court on motion. . . . Plenary and formal proceedings are not necessary, and are never required where the dispute is confined to matters arising under process of

* 1 Wallace, 655. † Id. 657. ‡ 14 Howard, 330.

execution. They are more conveniently and as fully brought before the court by a summary proceeding on motion." The case we cite was in essential respects like this; but the court held it to be "regularly" before it.

Then, is appeal the form of remedy which we should adopt? or ought we, as the other side urges, to rely on a motion for *mandamus* to vacate the order below? We think that appeal is a proper form, and perhaps the most proper. Here, too, *Perkins* v. *Fourniquet* is in point. The case there, like this one, was an appeal, and a motion was made to dismiss it, on the ground urged here by our opponents, that appeal was not the proper practice, and that *mandamus* alone was. But what decides the court? "The subject might," says the late Chief Justice, speaking for it, "without doubt, be brought here upon motion, and a *mandamus* issued to compel the execution of the mandate; but an appeal from the decision of the court below is equally convenient and suitable, and perhaps more so in some cases, as it gives the adverse party notice that the question will be brought before this court, and affords him the opportunity of being prepared to meet it at an early day of the term."

The CHIEF JUSTICE delivered the opinion of the court, announcing that the order in question was a decree, and was a final decree, from which any party aggrieved by supposed error in finding the amount of interest, or in omitting to ascertain and apply to the reduction or discharge of interest the amount of moneys in the hands of the receiver or receivers, might appeal. The ruling of this court in *Perkins* v. *Fourniquet*, cited by the appellant's counsel, was a full and direct sanction to this conclusion.

MOTION DENIED.

NOTE.

For greater caution, Mr. Carpenter, *before* this motion was heard, had moved for a *mandamus* to vacate the already mentioned order of the Circuit Court. The *appeal* being allowed, that motion was of course refused; the Chief Justice, in announcing such refusal, saying that it was made without express-

ing any opinion as to the applicability of *that* remedy to the case before the court.

[For a further part of this case, and for the reasons and justification (under the special facts) of the court below, in executing the mandate as it did, see Railroad Company *v.* Soutter; *infra*, p. 510.]

UNITED STATES *v.* BILLING.

1. The doctrine of *United States* v. *Halleck* (1 Wallace, 439), that the decrees of the District Court on California land surveys under the acts of Congress are final, not only as to the questions of title, but as to the boundaries which it specifies, redeclared; and the remedy, if erroneous, stated to be by appeal.
2. Appeals on frivolous grounds, from decrees in cases of California surveys, in the name of the United States, acting for intervenors, under the act of June 14, 1860, discouraged as being liable to abuse; since, on the one hand, the party wronged by the appeal gets no costs from the Government; while, on the other, the Government is made to pay the expenses of a suit promoted under its name by persons who may be litigious intervenors merely.

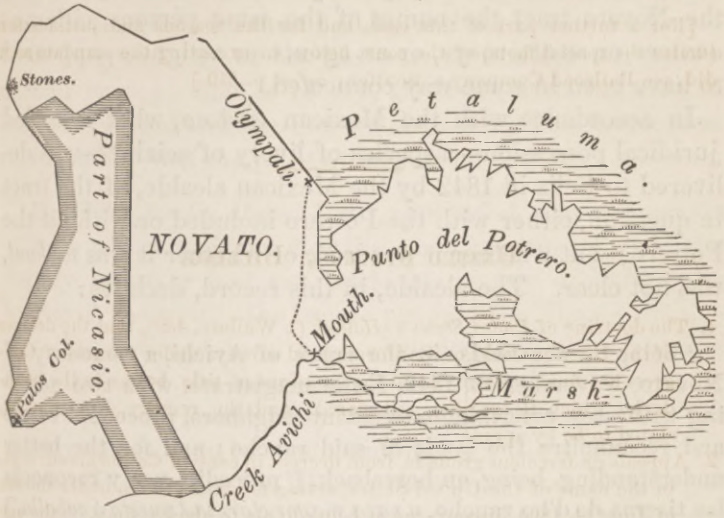
THE Board of Land Commissioners, established by act of Congress of March 3, 1851, to settle private land claims in California, confirmed, in 1851, to Billing and others, a tract of land granted in 1839 by the Mexican Government to one Felis.

The decree set forth the boundaries of the land essentially as follows:

"Commencing at the mouth of the creek Avichi, emptying into the Petaluma marsh, and running up said creek ten thousand varas, to a point called Palos Colorados; thence in a northerly direction five thousand varas, to a place marked by a pile of stones; thence in an easterly direction to a place called Olympali, five thousand varas; *from thence with the estuary, around the Punta del Potrero, on the estuary, to the place of beginning;* containing *two* square leagues, *a little more or less.*"

Statement of the case.

The diagram below will illustrate the *general* position of things; enough to give an idea.



It was admitted that no difficulty existed in ascertaining the boundaries described in this decree.

A survey was made according to these boundaries; but, thus surveyed, the tract included nearly *three* leagues, and the United States excepted to the survey on that ground.

While the case was pending in the District Court on that exception, one of the deputies of the Surveyor-General of the United States,—not acting under immediate direction of his superior, acting, indeed, without his knowledge at the time, though the principal afterwards issued instructions in execution of what his deputy had done—made a survey which excluded one league on the western side of the Novato tract, including it within another called Nicasio, now patented by the United States; the patent of the Government, however, by its terms, being declared not to "affect the interests of third persons." The District Court confirmed the survey for the tract as it stood, including the Potrero, and excluding the league on the west. This made a tract of about *two* leagues. From this decree the claimants made no appeal.

[The part of the land confirmed which was thus excluded from the Novato tract, and included in the Nicasio, lies in shade in the left of the diagram.] In both the Nicasio and the Novato tract the names of the same persons, either as owners or as attorneys, or as agents or assignees, appeared to have been in some way connected.

In accordance with the Mexican custom, what is called juridical possession—a species of livery of seizin*—was delivered to Felis in 1842 by the Mexican alcalde, of the tract in question, either with the Potrero included or without the Potrero; but whether it was *with*, or whether it was *without*, was not clear. The alcalde, in this record, declares:

"Being in the fields, in the creek of Avichi, a boundary of Novato, November 13, 1842, I, the magistrate, with two assisting witnesses, coterminous resident neighbors, proceeded to see and reconnoitre the lands of said rancho; and for the better understanding, being on horseback, ['procedi á ver y reconoces las tierras de d'ho rancho, *y para mayor claridad puesto á caballo*,'] in company with all the parties and witnesses before mentioned, I ordered the aforesaid witnesses to point out the places, limits, and boundaries of the land as they described them in their depositions. They did so; and I, the magistrate, and those of my assistance, saw and examined them and the documents presented, and in testimony I made official note of it, &c."

This officer then goes on to give some account of the measurement, which, he says, was made with a rope of hemp with measures stamped on it; and he concludes that by this rope, well twisted and stretched, it resulted that the rancho has five thousand "varas" in length and ten thousand in breadth. After which conclusion the owner having "been made to know the lands which belong to him, for a sign of true possession and customary form, pulled up grass and stones, and threw to the four winds of heaven, in manifestation of the legal and legitimate possession which he for himself took."

* See it described, Malarin *v.* United States, 1 Wallace, 284.

Argument for the appellant.

This Mexican record, the judge below, (Hoffman, J.,) after careful examination, thought so inaccurate and incomplete, that he considered himself free entirely to discard it, as hopelessly confused and unintelligible; and his Honor confirmed to Billing and the others the tract as marked out by the second survey; that is to say, the tract with the eastern league *ex*cluded and the Potrero *in*cluded. The correctness of his action was the point on appeal here.

Mr. Wills, for the United States, contended, that the owners of both tracts were in fact the same persons; that if the deputy surveyor had not made his survey excluding the league on the west,—the league put into the Nicasio tract,—the *Potrero* would have been excluded, and the claimants have thus lost the most valuable part of the whole tract; that to get this Potrero *they* had procured this survey by the deputy surveyor to be made, and had got the one league on the east included in the Nicasio tract (*their* tract, also, as was argued), in order to get the Potrero included in the Novato. The whole thing, it was urged, was a plan to get three leagues, the Potrero being included, where, otherwise, they would have got but two, with the Potrero excluded. It was argued, upon the evidence, not here reported, that the record of juridical possession did show that the Potrero was excluded, and that the tract of which possession was delivered was the Novato *without* that and *with* the part which the deputy had put into the Nicasio. In *Malarin* v. *United States*,* this court relied largely on this ancient proceeding of the Mexican law,—the identical form almost of the common law of England; and though no doubt, as was rightly decided in *United States* v. *Halleck*,† it will, as a general thing, follow boundaries distinctly given in a decree, it will not do so where it is plain that by the act of juridical possession the party was confined to less space; which space conforms exactly with the *amount* called for by the very grant confirmed.

Mr. Goold, contra:

* 1 Wallace, 282. † Id. 439.

Mr. Justice GRIER delivered the opinion of the court:

In the case of *United States* v. *Halleck*,* it is said that "the decree is a finality, not only as to the question of title, but as to the boundaries which it specifies." If erroneous in either particular, the remedy was by appeal; but the appeal having been withdrawn by the Government, the question of its correctness is forever closed. In *The Fossat Case*,† the same doctrine was fully established.

The final decree in this case sets forth the specific boundaries of the land granted, and it is admitted that the surveyor found no difficulty in finding the monuments and boundaries described in this decree. But as these boundaries included about three leagues, the surveyor-general, assuming that the grant was confined to two leagues, excluded a league of land within these boundaries on the western side, and included it in the survey of the Nicasio rancho, which adjoins.

As the owners of the Novato tract now in question did not appeal from that survey, and are content to take this survey of two leagues, we are not bound *now* to decide whether, according to the decree, they were not entitled to have *all* the land included within the boundaries mentioned in the decree, and whether the words "containing two leagues, a little more or less," should be construed merely as a conjectural estimate of the quantity contained within the boundaries described. But one thing is certain, that if the United States have taken a league on the western side of the Novato, and given it to the Nicasio rancho, it is with an ill grace that they who use their name now seek to take another league on the east.

The Punto del Potrero, a peninsula almost entirely surrounded by a salt marsh, is as clearly within the decree as language can make it. The decree being itself clear and precise, does not refer to the rough daubs called diseños, or to the record of juridical possession for the purpose of rendering uncertain that which the decree made certain. The

* 1 Wallace, 439.

† *Infra*, p. 649.

formula of this delivery of possession, or livery of seizin, did not require a survey of the estate. Perhaps the province of California at that time could not furnish a man capable of making an accurate survey. In the present case, the alcalde proceeded "*to see and reconnoitre*" the monuments claimed as corners in company of the witnesses, "*being himself on horseback for the better understanding;*" and after divers measurements made with a rope, he "concluded that it results that the rancho has five thousand varas in length and ten thousand in breadth." That would constitute a rectangular figure, whose contents would be easy of calculation, and avoid the difficulty of calculating the area of an irregular one, made by lines running from one monument or corner to another. The court below were fully justified in "entirely discarding" this document from consideration, whether it was "*hopelessly confused and unintelligible*" or not. We need not, therefore, further examine the argument of the learned counsel of the appellants whether the opinion of that court was correct or not on the construction of that document.

Another objection was made, though not much urged, that the survey in question was void, because not made by the surveyor-general in person, and because he had no "*lawful authority*" to approve a survey made by a deputy. This objection requires no further remark than merely to observe that the permission given by the act of 1860 to private intervenors to prosecute appeals to this court, in the name of the United States, may be much abused in cases where the Mexican grantee is compelled to defend himself even a second time in this court, and to answer frivolous objections to his title or his survey at the suggestion of any litigious intruder or secret intervenor. The party wronged by the appeal receives no costs from the Government; while the Government itself is made to pay the expenses of the oppressive and unjust litigation in which it has been made the actor by this class of persons.

DECREE AFFIRMED.

STEAMSHIP COMPANY *v.* JOLIFFE.

1. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute.

   Ex. gr. Where a pilot, licensed under a statute, had tendered his services to pilot a vessel out of port, and such services were refused, his claim to the half-pilotage fees, allowed by the statute in such cases, became perfect; and the subsequent repeal of the statute does not affect a judgment rendered in an action brought to recover the claim, or the jurisdiction of this court to view the judgment on writ of error.

2. The act of Congress of August 30th, 1852, "To amend an act entitled An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," does not establish pilot regulations for *ports;* its object is to provide a system under which the masters and owners of vessels, propelled in whole or in part by steam, may be required to employ competent pilots to navigate such vessels on their voyage.

3. The act of the State of California of May 20th, 1861, entitled "An act to establish pilots and pilot regulations for the port of San Francisco," is not in conflict with it.

THIS was a suit involving the subject of the passage by a State and by the United States of laws regulating *port* pilots, and raised the question whether the United States had, by enactment, in A. D. 1852, regulated pilotage generally. The case, a decision of which, it was understood, would settle several cases like it, was thus:

In 1787, when the Constitution of the United States was adopted, the different States had each laws of their own for the regulation of pilots and pilotage. *By* the Constitution, power was given to Congress "to regulate commerce with foreign nations and among the several States." In 1789, Congress passed a law enacting, that "all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the *States* may respectively *hereafter* enact for the purpose, until further legislative provision

shall be made by Congress."* With the single exception of a law of 1837,† by which it is made "lawful for the master or any commander of a vessel, coming in or going out of any port, situate upon the waters which are the boundary between two States, to employ any pilot licensed by the laws of either of the States," no other legislation on the subject was had until the 30th of August, 1852. An act was then passed, entitled "An act to amend an act, entitled An act to provide for the better security of the lives of *passengers* on board of vessels, propelled *in whole or in part by steam*, and for *other* purposes."‡ It consists of forty-four sections. Its first declares, that no license shall issue until the provisions of the act are complied with; "and if any such vessel shall be navigated, with passengers on board, without complying with the terms of the act, the owner and vessel shall be subjected to penalties set forth."

Succeeding sections relate to precautions as to fire,—pumps, hose, life-boats and life-preservers, buckets, floats, axes, safety-valves, plugs, &c.; the means of escape from the lower deck, the carrying of gunpowder, camphene, turpentine, and other dangerous articles, and the stowage thereof when carried; and then the act (§ 9) provides, "that *instead of the existing provisions of law* for the inspection of steamers and their equipment, *and instead of the present system of pilotage* of such vessels, and the present mode of employing engineers on board the same," certain regulations shall be observed, to wit, the collectors, supervising inspector, and district judge of the several designated judicial districts, within which are important commercial ports, are to appoint inspectors, who are empowered and required to perform various duties, specified in the subdivisions following: the first six of which provide for the examination and testing the hull and the boilers and machinery; the certificate of approval, the license to carry gunpowder, &c., and the keeping of a record of their certificates and licenses; and the

* Act of 7 August, 1789, 1 Statutes, 54.

† Act of 2 March, 1837, 5 Stat. at Large, 153.

‡ 10 Stat. at Large, 61.

seventh subdivision provides, that the inspectors shall license and *classify all* engineers and *pilots* of steamers carrying passengers. San Francisco is included among the ports where inspectors are to be.

The ninth enacts, that "when *any person* claiming to be a skilful pilot for any such vessel, shall offer himself for a license, the said board shall make diligent inquiry as to his character and merits, and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him for one year, to be a pilot of *any* such vessel *within the limit* prescribed in the certificate." Subdivision ten enacts, that it shall be *unlawful* for any person to *employ*, or any person to *serve*, as engineer or pilot on *any such vessel*, who is not licensed by the inspectors. It nevertheless, provides "that if a vessel leaves her port with a complement of engineers and pilots, and *on her voyage* is deprived of their services, &c., the deficiency may be supplied without penalty." Section twenty speaks of the "*master*, *engineer*, *pilot*, *or owner*."

Section thirty-eight provides, that *all engineers and pilots of any such vessel* shall, before entering upon their duties, make solemn oath that they will faithfully perform all the duties required of them by the act.

The act is full. Reports of pilots' names from port to port, except as to San Francisco, and signals are provided for. Parts of laws inconsistent with the act are repealed.

With this statute of the United States in force, the *State of California*, in 1861,* passed "An act to establish pilots and pilot regulations for the port of San Francisco." This statute created a Board of Pilot Commissioners, and authorized the board to license such number of pilots for the port as it might deem necessary, and prescribed their qualifications, duties, and compensation. It made it a misdemeanor, punishable by fine or imprisonment, for any person not having a license from the board, to pilot any vessel in or out of the port, by the way (called the Heads) which leads to

* May 20.

and from the ocean. It enacted that "all vessels, their tackle, apparel, and furniture, and the masters and the owners thereof, shall be jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction." And it declared, that when a vessel was spoken by a pilot, and his services declined, he should be entitled to *one-half pilotage fees*, except when the vessel was in tow of a steam-tug outward bound, in which case no charge should be made, unless a pilot should be actually employed.

In this condition of statutes, national and State, one Joliffe, a pilot commissioned *under the statute of California*, spoke the steamship Golden Gate, an American registered steamer, (owned by the Pacific Mail Steamship Company), and exclusively employed in navigating the ocean, and carrying passengers and treasure between San Francisco and Panama, then being in the port of San Francisco and about to proceed to sea, and offered his services (he being the first pilot that did so) to pilot her out. The vessel had upon her no pilot licensed under the act of Congress. The master declined to receive his services, and the pilot brought a suit in the Justices' Court of California, against the Steamship Company, for half-pilotage.

The claim was opposed on two grounds:

1. That the statute of California was in conflict with the already mentioned act of Congress of 30th of August, 1852.

2. That it was therefore, and for other reasons, repugnant to the provisions of the Federal Constitution, giving to Congress the power to regulate commerce.

The court below thought otherwise, and accordingly gave judgment for $52 against the Company; a judgment subsequently affirmed in the County Court of the City and County of San Francisco, "the highest court" of law in which a judgment or review could be had in the case in the State of California. The correctness of this judgment was the point brought up in error from below.*

* The case came here of course under § 25 of the Judiciary Act of 1789.

Statement of the case.

A new point, however, arose in this court. The case had been called at the last term; when it being suggested that the constitutionality of the statute of the State of California would be involved in the consideration, a decision was suspended until the State of California could be represented. The Attorney-General of the State now accordingly appeared and filed a brief. After the action of the court, as just stated, the legislature of California passed a *new* statute on the subject of pilots and pilot regulations for the port of San Francisco, *re-enacting, in substance, the provisions of the original act, but at the same time, in terms, repealing that act.*

The new act was more extensive, however, in its operation than the old one; for it embraced within its provisions the ports of Mare Island and Benicia, as well as the port of San Francisco. It created a Board of Pilot Examiners for the three ports, in place of the Board of Commissioners for the port of San Francisco, and it prohibited the issue of licenses to any one disloyal to the Government of the United States. The new point now accordingly made in this court,—one by the Attorney-General of California,—was, that by reason of the *repeal*, the present action could not be maintained; his position being, that as the claim to half-pilotage fees was given by the statute, the right to recover it fell with its repeal; that this court accordingly would be obliged, on that ground, to dismiss the writ of error.

The case was well argued; seven judges sitting.* *Mr. McCullough*, Attorney-General of California, supporting his preliminary point, that the writ of error would have to be dismissed, owing to the repeal (to which point *Mr. G. Yale* replied); and *Mr. D. B. Eaton, for the plaintiff in error*, arguing, with research and ability, for reversal on merits; that is to say, from the conflict of the California statute with the act of Congress of 30th of August, 1852, and its consequent unconstitutionality.

* The Chief Justice, though on the bench when judgment was rendered, took no part in it; not having taken his seat when the case was argued. Davis and Catron, JJ., were absent, from indisposition, through the term.

Messrs. Cope, Yale, and Carlisle, for the defendant in error; McCullough representing the State of California.

Mr. Justice FIELD delivered the opinion of the court.

This case arises upon the act of the State of California, of the 20th of May, 1861, entitled "An act to establish pilots and pilot regulations for the port of San Francisco." The act provides for the creation of a Board of Pilot Commissioners, and authorizes the board to license such number of pilots for the port as it may deem necessary, and prescribes their qualifications, duties, and compensation. It makes it a misdemeanor, punishable by fine or imprisonment, for any person not having a license from the board, to pilot any ship or vessel in or out of the port by way of the "Heads," that is by the way which leads directly to and from the ocean. It enacts that "all vessels, their tackle, apparel, and furniture, and the masters and the owners thereof, shall be jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction." And it declares, that when a vessel is spoken by a pilot and his services are declined, he shall be entitled to one-half pilotage fees, except when the vessel is in tow of a steam-tug outward bound, in which case no charge shall be made, unless a pilot be actually employed.

On the 1st of November, 1861, the plaintiff in the court below, the defendant in error in this court, was a pilot for the port of San Francisco, having been regularly appointed and licensed by the board created under the act of the State. At that time the steamship Golden Gate was lying in the port, and about to proceed to Panama, carrying passengers and treasure. This vessel was then, and ever since 1852, had been an American ocean steamer, registered at the custom-house, in the port of New York, and exclusively employed in navigating the ocean, and carrying passengers and treasure between San Francisco and Panama, and was owned by the Pacific Mail Steamship Company, a corporation created under the laws of the State of New York. To the master of this steamship the plaintiff offered his services

to pilot the vessel to sea; but his services were refused, and to recover the half-pilotage fees allowed in such cases by the act of 1861, the present action was brought.

At the last term of this court, it was suggested that the constitutionality of the act in question was involved in the decision of the case; and the court thereupon reserved its consideration until the State of California could be represented. The Attorney-General of the State has accordingly appeared and filed a brief in the case. Since the action of the court in this respect, the legislature of California has passed a new statute on the subject of pilots and pilot regulations for the port of San Francisco, re-enacting substantially the provisions of the original act, but at the same time in terms repealing that act. And the first point made by the Attorney-General is, that, by reason of the repeal, the present action cannot be maintained. His position is, that as the claim to half-pilotage fees was given by the statute, the right to recover the same fell with the repeal of the statute; and that this court must dismiss the writ of error on that ground.

The claim to half-pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. The object of the regulations established by the statute, was to create a body of hardy and skilful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration. The experience of all commercial states has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation, not only when the services tendered are accepted by the master of the vessel, but also when they are declined. If the services are accepted, a contract is created between the master or owner of the ves-

sel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, "consulting the interests of morality," implies one; and the liability thus arising is said to be a liability upon an implied contract.* The claim for half-pilotage fees stands upon substantially similar grounds.

"There are many cases," says Mr. Justice Curtis, speaking for this court, "in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage services one of those cases."†

The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute,

* Argenti *v.* San Francisco, 16 California 282; Maine on Ancient Law, 344.

† Cooley *v.* Board of Wardens of Port of Philadelphia, 12 Howard, 312.

and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.

And it is clear that the legislature did not intend by the repealing clause in the act of 1864, to impair the right to fees, which had arisen under the original act of 1861. The new act re-enacts substantially all the provisions of the original act, relating to pilots and pilot regulations for the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services; and it allows half-pilotage fees under the same circumstances as provided in the original act. It appears to have been passed for the purpose of embracing within its provisions the ports of Mare Island and Benicia, as well as the port of San Francisco; of creating a Board of Pilot Examiners for the three ports, in place of the Board of Pilot Commissioners for the port of San Francisco alone, and of prohibiting the issue of licenses to any persons who were disloyal to the Government of the United States. The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice Shaw, in *Wright* v. *Oakley*,* upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the State, may with propriety be applied to the case at bar.

"In construing the revised statutes and the connected

* 5 Metcalf, 406.

acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones."

On the trial in the court below two grounds were urged in defence of the action: 1st, the unconstitutionality of the act of the State of May 20, 1861; and, 2d, the repugnancy of its provisions to the act of Congress of August 30, 1852. Similar grounds were urged in this court for the reversal of the judgment.

The unconstitutionality of the act was asserted from its alleged conflict with the 3d clause of the 8th section of the 1st article, which declares that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The power conferred by this clause is without limitation; it extends to all the subjects of commerce, and to all persons engaged in it; it embraces traffic, navigation, and intercourse, and necessarily, therefore, the whole subject of pilots and pilotage. But the clause does not, in terms, exclude the exercise of any authority by the States to regulate pilots. On the contrary, the authority of the States to regulate the whole subject, in the absence of legislation on the part of Congress, has been recognized from the earliest period of the Government. On the formation of the Union there were laws in force in the different States bordering on the sea for the regulation of pilots and pilotage; and at its first session, in 1789, Congress passed an act adopting the existing regulations and

such as might be provided by subsequent legislation of the States. The act reads as follows: "All pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, *or with such laws as the States may respectively hereafter enact for the purpose*, until further legislative provision shall be made by Congress." In 1837, another act was passed making it "lawful for the master or commander of any vessel coming in or going out of any port, situate upon the waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States." No other legislation has been had by Congress impairing the right of the States to adopt such system for the regulation of port pilots as they might deem best, unless it be found in the act of August 30, 1852.

It is insisted by the plaintiff in error that this act of 1852 is in conflict with the provisions of the act of the State of May, 1861; that in fact it has superseded all State legislation concerning port pilotage, so far as steamers carrying passengers are concerned, and to that extent has modified or repealed the act of 1789.

From a careful examination of the act of 1852 we have arrived at a different conclusion. We do not perceive in its provisions any intention to supersede the State legislation recognized by the act of 1789, or any inconsistency with the local port regulations established by the act of California of 1861. The act of 1852 was intended, as its title indicates, to provide greater security than then existed for the lives of passengers on board of vessels propelled in whole or part by steam. Previous to its passage frequent accidents, occasioning in some instances great loss of life, occurred to steamers, arising from the imperfect construction of the vessel, defective machinery, inadequate protection against fires, the carrying of dangerous articles, or the want of pumps, life-boats, and other means of escape in case of danger. To guard against accidents from these and like sources was the general purpose of the act of 1852. It therefore contains provi-

sions relating to fires, pumps, boats, life-preservers, buckets, the means of escape from the lower to the upper deck, the carrying of gunpowder, camphene, and other dangerous articles, and their stowage. It also provides for the appointment of two inspectors, one of whom is to possess a practical knowledge of shipbuilding and the uses of steam in navigation, and the other is to possess knowledge of and experience in the duties of an engineer of steam-vessels, and of the construction and use of boilers and machinery and appurtenances connected with them, and the two are required to make an examination of the hulls of the vessels, to inspect and test the boilers and machinery, and to require licenses to be obtained before dangerous articles can be taken aboard.

The act contains few provisions relating to pilots; indeed, it was not directed to the remedy of any evils of the local pilot system. There were no complaints against the port pilots; on the contrary, they were the subjects of just praise for their skill, energy, and efficiency. The clauses respecting pilots in the act relate, in our judgment, to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by the inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors.

Thus the ninth section speaks of a vessel *leaving her port* with a complement of engineers and pilots, and provides for temporarily supplying the deficiency in case she is deprived of their services *on her voyage*.* And, again, the same section speaks of pilots as *belonging* to the vessels on which they are employed, and requires them to assist in the inspection of the vessels,—language which is entirely inappropriate to local or port pilots, whose employment lasts but a few hours, and who have no connection with any vessel except to bring into or take it out of port.†

The term pilots is equally applicable to two classes of per-

* Subdivision 10.

† Subdivision 15.

sons,—to those whose employment is to guide vessels in and out of ports, and to those who are intrusted with the management of the helm and the direction of the vessel on her voyage.* To the first class, for the proper performance of their duties, a thorough knowledge of the port in which they are employed is essential, with its channel, currents, and tides, and its bars, shoals, and rocks, and the various fluctuations and changes to which it is subject. To the second class, knowledge of entirely a different character is necessary. Yet the act in question does not require the inspectors, who are to license pilots under its provisions, to possess any knowledge of the harbors for which, under the theory of the plaintiff in error, pilots are to be licensed, or to exact any such knowledge from the pilots themselves. They are to issue their license to a pilot when satisfied, from "inquiry as to his character and merits," that he "possesses the requisite skill, and is trustworthy and faithful." The qualifications thus required may be sufficient for the pilot of the steamer on her voyage at sea, but are entirely insufficient for the intricacies of harbor navigation.

On the argument at the bar much stress was laid by counsel for the plaintiff in error upon the language of the first clause of the *ninth* section, as indicating an intention to supersede State legislation on the subject of port pilotage. That section declares "that instead of the *existing provisions of law* for the inspection of steamers and their equipment, and instead of the *present system of pilotage* of such vessels, and the present mode of employing engineers on board the same," certain regulations should be observed as prescribed by the act. But in our judgment the section excludes the inference drawn by counsel. No explanation is given as to the meaning of the term "system," as here used; but it is clear that it does not refer to any system established by law. The section supersedes in express terms "*existing provisions of law*" for the inspection of steamers and their equipment, but it uses different language when speaking of pilotage. If

* Abbott on Shipping, 195; Bouvier's Law Dictionary, term "Pilots."

the section had also been directed against the law recognizing State regulations in respect to port pilotage, the intention of Congress in that respect would undoubtedly have been expressed with equal clearness, and not left to be implied from the use of an indefinite and ambiguous term.

The act does not purport to establish regulations for port pilotage; and we cannot suppose that in a measure intended to give greater security to life Congress would have swept away all the safeguards in this respect provided by State legislation without substituting anything in their place. Under the act the ports may be left entirely without resident or local pilots, for it does not require the appointment of such pilots, though the necessity for them must have been obvious. Having omitted this important requirement, the act omits of course all provisions as to the number of pilots, their duties, responsibilities, and compensation. These are matters of the greatest consequence, are contained in all State regulations, and without them no effective system can ever be established.

JUDGMENT AFFIRMED.

Mr. Justice MILLER (with whom concurred WAYNE and CLIFFORD, JJ.) dissenting:

In this case seven members of the court heard the argument and participated in its decision. Of this number only four concur in the judgment and opinion of the court. These facts, as well as the importance of the main question whether the act of the California legislature concerning pilots is in conflict with the act of Congress of 1852 on the same subject, and, therefore, void, justify a statement of the views of the minority.

There was a preliminary point, however, raised by the Attorney-General of California, much pressed and well argued on both sides, on which I had hoped the case would have been decided without reaching the question just stated; a point I think well taken, and fully sustained by the authorities. The proposition is, that the statute of California,

under which plaintiff below recovered his judgment, has been repealed since the writ of error was sued to this court; and that the action being wholly dependent on the statute, the repeal takes away the right, and the judgment which he has obtained must be reversed, and the case dismissed.

That the 26th section of the act of April 4th, 1864,* does, in express terms, repeal the act under which plaintiff's proceeding was instituted, is not denied. It is equally clear that there is no clause in the act of 1864 saving rights which had accrued under the act repealed. I take the law to be well settled that a right of action not growing out of contract, but which is solely dependent upon a statute, ceases and determines with the statute on which it depends.

One of the earliest cases on that subject is *Miller's Case.*† That was a case in which Miller had been made, under a compulsory clause in a statute of insolvency, to give in a schedule of his property, and deliver it up to his creditors. The statute then authorized a discharge from all his debts. He accordingly moved for such discharge. But the justices of the county court for some reason delayed this from time to time, until the compulsory clause of the act was repealed, and then refused it altogether. On an application for mandamus in the King's Bench, Lord Mansfield held that the repeal of the law carried with it the right to a discharge, and overruled the application. In *Surtees* v. *Ellison*,‡ where the same question was raised on an act repealing the bankrupt law then in existence, Lord Tenterden said, that notwithstanding the disastrous effect of the repeal on previous cases of bankruptcy, and on proceedings then in progress under the act, they were not at liberty to break in upon the general rule. In the subsequent case of *Key* v. *Goodwin*,§ Tindal, C. J., says: "I take the effect of the repealing statute to be to obliterate the repealed statute as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for

* Statutes of California, 1863–4, page 392.

† 1 William Blackstone, 451; S. C. more at large in 3 Burrow, 1456.

‡ 9 Barnwall & Cresswell, 750.

§ 4 Moore & Payne, 341.

the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law."

This principle is also sustained by numerous American cases, cited in the note below.*

It is maintained, however, that in this court, on a writ of error, we can only determine if there was error in the record as the law stood at the time the decision of the court was made, which is brought here for review.

In the cases of *Hartung* v. *The People*, and *Sanches* v. *The People*,† which are very recent cases, and were much considered, the Court of Appeals of New York unanimously held, that while on a writ of error, the case must be decided on the record as made in the court below, the question of error or no error must be determined by the law as it stands at the time the case is heard in the Court of Appeal. Such, also, is the decision in the Pennsylvania case of *Commonwealth* v. *Duane*,‡ which was an indictment for libel, in which the statute on which it was founded was repealed after the defendant had been found guilty in the court below, and the appellate court held that for that reason the case must be reversed, and the libel dismissed. *Lewis* v. *Foster*,§ in the Supreme Court of New Hampshire, decides the same thing on a case of review under their statute. The cases of *Yeaton* v. *United States*,‖ and *Schooner Rachel*,¶ in this court, decide, that on appeal from an admiralty decree, that decree will be reversed, because the law under which the vessel became forfeited had expired by its own limitation pending the appeal, although the vessel had been sold and the money paid into the Treasury of the United States before the statute expired.

Unquestionably, the appellate tribunal is bound to take

* Butler *v.* Palmer, 1 Hill, N. Y. 324; Hartung *v.* The People, 22 New York, 95; Sanches *v.* The People, Id. 155; Commonwealth *v.* Duane, 1 Binney, 601; Board of Trustees *v.* City of Chicago, 14 Illinois, 334; Yeaton *v.* United States, 5 Cranch, 281; Schooner Rachel, 6 Id. 329.

† Cited in note, *supra*.

‡ 1 Binney, 601; cited *supra*, in note.

§ 1 New Hampshire, 61.

‖ 5 Cranch, 281.

¶ 6 Id. 329.

judicial notice of the repealing statute. If so, I fail to see how it can affirm a judgment, which, by the law in existence at the time of such affirmance, has become erroneous, though not so when rendered. And so are the authorities without exception, as far as I am aware.

But it is said that plaintiff, by his judgment in the court below, acquired a vested right to the sum of money for which he recovered that judgment, which could not be taken away by a repeal of the act.

I deny that a party suing another for a statute penalty can acquire a vested right in the sum which the law allows in such cases, until he has actually received the money into his own possession. Such is evidently the principle deducible from the cases of *Yeaton* v. *United States*, and the *Schooner Rachel*, above referred to. Such is also the express decision of this court in the case of *Norris* v. *Crocker*,* except that in that case the repeal took place while the suit was pending and before judgment. This court held, in the language of Judge Catron, that, "as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law."

A judgment is only one of the steps in the progress of a suit by which the plaintiff, if successful, obtains what he is seeking. It only *declares* the right of the party, but does not *create* it. It may be set aside or reversed, and gives the plaintiff no right superior to that which he had before he obtained it.

If the claim on which he proceeded was a vested right, it remains so after judgment; not because of the judgment, but because it existed before, and the judgment only ascertains that fact, and enables him to enforce it. If the judgment was founded on a statute right, it still only declares that on the facts as the law then stood, the plaintiff was entitled to recover; but that right is no more sacred or no more protected from legislative action than before. If there is such a thing as a vested right in a statute penalty, it must become

* 13 Howard, 429.

vested either when the facts occur which give the right, or when the plaintiff makes his claim to the benefit of the statute by commencing an action for the sum which the law allows. That no such right accrues from either of those circumstances, the cases which I have last cited seem conclusive.

But it is said that although the act of April 4th, 1864, repeals the prior act, it re-enacted the same provisions on the subject of pilots, and that this operates as a continuance of the former law. It may be answered that if such were the intention of the framers of the new law, the repealing clause is not only useless, but, if effectual, it must operate to defeat that intention. In the next place, the appropriate and usual mode of expressing such an intention is by a saving clause; and, lastly, by a well-settled rule of construction, the new statute can have no retrospective operation, unless by its own express language, or by necessary implication,—neither of which exist in this case. The case of the *Board of Trustees* v. *City of Chicago*,* was one where proceedings to condemn property for public use were instituted under the city charter. While they were pending, the legislature passed an act which amounted to a new charter, but which contained no repealing clause. The Supreme Court held that the new charter by implication repealed the old one; and although it granted the right to condemn as the other one had done, yet the right to proceed under the old charter was gone, and the party must begin and proceed under the new one.

No authority, I believe, can be found to controvert this principle. The remark of C. J. Shaw concerning the necessity of so construing the Revised Statutes of Massachusetts, when the entire laws of the State had been revised and re-enacted, as to prevent a total lapse of all rights existing under the statutes thus revised, can have no application to the case of a single statute expressly repealed by a clause in a new law on the same subject.

It is contended by counsel in the argument that the judg-

* 14 Illinois, 334.

ment in this case is based on contract, and that no repeal of the statute by State law can impair its obligation. This idea seems to me without foundation. The statute enacts, for the protection of the pilots of San Francisco, that a vessel approaching or leaving the harbor shall employ the first pilot, licensed under that law, who offers his services; and if the officers of the boat refuse, it renders the owners liable in an action by that pilot to half the usual pilot fees. If the officers of the vessel accept the pilot and his services, unquestionably the law implies a contract to pay either what they may reasonably be worth, or the sum fixed by statute. But if they refuse to accept him or his services, they violate the law; for which violation it imposes the penalty of half the usual pilot fees. Here is no element of contract; no consent of minds; no services rendered for which the law implies an obligation to pay. It is purely a case of a violation of the law in refusing to perform what it enjoins, and the enforcement of the penalty for the benefit of the party injured. It is just as easy to see a contract in a hundred other cases where the law imposes a penalty for its violation, and gives an action of debt for the recovery of that penalty.

It is my opinion, then, that we should have reversed the judgment, and ordered the dismissal of the case on the grounds just discussed.

As regards the merits of the case, it seems to me still clearer that the judgment should have been reversed. The case of *Cooley* v. *The Board of Wardens*,* raises the question of the relation of pilots and pilotage to commerce, and holds that the power of regulating pilots by law, and framing a system for their government and control, is clearly conferred upon Congress by the Constitution. It also holds that in the absence of the exercise of that power by Congress, the States may provide such rules and regulations on the subject as may be necessary and proper; but the implication is forcible, that if any such regulation is in conflict with any act of Congress,

* 12 Howard, 299.

it is void; and, indeed, that if Congress has legislated on the same subject with a view to provide a system of rules, that there is no place left for State legislation. The proposition is too plain for argument, that, if Congress has power to pass such laws, and has passed them, any act of a State legislature in conflict with them must necessarily be void. I do not understand the majority of the court to controvert this principle, or even to deny that if Congress has legislated on this precise subject, and provided rules for this very class of cases, that then the act of the legislature of California is to that extent void. But the precise point of difference between us is, that while I contend that an act of Congress of August 30th, 1852, covers the subject-matter of the statute of California under which defendant in error claims, they deny that it does cover the case, or was intended to apply to pilots of harbors and ports of the several States.

That act is in terms confined to vessels propelled in whole or in part by steam; and its object, as stated in the title, is the better security of the lives of passengers on board such vessels. The ninth section of the act, which is a very long section, composed of fifteen subsections, opens by declaring, "That instead of the existing provisions of law for the inspection of steamers and their equipments, *and instead of the present system of pilotage of such vessels*, and the present mode of employing engineers on board the same, the following regulations shall be observed, to wit." Here, then, is a declaration that it is the purpose of the act to abolish the old systems, and establish new ones on three distinct subjects: 1st, as to the inspection of steamers and their equipments; 2d, as to a system of pilotage; and 3d, as to the mode of employing engineers. The regulations adopted by this act are declared to be "instead of the (then) present system of pilotage." What system of pilotage was then in existence? Certainly none had been established by Congress. The act of 1838, to which this was an amendment, does not say a word about pilots or engineers. The acts of August 7th, 1789, and March 2d, 1837, had provided that State regulations should prevail until further action by Con-

gress. The system of pilotage, then, which was in existence when the act of 1852 was passed, was the State regulations of each port, almost all of which are substantially the same with the act of the California legislature of 1861. And it was this system which was to be superseded, and the one provided in the act of Congress introduced in its stead. This idea derives support from the significant fact that the decision of this court, holding that the State regulations were in force because no system had been adopted by Congress, was made in the winter of 1851–2; and this act, which provides such a system, was passed by Congress, August 30th, 1852. Unquestionably, Congress intended to supply that very system which the Supreme Court had intimated was needed, and was in the power of Congress to provide.

Let us examine, now, some of the provisions of this act which concern pilots.

Section nine creates a board of inspectors in each of twenty-three different ports of the Union, including San Francisco. Subdivision seven of that section says, that these inspectors shall license and classify *all* engineers and *pilots* of steamers carrying passengers. Subdivision nine says: "Whenever any person, claiming to be a skilful pilot for any such vessel, shall offer himself for a license, the board shall make diligent inquiry as to his character and merits, and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him for one year to be a pilot of any such vessel, *within the limit prescribed in such certificate.*" It also provides for revocation of the license for proper cause.

Subsection ten says: "It shall be unlawful for any person to employ, or any person to serve, as engineer or pilot on any such vessel who is not licensed by the inspectors; and any one so offending shall forfeit one hundred dollars for such offence."

Subsections thirteen and fifteen of section 9, and sections 20 and 38, all provide that these pilots shall be under the control of the boards of inspectors; shall take an oath to discharge their duties faithfully; and shall be liable to re-

moval and other penalties for unfaithful or unskilful conduct.

Section 23 requires the collectors of each port to report to the collectors of every other port the pilots licensed at their respective ports. From this provision the port of San Francisco is excepted. The obvious reason is, that being the only port on the Pacific coast where a board of inspectors is established by the law, there is no reason to suppose that pilots will be licensed at other ports for that coast, or at San Francisco for any other than the Pacific coast and ports.

In these enactments, and in the regulations which are authorized to be made of a set of signals in passing each other, we see a system of pilotage as complete, or more so, than any which had previously existed, and, in my judgment, one more judicious, and better calculated to secure safety of life and property than the one provided by the California statute. If, then, the principle be a sound one that, when Congress has provided such a system, those existing under State laws must give way, and if, as it appears manifestly from this act, the system thus provided was intended to be instead of and in exclusion of the State systems, how can the act of the California legislature stand?

It is said that the act of Congress was only intended to provide pilots for a voyage, and is not applicable to the local pilots of the ports. I am not able to perceive anything in the relation of these port pilots to the Federal Government and its right to regulate commerce, or in the nature of the special service which they are expected to perform, which can furnish any ground for this distinction. All the other regulations of commerce extend to the ports, and they are emphatically the theatre where commercial regulations are most needed, and where Congress has oftenest exercised its power to regulate commerce. As to the services usually rendered by these pilots, if they are more difficult and require a higher degree of skill than others, there would seem to be the greater necessity why they should be thoroughly examined and licensed by the proper authority, and also why they should be under the control of proper officers, and subjected

to laws and rules calculated to compel a strict performance of their duties. All these are well provided for in the act of Congress.

It seems to be supposed, however, that the pilots licensed under the act of Congress must necessarily be for long voyages, and that such licenses cannot issue limited to the bays and harbors of the various ports. This is a great mistake. The board of inspectors for each port should be as competent to determine the qualifications of these local pilots as any such examiners appointed by the State. That portion of subsection nine of section 9, which I have quoted in italics, says that they are to license a person "to be a pilot on any such vessel within the limits prescribed in his certificate." If, then, the pilot licensed is particularly skilled as a port pilot, and competent for no more, his license will restrict him accordingly. If he is competent for the voyage and not for the harbor, his license will exclude him from piloting in the harbor. This idea is in direct conflict with the language of the act of Congress, which declares that the boards of inspectors "shall license and classify *all* engineers and pilots of steamers carrying passengers." The opinion assumes, in the face of this language, that there may be a very large class of pilots allowed to exercise their profession without such a license.

Again, all these regulations apply in the same terms of license and prohibition to engineers and pilots. But can it be pretended that a vessel may go into a port and out of it without a licensed engineer, and yet be guilty of no violation of the law? If the statute is only applicable to pilots on a voyage, it must also apply only to engineers on a voyage.

But it is argued that the whole system of pilotage relates to the voyage, and does not include the ports; because a proviso to subdivision ten of section nine says, that if the owners of the boat shall, without default of theirs, be deprived of the services of a licensed pilot or engineer on the voyage, they shall be relieved of the penalty which the law imposes for navigating their vessel without one, until such time as they can procure a licensed pilot or engineer. From

this proviso I draw an inference precisely the reverse. For this statute evidently means, that if this loss of the services of a licensed pilot or engineer takes place before the port is left, it is no protection against the penalty, because it may be supplied. And so if it occurs after the port is left, and is not supplied by a licensed pilot as soon as you approach the port where one can be obtained, the protection ceases.

It may be urged that the system provided by Congress is incomplete, because there is no provision for compensation of pilots, and none for compelling vessels to accept, in their due order or rotation, those who may offer. Congress may well have thought that these matters might be prudently left to the laws of supply and demand, and to the ability of the parties concerned to take care of their own interests.

If this principle prevails, that the ports are exempt from the law of Congress as to pilots, I expect to see every town on the lakes, the Mississippi and Ohio Rivers, as well as all their tributaries, passing its ordinances, that when steamboats come within a mile of their landing they must stop and take on board a local pilot, or pay him compensation for refusal. If the States where seaports exist can make laws thus to burden commerce, I see no reason why the States which have towns on navigable rivers should not pass similar laws. I may add here, that if we permit the States to interject their legislation at every point, however minute or unimportant, which they may fancy that Congress has left unoccupied; then in all that class of cases in which it has been held that the States may legislate until Congress acts on the subject, we shall have this piebald, conflicting, and incongruous system of laws, with a persistent struggle, on the part of the States, to control the legislation of Congress.

But not only is the act of the California legislature void, because Congress has provided a system of pilotage which is in its nature exclusive, but it is also void because its provisions are in direct conflict with the act of Congress. The statute of California provides, that if one of the pilots which it recognizes shall offer his services to a vessel and is refused, the owner of the vessel shall pay the penalty; and it does not

require, as condition for claiming this penalty, that such pilot shall have the license required by act of Congress. The act of Congress provides, that if any person shall be employed as a pilot on such vessel without such license as it prescribes, the owner shall forfeit the sum of one hundred dollars. Here is a manifest conflict. It is made a part of this case, as found by the court below, that the plaintiff did not have any such license as the act of Congress required. Defendant, notwithstanding this, has been compelled by the State court, under the State law, to pay fifty-two dollars for refusing to take this pilot. If he had accepted him, he would have forfeited to the United States the sum of one hundred dollars for violating the act of Congress. The conflict of the two statutes is too obvious for comment. I think the act of Congress ought to prevail.

THE BAIGORRY.

1. The blockade of the *coast of Louisiana*, as established there, as on the rest of the coast of the Southern States generally, by President Lincoln's proclamation of 19th April, 1861, was not terminated by the capture of the forts below New Orleans, in the end of April, 1862, by Commodore Farragut, and the occupation of the city by General Butler on and from the 6th of May, and the proclamation of President Lincoln of 12th May, 1862, declaring that after June 1st the blockade of the port of *New Orleans* should cease. Hence, it remained in force at Calcasieu, on the west extremity of the coast of Louisiana, as before.
2. The fact that the master and mate saw, as they swear, no blockading ships off the port where their vessel was loaded, and from which she sailed, is not enough to show that a blockade, once established and notified, had been discontinued.
3. Intent to run a blockade may be inferred in part from delay of the vessel to sail after being completely laden; and from changing the ship's course in order to escape a ship of war cruising for blockade-runners.
4. A vessel and cargo, even when perhaps owned by neutrals, may be condemned as enemy property, because of the employment of the vessel in enemy trade, and because of an attempt to violate a blockade, and to elude visitation and search.

THE schooner Baigorry, laden wholly with cotton, was captured at sea, about one hundred miles off Havana, to

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which port she was sailing from Calcasieu Pass, in Louisiana, by the United States brig-of-war Bainbridge, *on the 9th of June*, 1862, and taken into Key West, where both cargo and schooner were libelled as prize of war. The ground, in fact, of the proceeding was,

1. Alleged violation of the blockade, established by President Lincoln's proclamation of 19th April, 1861.

2. That the cargo and ship were enemy's property.

The defence in turn was,

1. That no blockade had been broken; there not, as was alleged, having, in fact or in law, been any blockade at the date when the vessel sailed. And,

2. That the cargo and vessel were neutral property, and protected under a certain proclamation of General Butler's, made May 6th, 1862, hereinafter mentioned.

The cotton, according to the mate's testimony, had been laden at Calcasieu, in the State of Louisiana, *between* the 27th of April and *the 3d of May*, 1862. The vessel sailed from Calcasieu on the *26th of May*. [Dates in this case are important.] Calcasieu Pass is on the western portion of the coast of Louisiana, and towards the western boundary of the State. Its topographical relation to the mouths of the Mississippi, New Orleans, and the country about the two, will be indicated with sufficient nearness to give the reader not acquainted with this special region an idea of things, by an arrow in the lower and left corner of the diagram, at page 263. An extension of the line of the arrow to the coast (cut off on the diagram) would indicate the position of Calcasieu.

As mentioned in two previous cases in this volume,* and as is matter of known history, Commodore Farragut captured and took possession of the forts below New Orleans, then in possession of the Southern rebels, *in the end of April*, 1862; and General Butler, as a consequence, entered New Orleans on the 1st of May; his occupation of which by the 6th was complete. Prior to this last date, various other

* The Circassian and the Venice, *supra*, pp. 135, 258, one or both of which cases should be read before this.

forts about New Orleans were abandoned or destroyed, and the navigation of the Mississippi, from its mouth, for a considerable distance upwards, left clear. But none of the places certainly abandoned were near to Calcasieu; nor although Commodore Farragut reported to the Government that "a general stampede" was taking place as a consequence of the capture, were the rebels at that date driven out of Louisiana generally. The "stampede" was general, as described; but it was general apparently only in the regions which were the theatre of the brave Commodore's operations, the region, namely, about New Orleans. On the *6th of May*, General Butler issued a proclamation, written and dated on the 1st, in which he stated, that New Orleans and its environs having surrendered, were then occupied by the United States forces; that all foreigners not naturalized and claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, would be protected in their persons and property, as heretofore, under the laws of the United States; and that the rights of property, of whatever kind, would be held inviolate, subject only to the laws of the United States. All the inhabitants were enjoined to pursue their usual avocations.

The proclamation of blockade referred to above, as having been made by President Lincoln, April 19, 1861, was declared from the first, by the Government, to be a blockade of the whole Southern coast of the United States. After the capture and complete occupation of New Orleans, that is to say, on the 12th of May, 1862, fourteen days before the Baigorry sailed at all from Calcasieu Pass, the President issued another proclamation, in which he declared that the blockade of the *port of New Orleans* should so far cease and determine, from and after the 16th of June, 1862, as that commercial intercourse with it might be carried on after the 1st of June following, except as to persons and things contraband.

The charge of breaking the blockade was resisted, therefore, partly on the ground that the blockade had been raised

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by the Executive, but more on the fact testified to by the captain of the vessel, that he saw no blockaders either when he went into Calcasieu, or when he came out of it. He swore "he knew, before going to sea, that the city of New Orleans had been taken by the United States before the vessel left Calcasieu; and had information that the United States had allowed vessels to go from Berwick's Bay* to Sabine, after being visited." He knew, also, as he swore, "that there had been an order of blockade of the ports of the *State of Louisiana;* but he thought that the ports of the State were open after the capture of New Orleans. He wished to go to New Orleans for a clearance from the United States authorities; *but was not allowed by the Confederates to pass through the country.* He had seen blockading vessels in February, 1862, when sailing from Havana towards the coast of Louisiana, *without having any fixed port of destination*, but saw none either when he entered or when he left Calcasieu, on this last voyage, though he saw a steamer passing along at a distance from the coast once, while the Baigorry was at Calcasieu."

The mate testified that he knew that on the 26th of May, when the Baigorry set sail, "the ports of Louisiana were then declared to be blockaded, but he did not see any vessel then on the coast. He saw steamships at a distance off the coast twice, while the Baigorry lay at Calcasieu Pass. He did not know what they were."

The Bainbridge was first seen the evening before the capture. "I changed the course," said the captain, "after I saw that the Bainbridge was waiting for me, in order to avoid her. There was very little wind." No spoliation of papers or concealment were alleged.

The business of the vessel was thus described by the captain:

"I first saw her in November, 1861, at Grand Caillou, a port

* The position of Berwick's Bay may be seen by reference to the diagram at page 263. It runs south from "Berwick." Sabine is on the Sabine River, the river which divides Louisiana from Texas.

on the coast of Louisiana. She made a voyage from that place to Havana, and thence to Calcasieu, last before the voyage on which she was taken. She carried cotton from Grand Caillou to Havana, and brought groceries, shoes, clothing, medicines, and wine to Calcasieu. She took cotton at Calcasieu, which was on board when she was taken. This last voyage would have ended at Havana, unless the port of New Orleans had been opened."

So far as to breaking the blockade. Next as to the character of the ownership and the character of the trade in which she was employed.

She was first the property of her builder, at Grand Caillou, Louisiana, from whom one Adolphe Mennet, of New Orleans, purchased her, in October or November, 1861. She was American built; at the time named the Three Brothers, and had before borne the name of the G. W. Goodwin. Mennet, the owner, appointed Renaud, who was now commanding her at New Orleans, to command her, in December, 1861. Both lived at New Orleans; Renaud, who was a naturalized citizen of the United States, having lived there since 1853, and having a family there. They went to Grand Caillou, where Mennet placed Renaud in possession.

Renaud, whilst at Havana, under an alleged power of attorney from Mennet, sold or pretended to sell the schooner to an Englishman named Frederick Thensted, and under a British provisional certificate of registry, issued by the British consul-general at Havana, the new title and name of the British schooner Baigorry was given to her. Renaud (whose statement was the only evidence of the sale, no bill of sale having been produced) could not remember, so he swore, what her price was; but he swore that "it was paid to Charles Caro & Co.," a house well known as the consignees, at Havana, of blockade-runners. But it appeared by an entry on the British register, made at New Orleans, March 29, 1862, by a notary, that the vessel was mortgaged and hypothecated by Thensted to Adolphe Mennet, to secure payment for the sum of $5000, amount of two promissory notes. This practice of mortgaging, it may be here

stated, was a frequent method, during the rebellion, of securing one man's interest in a vessel whilst she was passing under cover of another's name.

The crew, chiefly French, Italian, and Spanish, were shipped at New Orleans, by order of the master, on the 16th of April, 1862, and went on board at Calcasieu on the 20th. It may be noted that, at that time, the concentration of our forces in the operations for the capture of New Orleans, made it impossible to load for blockade-running at that port. The master swore that the cargo was owned by several French citizens residing in New Orleans, and was shipped by one Durell, also of New Orleans, for them, and was consigned to Caro & Co., of Havana, to be delivered at that place for, and on account, risk, and benefit of, the said French citizens. A claim filed by Renaud for them, and the only claim made, asserted the same facts. The manifest sworn to by Renaud, 14th of April, 1862, at New Orleans, accorded with these statements. The bill of lading represented the cargo as shipped at New Orleans, by Cassillo and Harispe. The vessel cleared for Havana, at the "Confederate" custom-house at New Orleans, on the 14th of April, 1862.

The court below condemned both vessel and cargo as enemy property. Appeal here.

Mr. Coffey, special counsel for the United States. Messrs. Reverdy Johnson and Gillet, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The Baigorry and cargo were owned by residents of New Orleans, claiming to be subjects of Great Britain and France. She was employed in the trade of the enemy, plying between Havana and ports of Louisiana, and finding entrance as she could, by running the blockade. The cotton with which she was laden was shipped, according to the testimony of the mate, at Calcasieu Pass, between the 27th of April and the 3d of May; but she did not sail, if the master be credited, till the 26th of May. Calcasieu Pass, and all the neighbor-

ing region was in possession of the rebels, and the establishment of the blockade was well known to the officers of the schooner. The master says that he saw no blockading vessels off Calcasieu when he went in or when he came out. The mate, in answer to the same interrogatory, says nothing of what he saw when the schooner entered the Pass, but asserts that he saw no blockader when he came out. But the master says also, that he saw blockading ships as he was going towards the coast of Louisiana in February, and also, saw a steamer passing along the coast, while the schooner was at Calcasieu. The mate says he saw steamships—not one, but several—off the coast during the same time. It is also in evidence, that when the master of the Baigorry saw the Bainbridge, on the afternoon before the capture, and that she was hove to and waiting for him, he changed his course to avoid her.

We have already held, that a blockade once established, and duly notified, must be presumed to continue until notice of discontinuance, in the absence of positive proof of discontinuance by other evidence; and we do not think that the testimony of the master and mate that they saw no blockaders when entering or leaving Calcasieu Pass, supplies such proof. On the contrary, we think that positive proof that the blockade was not discontinued, is made by the admissions that blockaders were seen when the Baigorry approached the coast, and that one or more steamships were seen off the coast while she lay within Calcasieu Pass.

No attempt is made to account for her delay in sailing, from the 3d to the 26th of May, after her cargo was on board; and the absence of any explanation of this circumstance, warrants the inference that she was watching her opportunity to get out without being seized. It goes to establish guilty intent. So, too, the endeavor to escape from the Bainbridge. No such attempt would have been made, had the officers of the Baigorry been unconscious of any infringement of the blockade.

The proof of violation of the blockade, and of its existence

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both when the schooner entered and when she left Calcasieu Pass, is clear.

We think, also, that both ship and cargo were rightly condemned by the District Court as enemies' property. It is claimed that both belonged to neutrals resident in New Orleans, and entitled to protection under proclamation,* and the proof, to some extent, supports this claim; but both were liable to be condemned as enemies' property, because of the employment of the vessel in enemies' trade, and because of the attempt to violate the blockade, and to elude visitation and search by the Bainbridge. On this latter point, the language of Chief Justice Marshall, in *Maley* v. *Shattuck*,† is express.

DECREE AFFIRMED.

THE ANDROMEDA.

1. A vessel and cargo condemned as enemy property, under circumstances of suspicion,—spoliation of papers in the moment of capture being one of them as regarded the cargo, and a former enemy owner remaining in possession as master of the vessel through a whole year, and through two alleged sales to neutrals, being another, as respected the vessel,—the alleged neutral owners, moreover, who resided near the place where the vessel and cargo were libelled, handing the whole matter of claim and defence over to such former owner as their agent, and giving themselves but slight actual pains to repel the inference raised *primâ facie* by the facts.
2. A libel in prize need not allege for what cause a vessel has been seized, or has become prize of war, as *ex. gr.*, whether for an attempted breach of blockade or as enemy property. It is enough if it allege generally the capture as prize of war.
3. A blockade once regularly proclaimed and established will not be held to be ineffective by continual entries in the log-book, supported by testimony of officers of the vessel seized, that the weather being clear, no blockading vessels were to be seen off the port from which the vessels sailed.

ON the 20th of May, 1862, the schooner Andromeda, with a cargo of cotton and hides, was captured off the coast of

* The Venice, *supra*, 135. † 3 Cranch, 488.

Cuba by the Pursuit, a sloop-of-war of the United States. The schooner at the time was bound to Havana, on a voyage from the port of Sabine, in Texas, where she had received her cargo. Being brought into Key West, she was libelled by the District Attorney of the United States as "lawful *prize of war*, and subject to condemnation and forfeiture as such;" the libel, however, not stating for *what cause* she was seized, or had become "lawful prize of war," as set up in that document.

The manifest read thus:

EXPORT MANIFEST.

Manifest of the cargo on board the schooner Andromeda, of the burden of $229\frac{8}{100}$ *tons, whereof J. H. Ashby is master, bound from Sabine Pass to Havana.*

Name of Shippers.	Marks and numbers.	Number of entries.	Packages or articles in bulk.	Contents or quantities.	Names of consignees.	Value at the port of exportation of domestic produce or merchandise.
Andromeda & Culmell.	Various.	597	597 bales cotton.	297,514 pounds.	Chas. Caro & Co.	$31,000 00
Do.	F v C.	291	291 hides.	1,164 pounds.	do. do.	58 20
Total amount,	.....	..	.....	.....	.....	$31,058 20

The bill of lading, described Edmonson and Culmell as shippers of all the items of the cargo.

AS TO THE OWNERSHIP OF THE CARGO libelled, as mentioned. The master of the vessel, Ashby, admitting that ninety bales of the cotton belonged to him, set up that *one hundred* belonged to a certain Culmell, "a native citizen of Denmark," and for ten years resident in Texas, where he was in trade as a partner of one Edmonson; and that the *remainder* of the cotton and all the hides belonged to Messrs. Caro & Co., merchants of Havana, to whom they were consigned. Caro & Co. were French subjects. Culmell made the same defence as to one hundred bales. Caro & Co. gave a power of attorney to the captain, to claim for them

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as theirs, all the hides and the whole cargo, with the exception of the one hundred and ninety bales; but, notwithstanding that an order for further proof was granted to allow them to exhibit proof of their ownership, they did not themselves appear at Key West, nor take any more active measures to protect their interests thus, by their answer, set up.

Ashby himself, was examined in *preparatorio*. His answers were, that "he was born in New York,—now lives in Louisiana,—owes allegiance to Louisiana and the Confederate States,—is not a citizen of the United States,—is married, and has a family in Louisiana." It appeared that he bought and took possession of the vessel in October, 1860, before the rebellion broke out; came soon afterwards to the Gulf and New Orleans, in which city he was when the war broke out, and which he left soon afterwards on the vessel (now, according to his account, sold), as master, and had been sailing since chiefly in those regions on her.

Just after the vessel hove to, and before the capturing officers from the Pursuit came on board, the steward, one Monsell, by order of Culmell, who was on board, and at the time with the captain, in the cabin, threw over a package of papers. The captain swore that he did not know what they were; the steward said, that he supposed they were newspapers. Culmell swore, that "the invoice and bills of lading of the portion of the cargo *owned by himself*, were thrown over; he did not know who threw them overboard, but he gave them to the steward on the day of the capture, with orders to have them thrown overboard."

The vessel had left Havana on the 8th of March, 1862, under the British flag, but with the American flag on board; her destination having apparently been Matamoras. Her cargo consisted of coffee, soap, oil, salt, candles, shoes, &c.; and running the blockade, legal or ineffective, then established by our Government, she arrived at Sabine, March 16th. This cargo was delivered to Messrs. Edmonson & Culmell, who received and sold it "*on account of the schooner*

Andromeda;" and their account showed a large balance "due the *schooner* on the cargo."

AS TO THE OWNERSHIP OF THE VESSEL. The vessel was American built. Prior to the rebellion she had belonged confessedly to Ashby, her now captain, who first saw her at Bridgeport, Connecticut, in 1860. Soon after the breaking out of the war he sold her, in May, 1861, at New Orleans, according to his own sworn statement, to a certain Richard Alleyn, described in the register as "of Baltimore, in the county of Cork, Ireland, residing at the time in New Orleans," a British subject; and documents, attested by the British consul at New Orleans, one Mure, showed that various *forms*, indicative of a *bonâ fide* sale, had been gone through with great regularity. Alleyn sold her in March, 1862, according to the account, to a certain Gerald Thomas Watson, her now claimant. Watson was asserted to be a merchant of Havana, and, like Alleyn, a British subject. He was no doubt a British subject, but where he lived was not so plain. In one consular paper he was described as of "No. 52 Cornhill, London." *Ashby remained all the time in command of the vessel.* In reply to a question under an order allowing further proofs, he gave, under oath, a narrative, substantially as follows, showing the motives of the transfer, and the causes of his own continuing possession of her.

"*To the fourth interrogatory the witness answers:* At the time of the purchase by Alleyn, and her transfer to the English flag and register, a blockade of the port of New Orleans was expected to be laid in a few weeks. Alleyn resided in New Orleans. He intended to send the vessel to sea in order that she might not be useless property to him during the time the blockade should exist. This witness was appointed to her command by Alleyn, because he, the witness, was a person of some property, and would be responsible to Alleyn in case of a mismanagement of the vessel. On account of the blockade, no owner could expect to communicate with the vessel for a long term of time, and would have to suffer her earnings to accumulate and remain in the hands of her master. The witness, as master, sailed the

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schooner for Alleyn upon a contract, by which the witness was to have entire control and direction of the vessel; pay her entire expenses; engage her in the most profitable trade possible, and receive one-half of her earnings as a compensation,—a common rate of contract and compensation for masters sailing vessels of her class. Under this contract he sailed from New Orleans with a cargo to Matamoras, in Mexico; remained there about a month; discharged her cargo; and there being no freight for vessels there at that season he sailed in ballast to Havana, in Cuba, and endeavored to obtain freight there, but was unable to do so for three months, at the expiration of which time he obtained a cargo of sugar and molasses for New York, at low rates for freight, with which he proceeded to New York, where the schooner was seized by the Federal authorities under the allegation that she was liable to confiscation under the provisions of the act of Congress of July 18, 1861, but was soon afterwards released. The witness returned to Havana with a general cargo of merchandise, and was unable to procure another freight for a long time. The expenses of the vessel thus accumulating rapidly, and she earning nothing, induced the witness, on receiving an offer of purchase from the claimant Watson, to accept the same, which course he believed was for the interest of her owner, Alleyn. One of the conditions of the sale was, the witness should be retained in command until the new owner should find some person who would sail her at lower rates of compensation. This stipulation was attached because this witness was cut off from New Orleans by the blockade, and had no remunerative employment, and for no other reason. In accordance with the stipulation, the witness took command of the schooner, and was to receive for pay five per cent. of the entire and gross charges for freight upon cargo carried by said vessel while he remained in command."

The log-book of the vessel was put in evidence, and the entries read from March 8, 1862, to the date of her sailing from Sabine, 10th of May, and indeed till the capture. Constantly throughout the log, with entries of "the pumps now working well," or the reverse of it; how the day "came in;" and how ended "these twenty-four hours;" that the ship "kept the Sabbath" on Sundays, and "took in cotton,"

"took in hides," during the week;—"lower hold full,"—were entries like these during the time she was in the harbor of Sabine,—a port which commands a view of the ocean:

"No blockade in sight, fine weather." "No blockading vessel off." "No blockade off, clear weather." "No blockade off the bar, fine and pleasant day." "No vessel in sight, clear day, wind from south." "Day commences with fine weather, no blockading vessels in sight." "Saw no blockading vessels, clear, with breeze from south and southeast." "No blockade in sight, pleasant weather."

And Culmell and Ashby, and the steward Monsell, alike swore that they saw no blockading vessels at any time; and that the vessel had not attempted, so far as they knew of, to go in or come out of any port when it was blockaded.

Noting that Caro & Co., though of Havana, had taken no further interest in the proceeding at Key West, near to them, than to sign a power of attorney to Ashby, the District Court considered that the claim set up by or for these persons to the bulk of the cargo, "was an attempt to cover up hostile property by the use of neutral names;" and that the whole cargo, except the portions claimed by Culmell (plainly confiscable), belonged to Ashby; that Ashby, too, was owner of the vessel; of which "his all along continuing in the command, notwithstanding the alleged sale by him to Alleyn, and by Alleyn afterwards to Gerald Thomas Watson," was a pregnant proof. That court accordingly condemned vessel and cargo. The question before this court was, whether the condemnation was warranted.

Messrs. Gillet and Reverdy Johnson, for the claimants, contended that there was *no sufficient* evidence to condemn either cargo or vessel in total at all. A portion of the cargo is admitted to have belonged to Culmell, and some to Ashby; but the bulk of it stood on a different footing, and should not be condemned. Nothing could be argued from the destruction of papers beyond the fact that Culmell owned a portion (which fact is admitted), and was fearful about this, *his* part, hoping to save it. Caro & Co. are not touched. There is, therefore, as to the bulk of the property, no evidence of enemy's property at all.

As respected the vessel, the narrative given by Captain Ashby, on oath, in answer to the fourth interrogatory, was remarkably clear, and had internal indications of truth.

Moreover the libel is defective in form. It ought to specify for what offence supposed to be committed the vessel is claimed as prize of war; whether for breaking blockade or as enemies' property, or for what else? This generality of accusation belongs to no good system of law. It is "the sending of the prisoner, and not withal signifying the crime laid against him,"—a matter which we have high authority to declare "unreasonable." Besides, there was no properly maintained blockade at Sabine. No blockaders could be seen for days and days. No nation has set itself more forcibly against paper blockades than the United States. Our natural duty and permanent interests are to support the rights of neutrals. We need not enlarge on a topic which was enforced with eloquence by counsel at this term in the case of *The Circassian*.* Our country has already given the world great lessons. In public law it remains for us to carry out the defence of neutral rights to their true dignity. This is the distinction which awaits us.

Lower views also would control this matter. We must not attempt to enforce doctrines against Great Britain and France that we are not willing to have applied to ourselves; nor while maintaining our present interest, teach instructions which will but return to plague the inventors.

Mr. Coffey, special counsel of the United States, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is not disputed that the cargo consisted of Texan products. Prior to shipment, then, it was enemy property.

The manifest of the cargo, found on the schooner when captured, shows that five hundred and ninety-seven bales of cotton, valued at thirty-one thousand dollars, and two hundred and ninety-one hides, valued at fifty-eight dollars and

* See *supra*, p. 147.

twenty cents, were shipped at Sabine, in May, 1862, "by the Andromeda, Culmell," and consigned to Charles Caro & Co., at Havana. Of this cargo, Ashby, the master, says that ninety bales of cotton belonged to himself, and one hundred to Culmell, and that the remainder of the cotton, four hundred and seven bales, and all the hides, belonged to Caro & Co., who, he says, are neutral merchants, residing in Havana. Culmell says the same. Culmell was a rebel enemy, residing in Texas. Ashby left New Orleans in the Andromeda soon after the breaking out of the war, and from that time to the capture was in command of her, engaged in the Gulf trade, and the greater portion of the time with the rebel territory. He says of himself, that he was born in New York; lives in Louisiana; owes allegiance to Louisiana and to the Confederate States, and is not a citizen of the United States. His acts and declarations prove him a rebel enemy. There can be no question, therefore, that the cotton, when it became the property of Ashby or Culmell, or both, was enemy property. There is nothing in the record to support the statements of those persons, as to the ownership of Caro & Co. On the contrary, there is much to discredit them. There is nothing in the manifest which shows any distinction of ownership; and it is proved that a part belonged to Ashby and Culmell. The cotton and hides appear to have been purchased with the proceeds of the merchandise brought by the Andromeda to Sabine; and there is nothing before us, except the bare statement of Ashby, that the schooner was chartered by them for Matamoras, which affords the slightest indication that Caro & Co. had any interest whatever in that merchandise; while the account of sales is not with them, but with "schooner Andromeda and owners."

Besides these facts, another circumstance is of much weight. It appears from the record that Caro & Co., though residing at Havana, only a hundred miles from Key West, where the District Court was held, never appeared there during the proceedings in prize, never manifested any concern in the result beyond the mere signing of a power of

attorney, authorizing Ashby to claim in their name. The court below very properly gave much consideration to this circumstance. In connection with the other facts mentioned, we think it fully warranted the conclusion, that no part of the cargo belonged to Caro & Co., and that the original enemy character of the whole of it remained unchanged at the time of capture.

The enemy character of the vessel is quite as clearly proved. She was originally the property of Ashby, a confessed rebel enemy, and, according to his statements, of others who, in the absence of any allegation to the contrary, must be presumed to have been, also, rebel enemies. By Ashby she was sold, as he asserts, to one Alleyn, said to have been a neutral residing in New Orleans. But there was no change of possession. Ashby remained in full and absolute control, both of her use and disposal, and afterwards sold her, under the asserted authority of Alleyn, to one Watson, alleged to have been a neutral residing in Havana. Still, however, there was no change of possession, control, or employment. There is not the slightest evidence that either of the alleged sales was real, except the unsupported statement of Ashby. That statement under the circumstances can carry no conviction with it.

The condemnation both of vessel and cargo seem to us, therefore, well warranted.

Were there any doubt, it would be removed by the destruction of papers proved to have been committed both by Ashby and Culmell, the real owners, as we think, of the schooner and her lading. Monsell, the steward, states that "after the vessel was hove to, and before the officer came aboard from the Pursuit," Culmell gave him a package of papers, which he believed to be newspapers, and told him to throw them overboard, which was done. He says, that Ashby and Culmell were in the cabin together when this direction was given. Ashby admits that the charter-party of the voyage was destroyed before the capture, and that some papers were thrown overboard, he did not know what. Culmell confesses that the invoices and bills of lading of the

portion of the cargo owned by himself, were thrown overboard. Now, when it is remembered that the only bill of lading in the record describes all the cotton as shipped by Edmonson & Culmell, the significance of this confession becomes manifest; for if the bill of lading destroyed was, as it must have been, one of three of like tenor and date with the one found by the captors, then, if this statement be true, all the cotton was owned by Culmell. If, on the other hand, the statement be false, and the papers destroyed were other than as represented, then their destruction and the destruction of the charter-party authorize, under the circumstances, an absolute inference of enemy property, against both vessel and cargo.

We think the proof that the Andromeda and her cargo were liable to capture and condemnation for breach of blockade, equally clear; but, as we do not place our decision on that ground, we refrain from any remarks upon that aspect of the case.

No objection was made in argument to the sufficiency of the libel in the District Court. It would be enough to say of this objection, that the libel shows a case of prize, and that is sufficient for jurisdiction. All other exceptions are too late here. But the libel is beyond all exception. The rule is, that a libel in prize must allege generally the fact of capture as prize of war, and the libel in the record is in conformity with this rule.

The decree of the District Court must be affirmed.

NELSON, J. The proofs in the case, I think, fairly lead to the conclusion, that Ashby, the master of the Andromeda, was the real owner of the vessel, and that the sales by himself and others, in May, 1861, at New Orleans, to Alleyn, and by himself as attorney for Alleyn to Watson, at Havana, in March, 1862, were colorable; and, if Ashby was a resident and inhabitant of New Orleans, at the time of the capture of that port and city by our forces, on the last days of April, 1862, as seems to be assumed, there would be ground for claiming that he was entitled to the benefit and

protection of General Butler's proclamation of the 1st of May following; and, also, to the effect of that capture upon the status and property of the inhabitants of the captured city.*

The view I have taken of the proofs in the case, do not involve these questions.

Ashby left the city of New Orleans in this vessel soon after the breaking out of the war, and before the establishment of the blockade, and has never returned to it. During all this time and down to the seizure of the vessel, 26th of May, 1862, he has been in command of it, and engaged in the Gulf trade; and the greater portion of the time with the rebel territory. In answer to the first interrogatory, in *preparatorio*, he says, "that he was born in New York; he now lives in Louisiana, and owes allegiance to Louisiana and the Confederate States; is not a citizen of the United States." In answer to the fourth interrogatory, under an order allowing further proofs, he says that he left New Orleans with the vessel anticipating a blockade, that she might not become useless property, and that he did not expect to communicate with that city while the blockade continued. The proofs, as we have seen, show how he has been engaged during all this period.

On the above ground, I agree that the vessel was properly condemned in the court below, as enemy's property; and, also, the cargo, which the court have adjudged belonged to him.

DECREE AFFIRMED.

KUTTER *v.* SMITH.

1. The law imposes no obligations on a landlord to pay the tenant for buildings erected on demised premises. The innovation on the common law, that all buildings become part of the freehold, has extended no further than the right of removal while the tenant is in possession.

* See *supra*, p. 263, The Venice; also, The Baigorry preceding case. REP.

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2. Where a lease binds a landlord to pay his tenant, *on the efflux of the term*, for buildings erected by the tenant, or to grant him a renewal, the landlord is not bound to pay when the lease has been determined by *non-payment of rent before such efflux*, and by forfeiture and entry accordingly.
3. This is true, even though by the terms of the lease the repossession by the landlord is to be "*as in his first and former estate;*" and though the erections were not on the ground at the date of the lease.

LINK demised, on the 1st of May, 1857, to Sherman, a lot in Chicago, for twelve years from that date. The lessee covenanted to pay all the taxes and assessments levied on the premises during the term.

It was provided that, in case of a failure by the lessee to pay the rent when due, the lessor, his heirs or assigns, should have the right to enter into the demised premises, with or without process of law, and expel the lessee or any persons occupying them, "and the said premises again to repossess and enjoy, *as in his first and former estate;*" and the lessee covenanted that, if the term should at any time, at the election of the lessor, or his assigns, be ended, he, and all those occupying the premises under him, would immediately and peaceably surrender the possession of the premises to the lessor or his assigns. Sherman contemplated making an erection upon the premises, which it was agreed he might do; and the lease contained the following covenant:

"It is agreed upon, by and between the parties, that at the expiration of ten years from the first day of May, one thousand eight hundred and fifty-nine, it shall be at the election of the first party either to purchase the buildings erected on said leased premises at the appraised value at that time, or renew the lease of the said demised premises for the term of ten years longer, and the value of the buildings as well as the value of the rent of the said demised premises, to be appraised by three disinterested persons, who are to decide the value of the buildings, as well as the value of the rent of the above-mentioned premises, as the case may be. And it is further agreed upon, by and between the parties, that at the expiration of each and every ten years from May first, one thousand eight hundred and sixty-nine, for and during the term of *ninety-nine years* from the date

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of this indenture, that the party of the first part is either to renew the lease or purchase the buildings as above stipulated."

The lessee did erect a brick structure or storehouse on the premises, valued at $2500 to $4000.

The rights of the lessee, Sherman, became afterwards vested in one Kutter, and those of Link, the lessor, in a certain Smith.

On the 1st of May, 1862, Smith, as assignee of Link, went upon the premises, and demanded the rent due that day on the lease, which was not paid, and the next day he gave notice that he had elected to forfeit the lease for non-payment of rent, due May 1, 1862.

In July, 1862, Kutter (assignee of Sherman) notified to the defendant that, owing to the forfeiture of the lease from Link to Sherman, for non-payment of rent, he (Kutter) was entitled to have the brick building on the demised premises appraised under the terms of the lease, and the value of it paid to him. Smith refusing to join in any effort to have it appraised, this suit, *an action on the case*, was brought in the Circuit Court for the Northern District of Illinois.

The declaration set out the lease by Link to Sherman; the subsequent vesting of the lessor's title in the defendant, Smith, and of the lessee's in the plaintiff, Kutter; and that the defendant had declared the lease forfeited, and taken possession of the demised premises, and refused to join the plaintiff in having an appraisement of the building standing on said premises, and also neglected and refused to pay plaintiff the value of that building; whereby he became liable to plaintiff for its value, and this action was brought to recover it.

On the trial, the court instructed the jury as follows:

"By the terms of the lease from Link to Sherman, it seemed to be contemplated that the lessee should have power to put improvements upon the land which might remain there on the 1st of May, 1869 ('ten years from the 1st day of May, 1859'), and it was by the terms of the lease then left optional with the lessor to purchase the buildings erected on the land at the ap-

praised value, or renew the lease for ten years longer; but up to that time, that is to say, till May, 1869, the clause of forfeiture for the non-payment of rent was nevertheless in force and binding on the lessee; and notwithstanding improvements may have been in the mean time put upon the land, if the lessee did not pay the rent according to the terms of the lease, it was competent for the lessor to declare 'the term' ended, and to re-enter, and in case of a determination of the lease in that way prior to the time fixed (viz., May 1st, 1869), no provision seemed to be made by the lease for the payment by the lessor of any improvements put by the lessee upon the land; and in the case supposed, in the absence of such provision, the lessee could not recover for the improvements; and the plaintiff can be in no better position than Sherman. Consequently, if, on the 1st day of May, 1862, there was rent due and in arrear, unpaid, after demand made for the payment thereof, and the lessor or his assigns exercised the option given by the lease, and declared 'the term' ended, and re-entered and took possession of the premises, of which the lessee and his assignee had due notice, then the plaintiff cannot recover against the defendant in this action the value of the improvements made by Sherman or his assignee."

Verdict and judgment went accordingly; and the plaintiff, Kutter, took a writ of error to reverse the judgment.

Mr. E. S. Smith, for Kutter, plaintiff in error.

The court below—we may remark in the outset—treated the case as if it had been an action of covenant,—a suit to enforce, as against defendant Smith, the *provisions of the lease upon the covenants* on the part of Link, as to the purchase of the building at the end of the term. This was a mistake. The law, which, in an action of covenant, would have governed the case, has no direct application here, except as to the construction of the provisions of the lease, and the rights of the parties as they stood at the time of the suit. The action is an action on *the case;* an action, that is to say, on the special facts of this case; a form of action which in the plastic hands of the pleader becomes pliant, and takes a form as various as the business of men.

Argument for the plaintiff in error.

Now, here the owner of the soil has got possession of and is enjoying a house built by us; he has come into the use of buildings erected by our money and labor. We set forth those circumstances; make, in other words, an action on the case; and show that, *ex æquo et bono*, the defendant should pay us for that which of our money and labor he is enjoying and chooses to enjoy. The law is well settled, that a lessor cannot take buildings and fixtures placed on a lot by express agreement that he place them there; and that the lessee has the right to remove those buildings, whether it be at the end of the term, or on declaration of forfeiture by the lessor, at the expiration of the lease. Time is given by law for the removal of such fixtures, and any interposition, on the part of the lessor, to prevent the removal, is, in law, a conversion and an injury resulting from the act of the lessor, for which he must respond in damages.

Since the great case of *Elwes* v. *Mawes*, given in Smith's Leading Cases,* the rigor of the common law has been greatly relaxed, both in this country and in England, and courts of law have adopted the principle, that it is for the benefit of the public to encourage tenants to make improvements in trade, and to do what is advantageous for the estate during the term, with the certainty of their still being benefited by it at the end of the term. We hold that the rule is the same, and that it applies, whether the tenancy be for years or at will. It matters not whether the building is erected upon blocks or upon stone masonry; whether of wood, stone, or brick. It is the property of the tenant, and he has the right to remove it at the end of the term, and the landlord cannot interfere unless the tenant damages the freehold. The rule is founded upon a high principle of justice and right, and in this country, especially, should be maintained as tending everywhere to improvements.

This general principle has been applied, as the court knows, in a case where vats had been put up for the convenience of the trade of the tenant; also, in a case of a mill

* 2 Smith, 228, 6th ed., reported from 3 East, 38.

and furnace, steam engines, and copper stills, erected to carry on distilling, though fixed to the building; also, in a case where a building had been erected on the demised premises for the purposes of trade, and placed upon a foundation of brick masonry in the ground; also, in a case where a building had been erected upon stone posts set in the ground. Many other cases, equally decisive of the question, can be found in the books, even in the old ones.*

Concede that Smith became owner of the lot originally vested in Link, he holds it *quatenus et quodam modo;* he holds in subjection to the lease which Link had previously made. However viewed, the question comes to this: "Does the lease provide, under any state of the case, or position of the parties, and for any cause, that Link, or any one, may at any time take the property in the building without paying for it?" We answer that it does not, in any way or manner, so provide, nor does the lease in any one sentence so intimate. How, then, can counsel justify the high-handed act of the defendant in forcibly taking and holding the building?

It will be observed that, by the express words of the contract, the right to re-enter and to declare the term ended for non-payment of rent at the time due, only gives the right to *repossess Link's "first and former estate."* It does not give the right to take anything *but* the land. This is an important consideration, and one which should interpret and settle the rights of the parties. If, therefore, the defendant preferred to re-enter in the name of Link, or to take possession of the property under the covenant, instead of trusting to the chances to collect the rent, then, if he did so, he was obliged to *let the owner take* off the buildings, and leave the property as it was, so that the defendant could enjoy it as in Link's first and former estate; that being all the lease gave, or which any one claiming under it could enjoy.

Mr. Fuller, contra.

* Beck *v.* Rebow, 1 Peere Williams, 94; Lawton *v.* Lawton, 3 Atkyns, 13; Poole's Case, 1 Salkeld, 368; Van Ness *v.* Packan, 2 Peters, 137; Union Bank *v.* Emerson, 15 Massachusetts, 159; Holmes *v.* Tremper, 20 Johnson, 29.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

If we correctly understand plaintiff's counsel, one of the positions assumed by him in argument is, that the fact that under these circumstances defendant comes into the use and possession of the building, erected by the labor and money of plaintiff's assignor, entitles plaintiff to recover the value of that building, without aid from the contract on that subject in the lease, which we will consider hereafter. The authorities cited to support this position relate to the class of cases in which tenants have been permitted to remove fixtures from the premises which they have placed there during the tenancy.

Without elaborating the argument, it may be remarked that none of these authorities are applicable, for two reasons.

1. The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable as fixtures.

2. The doctrine concerning this class of fixtures, which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession; and has never been held to give a right of action against the landlord for their value.

We can very well understand that if defendant wrongfully entered upon the building, and retains wrongful possession of it, he may be liable to plaintiff in action of trespass *quare clausum fregit*. But, as we understand the facts, there is no such wrongful entry; and plaintiff bases his right to recover upon a very different view of the matter.

There was in the contract of lease between Link and Sherman a covenant that, at the expiration of ten years from the first day of May, 1859, it should be at the election of the lessor to purchase the buildings erected on the leased premises at their appraised value at that time, or renew the lease of said premises for the term of ten years longer, at a rent to be appraised in like manner; and this election, on the part of the lessor, was to be exercised at the expiration

of every ten years for the period of ninety-nine years. The plaintiff now contends,—because the defendant terminated the lease before the first ten years had expired, by virtue of a clause authorizing the lessor to do so for non-payment of debt,—that, therefore, defendant became liable to pay him the appraised value of the building. He accordingly gave a notice of his claim, and of his readiness to join in appointing appraisers, and then brought this suit.

It will be observed that while the right thus claimed is one growing out of the contract, and, as would reasonably be supposed, is for the failure to perform some obligation which that contract imposed, the action is neither covenant nor assumpsit, nor any other form of action founded on contract, but is an action on the case. And the counsel who framed the declaration objects in this court, "that the court below treated the case as one in an action of covenant, to enforce as against defendant Smith, the provision of the lease, upon the covenant on the part of Link as to the purchase of the building at the end of the term."

One obvious reason why plaintiff does not wish to be considered as suing on the contract is, the difficulty of holding that the covenant to purchase is one which runs with the land, or which, in any other manner, binds Smith as assignee of Link. An action of covenant would also be liable to the objection that the contingency on which the lessor was bound either to renew the lease or purchase the building, had never arisen.

To avoid these difficulties, the plaintiff brings an action on the case, in which he sets out this covenant with the entire lease and the other facts of the case, and seems to suppose that by virtue of the flexibility of this form of action, it may be found to embrace some principle which will justify a recovery. We have already seen that the law imposes upon the defendant no obligation to pay for the building apart from the contract. If the contract, when examined in the light of the facts proved, imposes no such obligation, we are at a loss to perceive what other ground of liability can be asserted against defendant.

Opinion of the court.

It is argued that the plaintiff's assignor became the owner, and had title or estate in the building as separated and distinguished from the land; and while the defendant had the right to enter, take possession, and hold for a failure to pay rent, that right was in some way subordinate to plaintiff's right to the house. But if we concede so singular a proposition as that the title to the soil was in defendant, while that of the building was in plaintiff, it by no means follows that defendant is bound to purchase plaintiff's building. The utmost that can be claimed on that subject is that Smith is bound by the covenant of Link, the lessor, to purchase at the end of ten years *or renew the lease.* He may always exercise his option in favor of the latter proposition, and by the contract may never be bound to purchase. So that if the title to the building is in plaintiff, and defendant has wrongful possession of it, we revert again to the proposition that trespass, or some form of action for use and occupation, is all the legal remedy which the plaintiff has.

But we cannot concede that plaintiff or his assignor had at any time the legal title to the building as distinct from the lot. The well-settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the fault of the plaintiff and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and labor, without compensation. It is from plaintiff's own default that the right to do this arises. He had his option to pay the rent due defendant, and retain the right to payment for his building when the time should arrive, or to give up his building, and with its loss relieve

himself of the burden of paying rent. He chose the latter with full knowledge, and there is no injustice in holding him to the consequence of his choice.

The covenant for re-entry provides that, in default of payment of rent, the lessor may enter "and the said premises repossess and enjoy, as in his first and former estate."

The plaintiff insists that the building is no part of such former estate, and defendant, therefore, does not become its owner by virtue of the re-entry. We have already shown that the building does become a part of the *land* as it is built. No such meaning was ever before attached to the use of the word estate in a legal document. It is used in reference to the nature of defendant's interest in the property, and not to the extent of improvements on the soil. As if the lessor had a fee simple estate, it reverted to him again as a fee simple. If he had a term for years, he was in again as part of his term. But it had no relation to the question of whether that estate might be more or less valuable when repossessed, or might bring to him more or less buildings.

We hold, then,

1. That without the aid of a special contract, the law imposes no obligation on the landlord to pay his tenant for buildings erected on the demised premises.

2. That treating the parties to this suit as standing in the places of the original lessor and lessee, no obligation arises from the contract in this case, that the lessor shall purchase or pay for the building erected on said premises, except as an option, to be exercised at the end of each period of ten years.

3. That the act of defendant in re-entering and possessing himself of the premises for plaintiff's failure to pay rent, imposes upon him no obligation to pay plaintiff the value of the building.

As the ruling of the court, to which exception was taken, was in conformity to these principles, the judgment must be

AFFIRMED WITH COSTS.

Statement of the case.

LEVY COURT *v.* CORONER.

1. The Levy Court of Washington County, in the District of Columbia, if not a corporation in the full sense of the term, is a *quasi* corporation; and can sue and be sued in regard to any matter in which, by law, it has rights to be enforced, or is under obligations which it refuses to fulfil.
2. The fees allowed by the eighth section of the act of Congress of July 8, 1838, to the coroners of the counties of Washington and Alexandria, and to jurors and witnesses who may be lawfully summoned by them to any inquest, are payable by the Levy Court of the county, not by the Federal Government.
3. Jurors and witnesses summoned in form by the coroner's summons, regularly served, are so far "lawfully summoned" under the eighth section of the act of July 8, 1838, just named, that they may be allowed their fees, though the case of death in which they were summoned was strictly not one for a coroner's view, and though the coroner himself would be entitled to none. Fees advanced by the coroner to jurors and witnesses in such a cause may be properly reimbursed to him, and consistently with a refusal to pay him those claimed as his own.

THE coroner of the County of Washington, D. C., brought *assumpsit* in the Circuit Court of the District against what is called the "Levy Court" of Washington, for his fees; fees for "viewing the body," and fees which he had advanced to jurors and witnesses at inquests called by him for that purpose.

Three questions arose:

1. A preliminary one; namely, whether the "Levy Court" was a body capable of being sued at all?

2. If it was, whether it was the Levy Court or the Federal Government which was bound to pay the fees of coroners and their inquests, &c.

3. If it was the Levy Court which was bound to pay them, whether the coroner could recover fees advanced to *jurors and witnesses* on occasions where the death, though sudden, had not occurred from other than natural causes; cases, for example, where the death came from apoplexy, fits, excessive and habitual intemperance, and other cases which the *coroner* considered had occurred from "misadventure," but which

might not have fallen within that term as interpreted by the law.

AS RESPECTED THE FIRST QUESTION,—the preliminary one, of whether the Levy Court was a body capable of being sued,—it appeared that this body derived its powers from a statute of Maryland, passed A. D. 1794, entitled "An act for the establishment and regulation of the Levy Courts in the several counties of this State." This authorized them to adjust the expenses of the county, and to impose an assessment for their payment, and to appoint a collector, who shall give bond *to the State*. Suits were directed to be brought against the collector, and judgments entered *in the name of the State*. By other statutes they are charged with the expenses of the county relating to roads, bridges, the poor and poor-houses, the orphans' court, the jail, &c., and invested with power to levy such expenses by taxes. One of these statutes calls them *Commissioners of the County*, and some acts of Congress speak of them in the same terms.

AS RESPECTED THE SECOND QUESTION—that is to say, whether the fees of the coroner, his inquests and witnesses, were payable by the Federal Government, or by the Levy Court itself, it is necessary to state the history of the legislation under which the claim was made.

Prior to the year 1838, there was no compensation allowed in the District by law to *jurors* and *witnesses* for attending inquests on the coroner's summons. They were compelled to attend by due process for the public good. The *coroner* himself, however, by an old statute of *Maryland*, passed A. D. 1779, but in force in the District, had a fixed fee—two hundred and fifty pounds of tobacco—for each inquest, without regard to the time which he might be required to give to it, or the trouble which it cost. This fee the statute made payable, in the first place, out of the estate of the decedent, and, in the absence of such estate, by the *Levy Court*.

On the 7th of July, 1838, *Congress* passed an act,* the

* 5 Stat. at Large, 306.

main purpose of which was to create a criminal court for Washington County, and transfer to it from the Circuit Court the jurisdiction of criminal causes. This Circuit Court had been in existence for many years,* and, from the date of its establishment, the marshal of the District, and also jurors and witnesses, had been paid from *the treasury of the United States.*

The *third* section of the new act—the act, to wit, of 1838—provides that the district attorney, marshal, and clerk of the Circuit Court, shall attend the criminal court, and perform the same duties, in relation to criminal causes, which had been required of them in the Circuit Court; and shall receive the same compensation therefor. Like provision is made for witnesses and jurors.

Then came an *eighth* section in these words:

"There shall hereafter be allowed and paid to the *coroners* of the counties of Washington and Alexandria, in said District, and to the *jurors* and *witnesses* who may be lawfully summoned by them in any inquest, the same fees and compensation *as are now paid to the marshal of said District, and the jurors and witnesses attending said Circuit Court in said county, for similar services.*"

These fees were *construed*, by the parties concerned, to be such as the marshal received for summoning, swearing, and impanelling jurors, swearing witnesses, and returning inquisitions. But the statute did not say who was to pay either the fees given by the third section to the district attorney, marshal, and clerk of the Circuit Court, or those given by the eighth section to the coroner, his jurors and witnesses; the same with the former.

THE THIRD QUESTION depended upon the expression of this same section, that these fees were to be paid to jurors and witnesses who might be "*lawfully* summoned" by coroners to "*any*" inquest; and on the fact, whether or not an inquest and witnesses, who received a summons, in form and on its face wholly regular, were "*lawfully* summoned" to any inquest which the *law*, rightly interpreted, would not consider a proper case for the coroner's jurisdiction.

* It was established by act of February 27, 1801; 2 Stat. at Large, 103.

Argument for the Levy Court, plaintiff in error.

The court below thought, on the *first* point, that the Levy Court was a body which could properly be sued; on the *second*, that *it*, and not the Federal Government, was the party to pay the coroner's fees. On the *third*,—while it thought that in no case of death from apoplexy, fits, or excessive and habitual intemperance, or of sudden death proceeding from natural causes and the visitation of God, it was proper to hold an inquest, and accordingly disallowed the coroner's claim in such cases to *fees for himself*,—it yet allowed him reimbursement of fees advanced by him to *inquests* and *witnesses*.

Judgment having been given accordingly, the correctness of the views taken below was now the matter in error here.

Mr. W. S. Cox, for the Levy Court, plaintiff in error:

I. On the preliminary point. There is no act of Maryland or of Congress which makes the Levy Court a corporation, or endows it with the capacity of suing and being sued. Even if it could be considered a *quasi* corporation, it could not sue or be sued without an enactment to that effect. Accordingly, the only reported cases in this District, to which the Levy Court was a party, were cases of a special character; one the case of a rule to show cause,* and the other a special and summary application, under an act of Congress.† English cases indicate that the justices of the county in England exercise functions analogous to those of our Levy Court, and cannot be proceeded against by suit, but only by *mandamus*.

II. But the court below also erred in their construction of the act of 1838. In the *third* section, it directs that the district attorney, marshal, and clerk of the Circuit Court shall attend the Criminal Court, and perform all the duties by law required of them in relation to the criminal business of the Circuit Court, and *shall receive the same fees and compensation therefor*, and that the *jurors* and *witnesses* attend-

* Levy Court *v.* Ringgold, 2 Cranch's Circuit Court, 659.

† Levy Court *v.* The Corporation of Washington, Ib. 175.

ing said court *shall be entitled to the same compensation they now receive* for their attendance in the Circuit Court. No one ever doubted that, under this section, the fees of jurors and witnesses in the Criminal Court were to be paid by the United States, although it is not so expressed. But the language of this section is not more pointed, in that direction, than that of the eighth section, referring to jurors and witnesses in cases of inquests. "*There shall be hereafter paid,*" for services in cases of inquest, "*the same fees and compensation as are now paid*" for similar services in the Circuit Court. Shall be paid by whom? Surely by the same paymaster as now pays those. If it had been intended otherwise, would not the act have said distinctly, "there shall be hereafter paid *by the Levy Court* (or by some one else) the same fees as are now paid by the United States?" Looking at the acts of Congress alone, who can designate the Levy Court any more than the corporation of Washington or Georgetown, as the source of payment? There is, perhaps, scarcely an act of Congress fixing the compensation of any officer, which designates the Treasury of the United States as the source of payment more distinctly than this. In most cases the language is, that such officer's compensation shall be, or, that he shall receive, be entitled to, or paid, such and such amounts. It may, indeed, be asserted, generally, that when Congress directs money to be paid, it is to be paid out of the Federal Treasury, unless something different is expressed, particularly where the law containing the direction clearly contemplates such payment from the Treasury, in regard to its principal subject-matter.

It will be argued, perhaps, that when the law of 1838 passed, the coroner's fee on inquests was, under existing laws, chargeable to the county; and that a general enactment, adding to his fees, is to be construed as making them payable from the same quarter, and as re-enacting the existing law, with reference to the new fees.

But the fact that one sort of fee—a certain amount of tobacco—was payable to the coroner by the county, does not justify the inference that the *fees given to him by this act*,

and which, for similar services, were always paid to the marshal by the United States, were to be paid by the county also. On the contrary, the fact that these fees were not charged to the county under the old law, rather forces us to infer that they were not intended so to be under the new. The fees which the coroner was entitled to, under the act of 1838, were construed to be such as the marshal received for summoning, swearing, and impanelling jurors, and swearing witnesses, and returning inquisitions. And as the United States paid these to the marshal, the fair inference is, that they meant to pay them to the coroner for similar services, rendered in the interest of public justice in this seat of exclusive Congressional dominion. Especially will this be regarded as the case when we consider that the provision in question is found in a law, the main scope and object of which was to create a new tribunal, all the expenses of which are confessedly chargeable to the United States.

Again, the argument in question is inapplicable to the allowances to jurors and witnesses, which constitute the most important part of this claim. The county paid nothing to jurors and witnesses on inquests before the act of 1838, and to infer that Congress meant to impose the burden of their compensation on the county because a certain coroner's fee was theretofore chargeable to the county, is to draw a conclusion wider than the premises.

Again, if the existing law is referred to and adopted by the act of 1838, as to the new allowances to the coroner, it must be the whole and not a particular part of it. The act of 1779 does not make the coroner's fee payable directly by the Levy Court, but directs that it shall be *paid* out of the goods and chattels of the person dead, if any there be, otherwise *to be levied* by the commissioners of the county. Now, did Congress mean the new fees of the coroners, and the fees of jurors and witnesses, to be paid out of the estate of the deceased, and was each juror and witness to have a separate cause of action against the estate, and, that resource failing, a separate ground for a *mandamus*, or other proceeding, against the Levy Court? Congress would hardly have left

all these questions thus uncertain, had they meant to incorporate the Maryland act of 1779 into their own act of 1838; and their silence shows that they had no reference to the act of 1779, but meant simply to refer to their own existing legislation, as to the fees and allowances in suits in court, and to extend the benefit of it to the cases of inquest.

III. The court below disallowed the coroner's claim for *fees*, in certain cases in which the inquests were illegally held, but allowed his *disbursements* to jurors and witnesses in the same cases. If the inquests were illegally held, so that the coroner could not claim compensation for his services, how could his disbursements upon these illegal inquests give him a legal claim for money laid out and expended? If his time and labor were given at the risk of losing them, so must his payments have been made at his own risk.

Mr. J. H. Bradley, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. The first question which arises in this case, is whether the Levy Court of Washington County has a legal capacity to be sued in a court of justice.

The Levy Court is the body charged with the administration of the ministerial and financial duties of Washington County. It is charged with the duty of laying out and repairing roads, building bridges, and keeping them in good order, providing poor-houses, and the general care of the poor; and with laying and collecting the taxes which are necessary to enable it to discharge these and other duties, and to pay the other expenses of the county. It has the capacity to make contracts in reference to any of these matters, and to raise money to meet these contracts. It has perpetual succession. Its functions are those which, in the several States, are performed by "county commissioners," "overseers of the poor," "county supervisors," and similar bodies with other designations. Nearly all the functions of these various bodies, or of any of them, reside in the Levy Court of Washington. It is for all financial and ministerial

purposes the County of Washington. If not a corporation in the full sense of the term, it is a *quasi* corporation, and can sue and be sued, in regard to any matter in which, by law, it has rights to be enforced, or is under obligations which it refuses to fulfil. This principle, a necessary one in the enlarged sphere of usefulness which such bodies are made to perform in modern times, is well supported by adjudged cases.*

2. We are next called upon to determine, whether the fees of the coroner of Washington County, and of the jurors and witnesses who attend at his summons upon the inquests held in the county, and which cannot be made out of the estate of the decedent, are by law payable by the Treasury of the United States, or by the Levy Court of said county.

It is contended by counsel for plaintiff in error, that these fees are payable out of the public treasury. The main reason on which the claim is founded is, that the fees mentioned in the third section are confessedly paid from that source. Hence it is argued that all the fees embraced in the same act, are by necessary intendment, payable from the same source, unless a contrary intention is expressed. And in support of this view, counsel says: "No one ever doubted that under this section" (the third) "the fees of jurors and witnesses in the Criminal Court were to be paid by the United States, although it is not so expressed."

It may be asked if the act does not express that these fees are to be paid out of the public treasury, upon what principle is it so universally conceded that they are to be thus paid? The answer is, because they were paid by the United States before the passage of that law; and while the lawmakers found it necessary to provide that officers, witnesses, and jurors, rendering services in a new court, of the same kind which they had formerly rendered in the Circuit Court, should receive the same compensation, they took it for

* Inhabitants, &c., *v.* Wood, 13 Massachusetts, 192; Bradley *v.* Case, 3 Scammon, 608; Overseers of Pittsburg *v.* Overseers of Plattsburg, 18 Johnson, 407; Overseers, &c., *v.* Birdsale, 1 Cowen, 260; Jansen *v.* Ostrander, Id. 670; Commonwealth *v.* Green, 4 Wharton, 598.

granted that the compensation would come from the same quarter as before.

An extension of this reasoning to the fees provided in the eighth section, where Congress desires to increase the compensation of the coroner, leads us to the conclusion that these fees were also to be paid from the same source they were formerly, namely, the Levy Court. It seems to us that the inference from the fact, that Congress made no mention of the source of payment for these fees, is that they did not intend to make any change in the rule on that subject. In regard to the fees payable to the coroner for his own services, there appears to be no room for doubt. And although the fees allowed to witnesses and jurors owe their existence to this act, and were therefore never before payable, either by the Levy Court, or by the United States Treasury, we cannot doubt that they must follow in that respect the fees of the coroner. They relate to the same kind of service, rendered in the same cases, and are provided for in the same sentence of the act which increases his fees. It would require positive language in the act to enable us to hold that while the coroner's fees for an inquest are payable by the Levy Court of the county, those of the jurors and witnesses summoned to serve on the same occasion, are to be paid by the Treasury of the United States.*

We are, therefore, of opinion that the fees allowed by the eighth section of the act of 1838, which cannot be made out of the estate of the deceased, should be paid by the Levy Court of Washington County.

3. Certain fees paid by the coroner to witnesses and jurors were allowed by the court, in cases where the fees for his own services were disallowed on the ground that the inquests were held in cases not provided for by law.

It is alleged for error, that the sums paid by him to witnesses and jurors in these cases were allowed him.

The eighth section of the act already quoted says, that

* See Attorney-General Cushing's opinion, 6 Opinions of Attorneys-General, 561.

these fees shall be allowed "to witnesses and jurors who may be lawfully summoned." It would be a very forced construction of this provision, as well as unjust, to hold that this lawfulness depends upon any other fact than the regular service of the summons by a lawful officer. The jurors and witnesses are compelled, when thus summoned, to obey the writ. They have no right to consider whether the summons issued on a proper state of facts as they might appear to the coroner, nor the means of deciding it, if they had the right. When witnesses and jurors thus summoned actually attend, they are entitled to their fees. It can make no difference in the justice or legality of the claims whether they are presented by the witnesses and jurors to the Levy Court, or whether they are first paid by the coroner and presented by him. He loses enough by his mistake in judgment, when he is refused compensation for his own services, without being compelled to lose what he has advanced for the public service.

We discover no error in the record, and the judgment of the Circuit Court is, therefore,

AFFIRMED.

MILWAUKIE AND MINNESOTA RAILROAD COMPANY AND FLEMING, APPELLANTS, *v.* SOUTTER, SURVIVOR.

1. Though a court below is bound to follow the instructions given to it by a mandate from this, yet where a mandate has plainly been framed, as regards a minor point, on a supposition which is proved by the subsequent course of things to be without base, the mandate must not be *so* followed as to work manifest injustice. On the contrary, it must be construed otherwise, and reasonably.
2. The appointment or discharge of a receiver is ordinarily matter resting wholly within the discretion of the court below. But it is not always and absolutely so.

   Thus, where there is a proceeding to foreclose a mortgage given by a railroad corporation on its road, &c.—a long and actively worked road—(a sort of property to a control of which a receiver ought not to be appointed at all, except from necessity), and the amount due on the mortgage is a matter still unsettled and fiercely contested, the appointment

Statement of the case.

or discharge of a receiver is matter belonging to the discretion of the court in which the litigation is pending.

But when the amount due has been passed on and finally fixed by *this* court, and the right of the mortgagor to pay the sum thus settled and fixed is clear, the court below has then no discretion to withhold such restoration; and a refusal to discharge the receiver is judicial error, which this court may correct, supposing the matter (not itself one in the nature of a final decree) to be in any way fairly before it otherwise.

If other parties in the case set up claims on the road, which they look to the receiver to provide for and protect, these other claims being disputed, and, in reference to the main concerns of the road, small,—this court will not the less exercise its power of discharge. It will exercise it, however, under conditions, such as that of the company's giving security to pay those other claims, if established as liens.

BRONSON and Soutter had filed a bill in the Circuit Court for Wisconsin, against the *La Crosse and Milwaukie* Railroad Company, to foreclose a mortgage given by the said company to them to secure bonds to the extent of one million of dollars, which that company had put into circulation, and the interest to a large amount on which was due and unpaid. To this bill the *Milwaukie and Minnesota* Railroad Company—a company which, on a sale under a mortgage *junior* to that of Bronson and Soutter, was organized, and became, under the laws of Wisconsin, successor in title and interest to the *La Crosse and Milwaukie* Company, and also three other persons, one named Sebre Howard—were made or became defendants, and opposed the prayer for foreclosure. They alleged that the bonds which the mortgage to Bronson and Soutter had been given to secure, had been sold, transferred or negotiated at grossly inadequate prices, fraudulently in fact, and were not held for full value by these persons, who sought by the foreclosure to recover their par. The court below, being of this opinion, gave a decree in that suit to the extent of but fifty cents on the dollar. Coming here by appeal at the last term,* the decree, after an animated, protracted, and very able argument in support of it by *Mr. Carpenter*, in behalf of numerous parties interested, was reversed, and a decree ordered to be entered

* See *supra*, page 283.

below for the full amount, *cent* for *cent.** The suit, at the time of the decree here, had been pending for four years. The mandate from this court ran thus:

"It is ordered that this cause be remanded to the Circuit Court of the United States for the District of Wisconsin, with directions to enter a decree for all the interest due and secured by the mortgage, with costs; that the court *ascertain the amount of moneys in the hands of the receiver or receivers from the earnings of the road covered by the mortgage, which may be applicable to the discharge of the interest*, and apply it to the same; and that *if* the moneys thus applied are not sufficient to discharge the interest due on the first day of March, 1864, *then* to ascertain the balance remaining due at that date. *And in case such* balance is not paid within one year from the date of the order of the court ascertaining it, *then* an order shall be entered directing a sale of the mortgaged premises."

Upon the filing of this mandate in the court below, the receiver was ordered to make report of the funds in his hands; from which it appeared that he had some $50,000 to $60,000 applicable to the payment of the interest on the bonds in suit.

The Milwaukie and Minnesota Railroad Company, who, as already stated, was an incumbrancer on the road, *junior* to Bronson and Soutter, insisted that instead of this small amount, there was really, or ought to be, in the receiver's hands, between $300,000 and $400,000 applicable to the payment of interest; and asked an order of reference to a master, with instructions to hear testimony, and ascertain and report on this claim. The court made the order, and postponed further action in the case, until the succeeding term in September. At that term it was ascertained that the master would be unable to report on the complicated accounts of the receiver, involving several millions of dollars; and the receiver was again ordered to report the funds actually in his hands. From this second report, it appeared,

* See *supra*, page 312.

that he had no money properly applicable to the payment of the debt of Bronson and Soutter, and thereupon the court proceeded to ascertain the amount of interest due on the bonds secured by their mortgage, and entered a decree accordingly, giving the defendant a year to pay it, before a sale of the mortgaged premises.

From this decree the Milwaukie and Minnesota Railroad Company, the already mentioned successors in title and interest to the La Crosse and Milwaukie Railroad Company, appealed; the first ground assigned for their appeal being that the decree was a departure from the mandate of the court, because such decree should not have been rendered *until the accounts of the receiver were adjusted, and it was judicially ascertained how much of the millions he had received ought now to be applied to the payment of complainants' interest.*

But another matter was now presented here.

At the first term of the court below, after the mandate was filed, the Milwaukie and Minnesota Railroad Company proposed to pay all the interest due on the mortgage of Bronson and Soutter, on condition that an order should be made, discharging the receiver, and placing the road and its appurtenances in the possession of them, the Milwaukie Company, just named. Upon the hearing of this petition, the judges of the Circuit Court were divided in opinion, and the application so, necessarily, refused.

The amount of Bronson and Soutter's debt, above mentioned, exclusive of interest, which the Milwaukie and Minnesota Railroad Company proposed to pay, was one million of dollars; and this, added to twelve hundred thousand dollars of prior mortgages, made two millions two hundred thousand dollars, which the road and its appurtenances would have to be worth, in order to secure the debt of Bronson and Soutter. The road on which the mortgage was a lien is ninety-five miles, and runs from Milwaukie to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It was in good condition. It constitutes a part of the direct line from Milwaukie to the

Mississippi, and is one of the valuable railroads of the United States. The gross earnings from this ninety-five miles for the year preceding the application to discharge the receiver, as shown by his reports, were about eight hundred thousand dollars; though the reports showed a large falling off in the receiver's receipts of later time.

In addition to the opposition made to this motion by Bronson and Soutter, it was opposed by one Sebre Howard, who, with the Milwaukie and Minnesota Railroad Company, had been a defendant to their bill, and on whose motion the receiver had been appointed. Howard objected to the discharge, because, as alleged, he had a judgment of $16,000 against the La Crosse and Milwaukie Railroad Company, which he asserted to be a lien on the road; though whether it was so or not, depended on some questions of fact and law, not perhaps quite clear. This court, assuming a certain state of facts, decided that he had; but it was said that facts had not been well explained to the court.

One Selah Chamberlain, too, opposed it; objecting to the discharge of the receiver, and particularly to delivering the property into possession of appellants, because, as he asserted, he himself was holder of a lien of over $700,000 in the road, and because that lien, according to his view, was secured by a lease which entitled him to the possession of the road. This same Chamberlain had been in possession under his lease for some time prior to the appointment of the receiver, under a contract with the La Crosse and Milwaukie Railroad Company, by which he bound himself to keep down the interest on the various mortgages on the road, including the one on which Bronson and Soutter had filed their bill. This he had failed to do, and he had actually abandoned the possession to the Milwaukie and Minnesota Company, who were in possession at the time the receiver was appointed. His judgment on a suit by the complainants had been assailed, and as it seemed, though counsel denied this view, declared to be fraudulent and void, by a decree of the District Court of the United States; but that question was not finally determined.

Statement of the case.

A *third* railroad company, called the Milwaukie and St. Paul Company, a rival company of the Milwaukie and Minnesota, whose relation to it will appear in the diagram below, also opposed the discharge.

This company was an organization created after the litigation already mentioned, as brought about by the proceedings of Bronson and Soutter to foreclose their mortgage, had commenced. It was no party to preceding suits. It owned the *western* end of the La Crosse and Milwaukie Railroad; that is to say, the road from Portage to La Crosse (one hundred and five miles), and was organized for the purpose of working a road, as its name imports, from Milwaukie to St. Paul; of course, the ownership and control of an eastern end was indispensable to the purpose. This company had procured, in June, 1863, an order from the District Court, that the receiver should deliver to them the eastern end of this road, and all its appurtenances, and they had used them from that day. This court, however, subsequently declared the proceeding of the District Court to have been without

jurisdiction, and the order a usurpation of authority.* The interest of this third company was, of course, of a strong character, for the necessities of their situation required that they should own an *eastern* end of the road, to complete their line from Milwaukie, one great terminus of the road to St. Paul.

Mr. Carpenter, for the appellants.

1. The proceedings had in the court below, by which the amount due on the bonds secured by the mortgage to Bronson and Soutter was ascertained and a decree entered, was not according to the direction of the mandate. The decree, indeed, gave the year to pay; but this, and all else that was done, was ordered *before and without* ascertaining what sum was in the receiver's hands. Now, the authority of the inferior court extends only to executing the mandate sent it. They cannot vary it, or give *any other or further* relief.† Under that mandate the court was bound "to ascertain the amount of moneys in the hands of the receiver," and its authority to order a sale arose only "IF" the amount was not sufficient to discharge the interest.

2. The appellants complain of the denial of their petition to the Circuit Court, since the cause was remanded, for leave to pay into court all the money due the complainants in this cause, and for possession of the mortgaged premises.

It is admitted that this order is not such as might be appealed from before a final decree. But, when an appeal is properly taken from a final decree, as it has been decided that the present one is,‡ the appellant may be relieved from any interlocutory order or proceeding by which he is aggrieved. The continuance of the receivership until the final decree, or until the amount due the complainants is paid into court, is matter of discretion, and not reviewable here. But after the amount due the complainant had been fixed by a final decree, as that also has been in this court,§ and

* Bronson *v.* La Crosse Railroad Company, 1 Wallace, 405.

† *Ex parte* Dubuque and Pacific Railroad, Id. 69.

‡ See *supra*, p. 440.

§ See *supra*, p. 312.

the owner of the equity of redemption offered to pay that amount into court, the discharge of the receiver was demandable as a matter of right; and its refusal was error, which can be reviewed here.

The Milwaukie and Minnesota Railroad Company was owner of the equity of redemption. As such, it had the right to redeem all prior incumbrances, and the foreclosure under which it was organized extinguished all liens of a date subsequent to that of the mortgage, on the foreclosure of which it came into existence. It was, therefore, entitled to possession, unless some other person could show better right thereto.

Howard's lien was declared by this court to be extinguished.* The language of the Supreme Court is this:

"Now it appears that each of these judgments were recovered after the date of the mortgage on the La Crosse and Milwaukie Company, upon the foreclosure of which the Milwaukie and Minnesota Company was formed. The liens of these judgments were cut off by its foreclosure; indeed, the judgment of *Howard*, of November, 1858, and the last judgment of Graham and Scott, which was recovered in 1860, never were liens upon any interest in the road of the La Crosse and Milwaukie Railroad Company."

It will be said that this opinion was delivered under a mistake of fact. Perhaps it was so, and perhaps, in a proper proceeding in his case, it may be found that Howard has a valid subsisting lien; but, on this motion, we must consider the presumption to be the other way, and act accordingly.

Chamberlain's opposition demands more respect. He claimed possession under his lease and judgment, which, the case shows, had been vacated by the decree of the District Court. This decree may be erroneous, but cannot be questioned collaterally. It was rendered in a cause in which the complainant, as a judgment creditor, sought to vacate the lease and judgment.

* *Supra*, p. 304.

Argument for the appellee.

The opposition of the Milwaukie and *St. Paul* Railroad has no foundation except in selfish interest. The motives of that company to keep the road *out* of the hands of its true owners, and *in* the hands of a receiver, interested in his commissions chiefly, are obvious when the topographical position of the rival companies is seen. It is a case where pecuniary motive is as strong as better reasons are weak.

Messrs. Cary and Carlisle, contra.

1. The mandate has been as well observed as in the nature of the difficulties it could be. The obligation of an inferior court to obey the order sent it, is not to be followed to the extent of sacrificing the spirit of the order to its letter.

The denying the appellant's motion to have the receiver pay the money in his hands into court, to discharge him, and to hand the road over to the Milwaukie and Minnesota Company, is so clearly a matter pertaining to the practice of the court below, and so entirely within the discretion of that court, that we have been surprised to hear counsel of Mr. Carpenter's ability, and regard to what positions he asserts, insist upon his right to appeal from it. Such matters *must* be left to discretion, if such a thing as discretion is to exist in an inferior court at all. But if this court will consider a matter in which, from the nature of the case, we think it has no good opportunity to form a judgment, then we say that both the judgment of Howard and the claim of Chamberlain should control the question. The receiver was appointed on Howard's motion. This court has, indeed, said* that his lien was discharged. Undoubtedly this idea proceeds on a misapprehension of fact. Howard's judgment in the State court against the La Crosse Company was recovered on the 1st day of May, 1858, and became a lien *prior* to the mortgage under which the Milwaukie and Minnesota Company sprung. This judgment was "sued over" in the Federal court, and judgment obtained there November 28th, 1859; but the record, of course, discloses the original lien of

* *Supra*, p. 304.

his judgment. The opinion of this court mentions the Howard judgment in the *Federal* court, but makes no mention of the judgment in the State court upon which the judgment of the Federal court was founded. Suing over in the Federal court did not extinguish its lien.

Chamberlain or Howard—if anybody but the present receiver—should have the road. Chamberlain was a judgment creditor and a lessee of the road. Counsel insist that the effect of that decree in the District Court was to *vacate and annul* the judgment and lease as to all the world, and that they are now of no force or effect, as between the parties thereto. But such, *we* apprehend, is not the effect in law. The effect of that decree was but to postpone the lease to the judgment of another party. The Milwaukie and Minnesota Company can claim no advantage from it.

The attack on the Milwaukie and St. Paul Railroad Company is gratuitous wholly. Legal rights are not to be denied it, merely because the granting of those rights are necessary to its interests and would greatly promote them. Yet this, in effect, is the argument of the other side.

Mr. Justice MILLER delivered the opinion of the court.

The first ground assigned for the appeal is, that the decree is a departure from the mandate of the court, because it should not have been rendered until the accounts of the receiver were adjusted, and it was judicially ascertained how much of the millions he had received ought now to be applied to the payment of complainants' interest coupons.

This construction of the mandate cannot be sustained. The receiver is the officer of the court, and neither party is responsible for his misfeasance or malfeasance, if any such exists, and it was not, therefore, reasonable that complainants should be delayed in the collection of their debts until the close of a litigation over the receiver's accounts, which might occupy several years. The suit had already been pending four years, and the mandate required the Circuit Court, in its decree *nisi*, to give another year for the payment of the sum found due. To suppose that this court

intended, in addition to these five years, to withhold the recovery of complainants for the additional uncertain period which might be necessary to litigate the receiver's accounts, is to impute to it a manifest injustice. The language of the mandate had reference to the sum *actually* in the receiver's hands, properly applicable to the payment of this debt, and not to what it might turn out on full investigation *ought* to be there for that purpose. This court had no reason to suppose that there would be any controversy with the receiver on the subject, and framed its mandate on the supposition that all the money for which he would be responsible, would be at once forthcoming. If such is not the case, neither the loss nor the delay of ascertaining the fact was intended by this court to be imposed on the complainants. The decree of the court is, therefore, AFFIRMED.

But another order was made by the Circuit Court, of a very important nature, after the return of the case from this court, and before the decree just affirmed, which appellants seek to have reversed.

At the first term of that court after the mandate was filed, the appellant proposed to pay all the money due on complainants' mortgage, on condition that an order should be made discharging the receiver, and placing the road and its appurtenances in the possession of appellants. Upon the hearing of this petition of appellant, the judges of the Circuit Court were divided in opinion, and the application was thereupon refused, as it was not a division upon a subject which is authorized to be certified to this court for its action.

The appellant insists that this court shall now review the order of the Circuit Court on this subject; and while conceding that it is not such an order, as standing alone could be the subject of an appeal, contends, that as the record is properly here on appeal from the final decree which we have just considered, the whole record is open for our inspection, and that it is our duty to correct the error of which he complains in this particular.

Opinion of the court.

There is no question but that many orders or decrees, affecting materially the rights of the parties, are made in the progress of a chancery suit, which are not final in the sense of that word in its relation to appeals. The order of the court affirming or annulling a patent, and referring the case to a master for an account, is an instance. The adjudications which the court makes on exception to reports of masters, often involving the whole matter in litigation, are not final decrees; and in these and numerous other cases, if the court can only, on appeal, examine the final or last order or decree which gives the right of appeal, it is obvious that the entire benefit of an appeal must, in many cases, be lost.

The order complained of in this case seems to be one of this class. The complainants are seeking a foreclosure of a mortgage with a view to make their debt. The owner of the equity of redemption in the mortgaged premises comes forward and offers to pay this debt, or all of it that is due, provided his property, which is in the custody of the court, shall then be restored to his possession. The right of the owner to this order is, under ordinary circumstances, very clear, and a refusal by the court to give him this right would seem to call for the revisory power of this court, when the whole case is before it, on the record brought here by appeal from a final decree.

The only doubt which the court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court, with which this court will not interfere.

As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment, or the discharge of a receiver for the mortgaged property, very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defen-

dant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it. That the order asked for by appellants should have been granted, seems to us very clear.

It was objected by the complainants that the receiver should not be discharged, because the security of the road and its appurtenances was not sufficient to insure the payment of their debt, and, therefore, its receipts should be applied to that purpose through the agency of a receiver.

The amount of complainants' debt, exclusive of the interest (which appellants proposed to pay), was one million of dollars, which, added to twelve hundred thousand dollars of prior mortgages, made the sum of two millions two hundred thousand dollars which the road and its appurtenances should be worth to secure complainants' debt. The road bed on which complainants' mortgage is a lien is ninety-five miles from Milwaukie to Portage, besides the depots, rolling stock, and other appurtenances belonging to it. It constitutes a part of the direct line from the former city to the Mississippi River, which is one of the most valuable routes in the United States, both present and prospective. The gross earnings from this ninety-five miles for the year preceding the application to discharge the receiver, as shown by his reports, were about eight hundred thousand dollars; and although these reports show a great falling off in the receiver's receipts since that time, the circumstances which have produced it are not of a character to incline us to continue the road in the possession of a receiver. The road was also in good repair. The decree which we have just affirmed authorizes the complainants, upon default in payment of any future instalment of interest, to apply for and have an order of sale of the road under that decree. Under these circumstances, when appellants propose to pay to me $300,000 or

$400,000 of complainants' debt before possession is given, it is idle to say that the security of their debt requires the road still to be detained from its lawful owner.

Sebre Howard objects to the discharge of a receiver, because he has a judgment of $16,000 against the La Crosse and Milwaukie Railroad Company, which he claims to be a lien on the road; and as the present receiver has also been appointed receiver in his suit, he claims that his debt must first be paid before he can be discharged.

The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery; but the extraordinary proceeding of taking millions of dollars worth of property—of such peculiar character as railroad property is—from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court.

Selah Chamberlain objects to the discharge of the receiver, and particularly to delivering the property into possession of appellants, because he says he has a lien of over $700,000 on the road, and because that lien is secured by a lease which entitles him to the possession of the road.

Mr. Chamberlain had been in possession under his lease for some time prior to the appointment of a receiver, under a contract with the La Crosse and Milwaukie Railroad Company, by which he bound himself to keep down the interest on the various mortgages on the road, including the one on which this suit is brought. This he had failed to do, and had actually abandoned the possession to the complainants in this suit, who were in possession at the time the receiver was appointed. His judgment was assailed, and declared to be fraudulent and void by a decree of the District Court of the United States. There is a question whether that decree

is binding as between him and the present appellants, which we do not intend to decide here; but we refer to this fact as having strong influence on the question of the propriety of keeping the road in the hands of a receiver for his benefit, or delivering it to him if the receiver is discharged. We shall endeavor to protect his interest, whatever it may be, in any order that shall be made on the subject.

As to the Milwaukie and St. Paul Railway Company, who also resisted this application, we do not see that they have any legal interest in the matter; and the interest which prompts their interference is not such as the court can consider on an application of this kind.

In reference to all these parties we remark again, that the court deprives them of none of their rights to proceed in the courts in the ordinary mode to collect their debts, and that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers, the exercise of which can only be justified by the pressure of an absolute necessity. Such a necessity does not exist here; and the fact that so many years of the exercise of this power has not produced payment of any part of the debts which the receiver was appointed to secure, is an irresistible argument against his longer continuance.

The order of the court dismissing this application is, therefore, REVERSED, and the case remanded to the Circuit Court, with instructions to ascertain the amount due to complainants within some reasonable time to be fixed by said court, and to make an order that on the payment of that sum, with the costs of complainants, into court, the receiver shall be discharged, and the railroad from Milwaukie to Portage City, with all the appurtenances, rolling stock, and other property, real and personal, belonging to said division of road, be delivered by said receiver to the Milwaukie and Minnesota Railroad Company; but that no such discharge of the receiver, or delivery of the road and its appurtenances, shall be made until said company shall first enter into bond

Statement of the case.

with sufficient surety to pay to Sebre Howard and Selah Chamberlain all such sums as may come into the hands of said company, which shall hereafter be found to be rightfully applicable to the payment of their claims, if they shall be established as liens on said road. And the appellants to recover their costs in this court.

ACTION ACCORDINGLY.

UNITED STATES *v.* STONE.

1. The United States may properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued by itself, ignorantly or in mistake, for lands reserved from sale by law, and a grant of which by patent was therefore void.
2. The southern boundary of Camp Leavenworth is the line as established by the surveyor, McCoy, A. D. 1830, for such extent as it was adopted by the subsequent surveys of Captains Johnson and Hunt, A. D. 1839, 1854, and by the Government of the United States. The Secretary of the Interior, in 1861, transcended his authority when he ordered surveys to be made north of it.
3. The treaty of 30th May, 1860, between the United States and the Delaware Indians, conferred a right to locate grants only on that portion of the Delawares' lands reserved for their "permanent home" by the treaty of 6th May, 1854, and did not authorize their location on that portion of those lands which, by that treaty, were to be sold for their uses.

THE United States, by treaty with the Delaware Indians, in 1818, agreed to provide for them a country to reside in; and in 1829, by supplementary treaty, agreed that the country in the fork of the Kansas and Missouri Rivers, extending "up the Missouri TO Camp Leavenworth," should be conveyed and secured to them as their said home.

A Senate resolution of 29th May, 1830, ratifying this treaty, provided that the President should employ a surveyor to run the lines, to establish certain and notorious landmarks, and to distinguish the boundaries of the granted country, *in the presence of an agent of the Delawares*, and to report to the President his proceedings, with a map; and

that, when the President was satisfied that the proceedings had been concurred in and approved by the agent of the Delawares, *he should also approve of the same by his signature and seal of office, and cause a copy to be filed among the archives of the Government.*

In 1827,—more than two years prior to this supplemental treaty,—Colonel Leavenworth, by orders of the Government, had selected a site for a "permanent cantonment" on the same bank of the Missouri; which site has always since been in the occupancy of the United States as a military post, and is the "Camp Leavenworth" referred to in the supplemental treaty above mentioned. The precise limits or extent of this cantonment, as originally fixed, if any were fixed, did not appear. The region at that time was wild; and the cantonment was one for shelter, rather than for defence.

Pursuant to the Senate resolution, one McCoy, a surveyor, made a survey in the summer of 1830, and made a report also of it, with a plat, in compliance with his instructions. His plat was now produced. In his report, McCoy says: "In the treaty no provision was made for a military *reserve* at Cantonment Leavenworth. It has been thought desirable that a tract of six miles on the Missouri River, and four miles back, should be secured for this object. Accordingly, the survey about the garrison has been made with a view to such a reservation, as will be seen by reference to the plat. *In this arrangement the Delaware chief, to whom the whole was fully explained on the ground, has cordially acquiesced.*"

No copy, however, of this report, with any map approved by the agent of the Delawares, or with the signature and seal of the President as provided for in the Senate resolutions, was found in the War Office. It did not appear that search was made in the State Department. There was, however, a copy without the President's signature or seal of office found in the War Office, and filed among its documents, directed to the Secretary of War.

The next survey of the military tract about Fort Leavenworth was made by Captain A. R. Johnson, in 1839, under orders, and a map of the survey filed in the War Depart-

ment. By this map, the *southern* boundary of the military tract appears as originally fixed by McCoy, in 1830, but the *western* boundary was somewhat changed by taking a natural boundary, instead of a geographical line run by McCoy.

In 1854, the Secretary of War ordered a survey to be made, and a reservation laid off for military purposes at the fort, which survey was made by Captain Hunt; and being approved by the Secretary of War, the land therein set off was directed by the President to be reserved for military purposes. This survey also followed the southern boundary line run by McCoy, in 1830; but Captain Hunt thought it proper to limit this line so as to exclude a part of the land embraced in the original reservation of 1830 and in the survey by Captain Johnson. In his report, Captain Hunt, after stating that the line is run with McCoy's southern boundary, says: "But as the reserve, as formerly laid out, was much larger than I conceived necessary under my instructions, I only went out two and three quarter miles on this line, and thence along the top of 'The Bluffs' as near as I could, to make a good boundary to the Missouri River."

This final survey made a camp of about three miles square; the usual size of our camps.

By treaty of the 6th of May, 1854, the Delaware Indians ceded to the United States all the land in the forks already mentioned, with the exception of a certain part reserved in the treaty,—no part of which reserved portion was north of McCoy's line as limited by Captain Hunt. This *reserved* part was to be still their "permanent home." The treaty provided that the United States would have the ceded country surveyed and offered for sale, and pay the Indians the moneys received therefrom. It provided, also, that, when the Delawares desired it, the President might cause the country reserved for their "permanent home" to be surveyed in the same manner as the ceded country was to be surveyed, and might assign such uniform portions to each person or family as should be designated by the principal men of the tribe.

Statement of the case.

In making the surveys under this treaty of May 6, 1854, the lands between the western line of McCoy's survey of 1830 and the western line of Hunt's survey of 1854 were surveyed, and were afterwards sold, by order of the President, for the benefit of the Delawares. But in those surveys, the western line of Hunt and the southern line of both McCoy and Hunt, as far west as Hunt ran, were accepted as the true lines of the military reservation, and no surveys under the treaty were made therein.

By the next treaty with the Delawares (made May 30, 1860), it was agreed that, in consideration of long and faithful services, certain of their chiefs should "have allotted to each a tract of land," to be selected by themselves, and should receive "a patent in fee therefor from the President of the United States."

The Commissioner of Indian Affairs, in the year 1861, informed the Commissioner of the General Land Office that the Secretary of the Interior had decided that the land lying between the fort and the southern line of McCoy's survey belonged to the Delawares, and had ordered the same to be surveyed. And the chiefs, or one Stone, rather, to whom they had assigned their "floats," having made selections in this strip, and everything having gone through the usual forms, patents passed the great seals, and having been signed by the President, were delivered to the chiefs, or to their agent, and subsequently to Stone, who now held, by deed from them, the estates granted.

The patents all recited the promises of the treaty of 1860 to grant land to the chiefs, and went on to grant the particular tract, "in conformity with the provisions, as above recited, of the aforesaid treaty." In 1862, the Secretary of the Interior decided that the patents had been issued without legal authority, and *he* declared them void and revoked. However, to proceed rightly, the United States filed a bill in the Federal court of Kansas, against the Indian chiefs and Stone, to have them judicially decreed null, and the instruments themselves delivered up for cancellation. The court gave the decree asked for. Appeal here.

Argument in support of the patent.

Messrs. Stinson and Browning, with whom were Messrs. Ewing and Carlisle, for the appellant Stone.

1. The recitals of the patent are conclusive, that the lands were within the class from which the chiefs might select. The language of the treaty of 1860 is, "there shall be allotted" to the grantees, to be selected by themselves, so many acres of land. There are no words of limitation upon this power of selection. It is made the duty of the President to issue patents for the lands so selected. This duty is cast, by the laws of the United States, upon the Commissioner of the General Land Office, under the direction of the President. The selections having been made, it was the duty of the commissioner, of course, either to pass upon them, under the direction of the President, and by procuring the patent to issue, make the allotment complete, or else to refuse to approve and ratify the selection. The interests of the Delawares were under the supervision of the Commissioner of Indian Affairs. These selections were made; they received the approval of the Commisioner of Indian Affairs, and were sanctioned by the President and the Commissioner of the General Land Office, by the issuing the patents.

The principal case in which the jurisdiction of chancery is affirmed to annul patents, at the suit of the sovereign,* is put upon the ground of fraud practised by the patentee. This is believed to be the only ground upon which the courts of chancery have heretofore taken jurisdiction in such cases. Admitting, however, that if the land were within the boundaries of any military reservation, a mere grant of it might be voidable, yet where the Commissioner of the General Land Office and the President declare, as they do here, that *they are acting "in conformity with the provisions of a treaty"* which authorizes grants only of lands *not* in such reservation, then the Government is concluded. It is estopped to say that the land was in a military fort. The discretion of saying what portion of these lands was open to patent, is vested by the

* Attorney-General *v.* Vernon, 2 Reports in Chancery; S. C., 1 Vernon, 277.

Argument in support of the patent.

Government in its officers, and the discretion having been exercised honestly, the decision is conclusive upon the Government. When no wrong is done to an individual, "it is supposed the acts of the executive, within the general scope of its powers and by virtue of law, cannot be removed, though to some extent the letter of the law may not have been followed. There is no court of errors in which executive decisions that do not affect individual rights can be reversed."* Any other doctrine would transfer the decision of every question of boundary and location which might arise in the sale of the public lands from the Land Office to the courts, and reduce letters patent under the great seal from the highest to the lowest grade of evidence of title. While the mere issuing of the patent has been treated by the courts as a purely ministerial act, yet the patent, when issued, becomes conclusive evidence of all the matters essential to the legality of its issue.

2. But, in point of fact, are these lands within the camp? Camp Leavenworth was located, in 1827, upon the public lands of the United States. There was no rule or usage which attached adjacent lands to such a camp. *Mitchell* v. *United States*† will, perhaps, be relied on by the other side as an authority for a limit of three miles. But that curtilage established in that case was founded on a Spanish usage in regard to fortified places, and even then a purchase from or cession by the Indians was necessary.

The authority to appropriate a portion of the public domain, in the vicinity of military posts, to their use, is conceded to the President as an incident to his power to establish such posts; but some actual appropriation is necessary; the establishment of a *camp* does not *proprià vigore* also establish a military reservation about it.‡ However, in this case there is no evidence even of a disposition by the President to have any part of this land; for it was provided by the treaty of 1829, that when the President is satisfied that the boundaries,

* United States *v.* Lytle et al., 5 McLean, 9; Astrom et al. *v.* Hammond, 3 Id. 107.

† 9 Peters, 711; S. C. Id. 52. ‡ Wilcox *v.* Jackson, 13 Id. 498.

as fixed by the surveyor, have been concurred in by such agent, he shall approve the proceedings under his signature and seal of office, and the boundaries so fixed shall be conclusive upon the parties to the treaty. There is no evidence that he ever did approve of anything. The non-production of the required map is rather proof that he did not. Whenever the United States have sought to reserve the right to establish military posts upon lands granted to an Indian tribe, the reservation has been distinctly made in the treaty containing the grant.* In 1832, the United States, by treaty, ceded to the Kickapoo Indians a portion of country immediately north of the reservation of the Delawares; but prescribed the boundaries of the ceded country, so as to exclude a large area northwardly and westwardly, from Camp Leavenworth. This express reservation, in that case, is presumptive evidence that no such reservation was implied or intended in the treaty with the Delawares of 1829.†

The faith and dignity of the Government forbid that any claim should be made on its behalf to the lands in controversy by reason of occupancy and possession. In no case can the United States acquire title by pre-emption. Here the Indians could not sue,—the Government could not be sued. The peculiarly fiduciary relations of the Government to the Indians, and their condition of absolute dependence, would in any event destroy the presumption of a grant which might in other cases arise from such possession unexplained.

Mr. Coffey, special counsel of the United States, contra.

1. This court has settled that the issuing of a patent for public lands is a ministerial act, which must be performed according to law; and that where it has been issued, whether fraudulently or not, *without authority of law*, it is void. The

* 7 Stat. at Large, 15, Art. 3; 17, Art. 4–7, 8; 22, Art. 3; 24, Art. 3; 30, Art. 10; 33 Art. 1, 2; 51, Art. 4; 56, Art. 4; 68, Art. 3; 86, Art. 11; 93, Art. 1; 314, Art. 9.

† Id. 389–391.

doctrine was strongly stated in *The State of Minnesota* v. *Bachelder* at the last term.* And such patents have been repeatedly declared void, both at law and in equity, though, as Marshall, C. J., says, "A court of equity is better adapted to the purpose than a court of law."† *Ladiga* v. *Roland*,‡ where an act of the President, under a special authority by treaty in disposing of Indian lands, was declared void for not conforming to the treaty, is, in principle, not unlike the present case. In *Jackson* v. *Lawton*,§ Kent, C. J., says, that the general rule is, that letters patent can only be avoided in chancery by a writ of *scire facias* sued out on the part of the Government, or by some individual prosecuting in its name; but he admits the equitable remedy also as a true one. He thus speaks: "The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. In addition to the remedy by *scire facias*, &c., there is another by bill in the equity side of the Court of Chancery. Such a bill was sustained in the case of the *Attorney-General* v. *Vernon*,‖ to set aside letters patent obtained by fraud, and they were set aside by a decree."

Where the United States is the party injured, as in this case, these principles are equally available for her relief. The patents, it is true, were issued by her officer, but she is not bound by their unauthorized acts. Her officers can bind her only within the scope of their lawful authority.

Plainly, too, the appropriate remedy of the United States, to set aside and cancel patents issued by her officers, without due legal authority, is by bill in equity.

2. The question then remains, What was the southern boundary of the fort? The line we apprehend as run by the surveyor, McCoy. This person made his survey in substantial compliance with the terms of the Senate resolution,

* 1 Wallace, 115.

† Polk *v.* Wendell, 9 Cranch, 98; Hoofnagle *v.* Anderson, 7 Wheaton, 214; Cunningham *v.* Ashley, 14 Howard, 389; Lindsey *v.* Miller, 6 Peters, 674; Brown *v.* Clements, 3 Howard, 667.

‡ 5 Howard, 581. § 10 Johnson, 24. ‖ 1 Vernon, 277.

and with the approval of the agent of the tribe. He reported his proceedings to the Secretary of War, the minister then intrusted with that branch of executive duty; and the map of his survey, taken from the records of the Government, is in evidence. In the absence of specific proof, the formal approval of the President will be presumed, as well because the condition upon which that approval depended was performed, viz., the concurrence of the agent of the Delawares in the survey, as, moreover, because no other survey of the Delaware grant was ever made afterwards, but the tribe took possession and held under that survey without objection for twenty-five years. This long acquiescence by both parties, with actual possession by the Delawares on one side of the lines, and by the United States on the other, must be conclusive.

Its recognition and adoption by the Executive Department is shown by the survey of Johnson in 1839; by the survey of Hunt in 1854; and the subsequent reservation by the President of the land therein embraced for military purposes, and by other evidence in the case. And the fact that the Secretary of the Interior, in 1861, overruling the decision of his predecessors, ordered surveys to be made north of that line, does not weaken the significance of this recognition.

The line was to run up the Missouri "*to*" Camp Leavenworth; but the treaty did not attempt to designate the site of the camp. That was a question of fact to be ascertained and determined by the United States, which had the right as absolute owner to say how far its selected military camp should extend. The proper person to decide that question was the authorized surveyor, who, in the presence and with the sanction of the Indian agent, was marking on the ground the vague boundaries fixed by the treaty. After twenty-five years of acquiescence by both parties in that designation, it must be accepted as an authoritative construction of the treaty, having the force of the treaty itself. The land in question was therefore never a part of the grant to the Delawares.

No law, or even uniform practice, has ever fixed a method by which the limits of a military reservation out of the public lands must be ascertained and marked. Each reservation has been designated in its own way, and some of them, as that of Rock Island, have never been surveyed at all. The survey of the exterior lines of the reservation of Camp Leavenworth by McCoy, has more of legal form and authority, as a designation of the reserve, than that of many others. This court, in *Mitchell et al.* v. *United States*,* directed that where the boundaries of land, ceded by the Indians to the King of Spain, in Florida, for the erection of a fort, could not be ascertained, the adjacent lands, which were considered and held by the Spanish government, or the commandant of the post, as annexed to the fortress for military purposes, should be reserved with the fortress for the use of the United States; that if no evidence could be obtained to designate the extent of the adjacent lands which were considered as annexed to the fortress, then so much land should be comprehended in the reservation as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. And if no such military usage could be proved, then it was ordered that the reservation consist of the land embraced within certain lines extending from the point of junction of two rivers *three miles* up both of said rivers.

Attorney-General Butler, who argued the case for the United States, suggests† that the length of three miles was probably selected, because generally considered the extreme distance to which a cannon-shot can be thrown. In an official opinion of his he advises the application of the rule laid down by the court in that decree,‡ in ascertaining the extent of other unsurveyed reservations out of the public lands for military purposes. If the rule be that the reservation should extend three miles around the fort, the line of McCoy, as altered by Johnson and Hunt, has kept within those limits. And whether three miles was fixed by the

* 9 Peters, 761, 762.

† 3 Opinions of the Attorneys-General, 110. ‡ Ib.

supposed length to which a cannon-shot could be thrown or not, it is clear that it was wisely adopted to protect military fortifications from encroachments like that in the present case, which actually, if I may here state a fact, takes part of the necessary buildings of the fort.

3. The treaty of 30th of May, 1860, conferred on the chiefs the right to select their respective portions of land from the body of land reserved to the tribe for its "permanent home" by the treaty of May 6, 1854, and from that body of land only; and, therefore, any selection made, even by themselves in good faith, outside of that permanent home, on the lands granted to the tribe by the supplemental treaty of 1829, and afterwards ceded to the United States in trust for the tribe by the treaty of May 6, 1854, would be unauthorized and void.

Mr. Justice GRIER delivered the opinion of the court.

A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy.

Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

It is contended here, by the counsel of the United States, that the land for which a patent was granted to the appellant was reserved from sale for the use of the Government,

and, consequently, that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed.

The grant to the Delaware Indians in 1829 calls for Camp Leavenworth as a boundary; consequently, the camp and its appurtenances were not included in the grant. What lands properly belonged to this military post, and the proper curtilage necessary for the use and enjoyment of it not being fixed with precision in the general description of the land granted, could be ascertained only by a survey on the ground.

The resolution of the Senate of May 29th, 1830, provides that the President should employ a surveyor "to run the lines, and to establish certain and notorious landmarks accurately and permanently, to distinguish the boundaries of the country granted, in the presence of an agent to be designated by the Delaware nation, the surveyor to make report with a map or draft of the said granted country," &c. The Secretary of War, by the authority of the President, referred the execution of this duty to a surveyor (McCoy), instructing him "to be governed in every particular by the treaty and the resolution of the Senate."

No copy of this report, with the map approved by the agent of the Delawares, and with the signature and seal of the President, as provided for in the Senate resolution, is found in the War Office, and it does not appear that search was made in the State Department. There is, however, a copy found in the War Office, directed to the Secretary of War, and filed among its documents.

This survey was made in the presence of the agent of the Delawares. It marked the usual quantity of about three miles square, as appurtenant to the post and necessary for its use and subsistence, making the lines thereof the boundary of the grant to the Delawares, with the concurrence and consent of the agent of the nation. It was made in the year 1830, and since that time both parties have held pos-

session and claimed up to the lines then established by the survey. In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case, notwithstanding the absence or loss of the document required by the resolution of the Senate.

The authority of the President, acting through the Secretary of War and his officers, to have posts and forts established, with a proper quantity of ground appropriated for the use of each reserved from sale, is fully discussed and decided in *Wilcox* v. *Jackson*.

In 1854, a survey was made under orders of the Secretary of War, "including the buildings and improvements, and so much land as may be necessary for military purposes, at Fort Leavenworth." This survey adopted the southern boundary as run by McCoy, and commenced at the same point. It did not include all the land reserved by that survey, but the land now claimed is embraced within its limits. This survey was approved by the President, and the land contained in it formally reserved for military purposes. The survey made of the Delaware lands, under the treaty of 1854, adopted the McCoy line.

The Secretary of the Interior, in 1861, transcended his authority when he attempted to overrule the acts of his predecessors, and ordered surveys to be made north of that line to include the land now in question.

We are of opinion, therefore,

1st. That the land claimed by appellant never was within the tract allotted to the Delaware Indians in 1829 and surveyed in 1830.

2d. That it is within the limits of a reservation legally made by the President for military purposes.

Consequently, the patents issued to the appellant were without authority and void.

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The question on the construction of the treaty of 1860, as to whether the grants to the chiefs and interpreter were to be located within that portion of these lands which was reserved for their "permanent home," or in that portion which was to be sold for their use, would be also fatal to the claim of appellant. But the decision of the other points in the case make this one only hypothetical, and, as it is a question not likely to ever arise again, we think it unnecessary to vindicate our opinion by arguments.

DECREE AFFIRMED.

THE ANN CAROLINE.

1. The ordinary and settled rule of navigation, that when two vessels are approaching each other on opposite tacks, both having the wind free, the one on the larboard side shall give way and pass to the right, does not apply when one is to the windward of the other, and ahead of or above her in a narrow channel, so that an observance of it would probably produce a collision.
2. Stipulators in admiralty, who have entered into stipulations to procure the discharge of a vessel attached under a libel for collision, cannot be made liable for more than the amount assumed in their stipulation as the amount which the offending vessel is worth, with costs as stipulated for.
3. The true damage incurred by a party whose vessel has been sunk by collision being the value of his vessel, that sum (without interest) was given in a proceeding *in rem.*, where the value of the offending vessel was fixed in stipulations that had been entered into to procure her discharge at that identical sum.

THIS was an appeal in admiralty from the decree of the Circuit Court for the Southern District of New York, in a case of collision at sea,—the case being thus:

The owner of the schooner J. C. Wells filed a libel in admiralty in the Southern District of New York against the schooner Ann Caroline, to recover damages for a collision occurring on the eastern shore of the Delaware Bay. The two vessels were beating up the bay of a fine morning in February, 1854, in company with several other vessels, and

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were just now between "Crow Shoal" and the Jersey shore, a passage in the bay where the channel is about a mile wide. The wind was N. N. W., a five or six knot breeze, "a full-sail breeze," the tide, flood, setting up the bay. The day being clear, nothing obstructed observation up and down the bay, except the transit of the various vessels across it. The Wells was closehauled on her larboard tack, which was a long tack from Crow Shoal to the Jersey shore. The Ann Caroline closehauled on her starboard tack on the opposite course from the Jersey shore to Crow Shoal. The Wells was heavily laden; the Ann Caroline in ballast. The two vessels had tacked at the Crow Shoal, upon the long tack, nearly at the same time; the Caroline at the time being to the leeward of the Wells and somewhat astern of her. The Ann Caroline ran out but one-half or two-thirds of her course when she suddenly came round on her starboard tack in consequence of a vessel ahead suddenly tacking and obstructing her course. While on this course she came in collision with the Wells, striking her on her starboard side, about ten or fifteen feet from her taffrail, opening her side so that she sank to the bottom of the channel in a few minutes, and was totally lost.

The main ground upon which the defence of the Ann Caroline rested was, that she was on the starboard or privileged tack, and that it was the duty of the Wells to give way and pass to her right. This rule of navigation was admitted on the other side; but it was insisted that it had no application to a case where the relative position of the two vessels was such as was here made out. It was contended for the owner of the Wells that she was to the windward of the Caroline, and ahead or above her in the channel, and that if this rule had been observed and the Wells had ported her helm, a collision would have been inevitable; that the change of course would have brought her head against the starboard side of the Caroline, and that a proper manœuvre in the emergency was to starboard her helm, which she did, and which would have avoided the other vessel if *she* had not ported her helm at or about the same time,

and so done that which caused her to strike the Wells on her starboard side, but a few feet from her stern.

One controlling question in the case therefore was, whether or not the Wells was to the windward, and so far above the course of the Ann Caroline, before the two vessels came together, as to forbid the application of the settled rule of navigation, that when two vessels are approaching each other on opposite tacks, both having the wind free, the one on the larboard tack shall give way and pass to the right.

The proofs were voluminous, and the testimony of the master and hands on board the respective vessels as usual in this class of cases was contradictory—those of the Wells contending that the course of the Caroline was to the leeward and southerly of that of their vessel, while those on the Caroline insisted that her course was to the windward of the Wells. But, in addition to the witnesses on the two vessels themselves, it so happened that four other witnesses (masters and hands upon two other vessels engaged at the same time in beating up this channel, and who were on the same tack with the Wells, but to the leeward and a little to her stern), witnessed the collision and the course of the vessels previous to the accident. These confirmed the testimony of the master and hands of the Wells as to the course and relative position of the two vessels. The Circuit Court accordingly made an interlocutory decree that the libellant recover "the loss and damages by him sustained by reason of this collision;" and it was referred to a commissioner "to ascertain the amount of such loss or damage."

The commissioner reported that the damages sustained by the libellant were:

1. The loss of his vessel, the Wells, whose value he fixed at . .	$5000 00
2. *Interest from the day of the collision and loss to that of filing the report, November* 12, 1860, ...	2362 50
	$7362 50

This being excepted to, the Circuit Court recommitted the report. The commissioner now made a second report,

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in which, finding, as before, the value of the Wells to be $5000, he took another basis of damages and gave the libellant:

1. The value of the *Ann Caroline*, which was estimated by the commissioner at	$3500 00
2. The freight pending on her cargo, ...	513 00
3. Interest on the freight and value of the Caroline to the date of the second report, October 7, 1862, ...	2431 43
	$6444 43

It is necessary here to state that, after the marshal of the United States attached the Ann Caroline, her claimants and the owner of the Wells, by agreement, filed of record, fixed her value at $5000, and that stipulators entered into stipulations reciting the attachment, value fixed, "as appears from said consent, now on file in said court;" and "agreeing that, in case of default or contumacy on the part of the claimants or their sureties, execution for the *above amount* may issue against their goods, chattels, and lands:" on which the vessel was discharged. A stipulation was also filed for costs, to the extent, however, of but $250.

The Circuit Court entered a decree on the basis of the second report. The decree

ORDERED, that the libellants recover against the schooner Ann Caroline and claimants (the sum awarded by the commissioner), ...	$6444 43	
With interest from the date of the commissioner's report, ...	26 31	—$6470 74
Together with their taxed costs, ...		731 77
In all, ...		$7102 51

And that "a summary judgment be, and the same is hereby entered, for the *amount aforesaid* against the *stipulators*, &c.;" and, unless an appeal was entered, that *execution issue* against the claimants and *them*.

From this decree both parties appealed. The libellant objecting because, as he said, the damages allowed were less than he was entitled to recover, the Ann Caroline having been valued by the commissioner but at $3500, instead of at $5000, as it ought to have been, that having been the

value agreed on by the claimants themselves. And the claimants objecting because, as they said, the Wells was in fault and nothing was due; or if she was not, and anything was due, it could not possibly exceed $5000, the amount fixed by consent as the value of the *Ann Caroline;* and for which sum, and no greater, the stipulators had agreed to be contingently bound. The libellants asserted, moreover, that the *first* report of the commissioner, which gave them the value of *their own vessel*, the Wells—which, by the fault of the claimants' vessel, had been sunk—and interest from the date of that loss, was the true rule.

Mr. Benedict for the libellants; Mr. Donohue, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the Southern District of New York, in a cause of collision, civil and maritime.

Damages are claimed in this case by the libellant on account of a collision which occurred on the 11th day of February, 1854, in Delaware Bay, between the schooner John C. Wells, bound on a voyage from New York to Philadelphia, and the schooner Ann Caroline, bound on a voyage from New York to Smyrna, in the State of Delaware, whereby the former was run down and sunk in the bay, and became a total loss. Libel was filed by the owner of the John C. Wells on the twenty-fourth day of February, 1854, and the owners of the Ann Caroline on the sixth day of December following appeared and filed their answer. Both parties took testimony in the District Court, and, after the hearing, a decree was entered dismissing the libel, and the libellant appealed to the Circuit Court. Additional testimony was taken in the Circuit Court and the parties were again heard, and, after the hearing, a decree was entered reversing the decree of the District Court, and a decree was entered in favor of the libellant. Whereupon both parties appealed to this court.

Opinion of the court.

I. Libellant objects to the decree because, as he says, the damages allowed are less than he is entitled to recover; and the claimants object to it because, as they say, the libellant is not entitled to recover anything. Claimants' vessel was sailing in ballast, but the vessel of the libellant was deeply laden with a cargo of assorted merchandise. They both sailed from the port of New York on the day previous to the collision, and the evidence shows that they both came to anchor during the night, in company with some fifteen or twenty other schooners, at a well-known anchorage outside of Cape May. Evidence also shows that they both got under way on the following day about one or two o'clock in the afternoon, and at the time of collision were beating up the channel, between what is called Crow Shoals and the Jersey shore. Most or all of the other vessels got under way about the same time, and were also beating up the bay in the same general direction. Proofs show that the wind was north-northwest, blowing "a full-sail breeze," and that the tide was an hour flood setting up the bay. Course of the vessels when they first got under way at the anchorage was on the long tack towards the Jersey shore, and it appears that both the vessels were put upon that course. Beating out that tack they then came about and stood towards the buoy, near the lower end of the shore, on the western side of the channel. Master of the Wells testifies that his vessel went so near the shoal before tacking that she stirred the mud with her centre-board or keel. Vessel of the claimants was more to the leeward, and it appears that her course was changed before she approached so near to the shoal. Pathway of the libellant's vessel was near the shoal, but the vessel of the claimants was some distance to the leeward and somewhat astern. Having beat out that tack without any difficulty, and without anything have occurred to indicate that they were in danger of colliding, they both went about and were again put on the long tack towards the Jersey shore, and the proofs are full to the point that they were both sailing on about the same course. Claimants' vessel being to the leeward, and both vessels being closehauled on

the wind, there could not be any danger that they would come together. They were both upon the larboard tack, and were heading about north-northeast. Remark should be made that most or all of the other vessels had tacked at the buoy and were beating up the channel on the same course. Weight of the evidence also shows that all of them, except one, was to the leeward, and most of them were astern of the vessel of the libellant. Such was the state of things when the Ann Caroline suddenly and unexpectedly, as alleged in the libel, went about and was put upon the starboard tack, on a course directly towards the injured vessel. Excuse for the sudden change in her course, as alleged in the answer, is, that a schooner ahead of her having tacked, it became necessary for the vessel of the claimants to go about before she had beat out her larboard tack. Reasons of the alleged necessity are not stated, and the proofs offered in support of the allegation are unsatisfactory; but it is not proposed to place the decision upon that ground, as it is not made certain that the allegation is untrue. Allegation of the libellant is, that the change was sudden and unexpected, and the evidence leads to the same conclusion. When the vessel of the claimants went about she was put upon a course heading west by north; and as the course of the libellant's vessel had not been changed, it must have been evident to every attentive observer that a collision was inevitable unless one or the other gave way. Sailing as they were in a clear day, with nothing to obstruct their view, although in a narrow channel less than a mile wide, it is clear that there can be no just excuse for the disaster, and consequently there is fault on one side or the other.

II. Theory of the claimants is that inasmuch as their vessel had come round on to the starboard tack, it was the duty of the vessel of the libellant to give way and pass to her right. General rule of navigation undoubtedly is that a vessel on the starboard tack, if closehauled, has a right to keep her course, and that one on the larboard tack, although she is also closehauled, must give way or be answerable for the

consequences.* But it is insisted by the libellant that the rule has no application to the relative position of the two vessels, as shown by the evidence in this case. His proposition in that behalf is that his vessel was to the windward of the vessel of the claimants, and so far ahead of her in the channel that if those on board his vessel had observed the general rule and ported her helm, a collision would necessarily have followed. Granting that the position of the two vessels was such as is assumed by the libellant, then it is clear that the rule of navigation under consideration cannot apply, and that the views of the libellant are correct. Proximity of the libellant's vessel to the shoal was such that it rendered it unsafe for those in charge of her to attempt to go about, because the danger was, if they should do so, she would be wrecked on the reef. She could not, therefore, starboard her helm and go about, and if, as assumed by the libellant, she was ahead of the claimants' vessel and to the windward, then it is clear that she could not be required to port her helm and attempt to go to the right, as in doing so she would have to cross the bows of the vessel astern, and must incur the imminent danger of colliding with the vessel of the claimants.

III. Principal question of fact therefore, is whether the theory assumed by the libellant is correct, because it is obvious that if the facts are so, the conclusion deduced from them must follow. Two controverted facts are assumed in the proposition of the libellant. 1. That his vessel was to the windward. 2. That she was ahead in the channel. Argument is not necessary to show that the libellant is right on the first point, as the whole current of the evidence when properly understood is that way, but there is much conflict in the testimony on the second point. Where the conflict of testimony in respect to a disputed fact is between the witnesses on board the respective vessels, and no others are examined in the case, it is sometimes difficult to form any satisfactory conclusion. No such embarrassment, how-

* St. John *v.* Paine et al., 10 Howard, 581.

ever, arises in this case, as there were four witnesses examined who were on board the other vessels in the same company. Those witnesses concur in the statement, not only that the vessel of the libellant was to the windward of the claimants' vessel, but that she was above her in the channel; and in view of the whole case, we adopt that conclusion as the correct one from the evidence. The vessel of the claimants was also in fault because she had no lookout, and the evidence tends strongly to the conclusion that the disaster is mainly attributable to that cause. Testimony shows beyond controversy, that she had no lookout at the time of the collision, and that the master, after the vessel was put about and filled away on the starboard tack, went below, and when he came on deck just before the disaster occurred, he inquired, with evident displeasure, if no one had seen the vessel of the libellant, and it is clear that he had abundant reason for dissatisfaction. Usual precautions were then too late, and in a very short time the vessel of the claimants struck that of libellant, and the latter sunk in the channel. Plainly the vessel of the libellant could not avoid the collision, because if she had attempted to go about she would have gone on the reef, and if she had ported her helm, and attempted to go to the right, she would have collided with the vessel of the claimants. On the other hand, it is clear beyond doubt, that the vessel of the claimants might have avoided the disaster without any peril. She might have gone about, as she had ample room to do, or she might have starboarded her helm, and gone under the stern of the other vessel. For these reasons we think the conclusion of the Circuit Court was right upon the merits.

IV. The rule of damages adopted by the court is the subject of complaint on both sides, and as both parties have appealed, the whole matter is open to revision. Sum allowed was seven thousand two hundred and two dollars and fifty-one cents, and the court ordered a summary judgment against the stipulators for that amount. Interlocutory decree was that the libellant recover the amount of the loss and damages by him sustained by reason of the collision, and

the cause was referred to a commissioner to ascertain the amount. Commissioner reported that the value of the vessel was five thousand dollars, and that the interest on the same to the date of the report, was two thousand three hundred and sixty-two dollars and fifty cents, and he accordingly reported the amount of those two sums as the damages in the cause. Exceptions were filed by the claimant to that report as follows:

1. That the sum reported as the value of the vessel was too much.

2. That the commissioner erred in allowing interest.

3. That the rule of damages adopted was erroneous: that the amount should not exceed the value of the claimants' vessel and freight pending.

4. That the commissioner erred in examining testimony as to the value of claimants' vessel.

Circuit judge sustained the third and fourth exceptions, and recommitted the report. Subsequently, the commissioner made a second report. In his second report he found:

1. That the value of the vessel of the libellant was five thousand dollars, and that by reason of the collision she was a total loss.

2. That the vessel of the claimants was worth the sum of thirty-five hundred dollars.

3. That the freight pending on the cargo of the claimants' vessel was five hundred and thirteen dollars.

4. That the interest on the freight and value of claimants' vessel was two thousand four hundred and thirty-one dollars and forty-three cents.

Accordingly he reported as due to the libellant the aggregate of those several sums. Both parties excepted to the report, but the court overruled their exceptions and confirmed the report, which was the foundation of the final decree, which is for the same amount.

Libellant insists that the first report of the commissioner was correct, that is, that he is entitled to recover the value

of his vessel together with the interest on that amount from the time of the collision to the date of the decree. On the other side the claimants insist that the stipulation for value under the general rules of the admiralty, stands in the place of the vessel, and that the decree as against the stipulators cannot exceed the amount of the stipulation. Separate stipulations are usually filed for costs, and the same rule, it is admitted, applies to such a stipulation as to the one given for the value of the vessel. Stipulation for costs in the sum of two hundred and fifty dollars was regularly filed by the claimants in this case at the time they entered their appearance. Such a stipulation is properly required as a condition of the right to appear, unless the claimant, under the act of the third of March, 1847, had given the bond to the marshal therein mentioned for the discharge of the property arrested at the time of the service of the monition.* Suit in this case was *in rem*, and consequently the vessel, when arrested, was in contemplation of law in the possession of the court. But the practice is where the claimant desires to regain the possession to allow the value of the same to be ascertained, and when that is done according to law, the claimant may file a stipulation for that amount in the place of the vessel. When the claimant desires to secure the possession of the vessel, he may apply to the court for an appraisement, or if the parties agree upon a sum as the value, the court may adopt that sum, and accept a stipulation for that amount. Parties in this case agreed that the value of the vessel was five thousand dollars, and thereupon the court accepted a stipulation for that amount, and the vessel was delivered to the claimants.† Obligation of a stipulator is the same as that of a surety, and consequently his liability is limited by the terms of his contract. Whenever the obligation of the stipulator is for a definite sum named in the stipulation, the surety stipulating to pay that sum cannot be compelled to

* 9 Stat. at Large, 181; 2 Conklin's Admiralty, 94, 97; Admiralty Rules 26 and 34.

† Admiralty Rule 11; 2 Conklin's Admiralty, 96; Lane *v.* Townsend et al., Ware, 300.

pay more than that amount.* Same rule prevails whether the instrument is in form a bond or stipulation. Where a claimant in a suit *in rem* made application for a delivery of the property, and obtained it by an order of the court upon giving a bond to suspend the appraised value, Judge Story held that the bond was good as a stipulation, and having affirmed the decree condemning the vessel, ordered that judgment should be entered against the signers of the bond as stipulators for the appraised value of the vessel with costs.† Mr. Benedict says, that where a party is entitled to have the property delivered on bail, he is bound to stipulate with sureties to pay the full value of the property. Such value, says the same author, may usually be fixed by consent and agreement of parties, but if not, then it is ascertained by an appraisement, and on final decree the stipulators are bound to pay into court *the sum ascertained as the value.*‡

Bail is taken, says Mr. Dunlap, for the value of the ship upon the delivery of the property, and it will not be reduced upon the ground that the property brought less upon a sale than the appraised value.§ Settled rule is, that where the value of the vessel condemned in a cause of damage is insufficient to pay the loss, it is not competent for the court to award damages against the owner beyond the value or proceeds of the ship.‖ But it has been held that costs might be awarded against the owner where there was an appearance and hearing, although no stipulation to that effect had been given.¶

Rule in admiralty, however, is the same as at law, that sureties are only bound to the extent of the obligation expressed in their bond, but not beyond its plain and obvious meaning.**

* Godfrey *v.* Gilmartin, 2 Blatchford, 341; Admiralty Rule 11.

† The Alligator, 1 Gallison, 1491.

‡ Benedict's Admiralty, § 498, p. 272; Dunlap's Practice, 181; The Octavia, 1 Mason, 150.

§ Dunlap's Practice, 174; The Peggy, 4 C. Robinson, 387.

‖ The Hope, 1 W. Robinson, 155.

¶ The John Dunn, 1 Id. 160. ** The Harriet, 1 Id. 192.

Statement of the case.

True measure of damages in this case was the loss which the libellant sustained by the sinking of his vessel, which, as the commissioner reported, was five thousand dollars. He lost that amount, and there is no proof in the case that he lost anything more, for which any claim is made in the libel. Stipulation for value filed by the claimants was for that sum, and consequently the libellant is entitled to a decree against the stipulators for that sum, as the value of the vessel and no more, because they never agreed to be bound for any greater sum.

Argument of the libellant is, that he is entitled to interest on that sum as against the stipulators for value, but it is a sufficient answer to the proposition to say that this court has expressly decided otherwise, and we adhere to that decision.*

Separate stipulation was filed for costs, and, of course, the libellant is entitled to full costs in the District and Circuit Courts, unless the amount exceeds the sum specified in the stipulation. He is, also, entitled to a decree of affirmance upon the merits, but without costs in this court, and the decree of the Circuit Court must be modified as to the damages so as to conform to views expressed in this opinion.

THE DECREE AFFIRMED AS MODIFIED.

THE MORNING LIGHT.

1. A vessel astern of another cannot be held in fault for not complying with the rule which obliges the rear vessel to keep out of the way of one ahead, when it is so dark that the latter vessel cannot be seen by the former.
2. As a general rule, there is no obligation on a sailing vessel proceeding on her voyage to shorten sail or lie to because the night is so dark that an approaching vessel cannot be seen.
3. A collision resulting from the darkness of the night, and without the fault of either party, is an "inevitable accident."

APPEAL from the decree in admiralty of the Circuit Court of the United States for the Southern District of New York.

About the 6th of August, 1855, the brigs *Jerry Fowler* and

* Hemmenway *v.* Fisher, 20 Howard, 258.

Statement of the case.

Morning Light, in a dark and rainy night, were pursuing a voyage off the coast of Rhode Island through Buzzard's Bay and Martha's Vineyard, eastward, with the wind from the northeast, the Jerry Fowler being the head vessel and the Morning Light in her rear, both vessels running on their starboard tacks on about a common course. At 4 o'clock in the morning of that day a collision occurred between them, the stem or bows of the Morning Light breaking through the starboard side of the Jerry Fowler near her main rigging, so that the latter vessel, with her cargo, was, by the collision, sunk, and became a total loss.

The Alliance and other insurance companies, who had connectedly underwritten upon the Jerry Fowler in stated proportions, paid the amount of their policies, and unitedly filed their libel in the District Court for the Southern District of New York (Betts, J.), to recover from the Morning Light the sums so paid. The answer set up inevitable accident as a defence.

The Jerry Fowler, at the time of the collision, was either in the act of completing her tack, or had just come round from the larboard to the starboard tack, and come underway on the last tack; the evidence as to her particular position when the two vessels came in contact not being exactly concurrent upon that fact on either side. She was tacked, not because of any actual necessity from the nearness of shoals or dangerous impediments, but because her master thought she had approached so near the Cutterhunk Shoals as to render it proper, in the darkness of the night, to change her course. It proved she was not, in reality, within five or six miles of the supposed reefs.

The wind was about a five or six knot breeze during the greater portion of the night, but it was not steady. There were fogs, and the rain came on in fog showers. Neither vessel had unusual sail up, and both appeared to have been well manned and navigated with care. There was no attempt to prove that the Morning Light had, at any time, shortened sail or lain to.

The witnesses on each vessel asserted that a light was sus-

pended in a place for being easily seen from the other; and on each side it is asserted that neither discovered any light exhibited upon the other vessel. The witnesses on the Morning Light testified to a darkness so extreme as to disable them discerning objects distant less than her length off. Some on the Jerry Fowler state that they saw the other vessel coming upon them half a mile distant. But in their sworn protest, made directly after the accident, they represented the darkness to have been so extreme at the time of the collision as to prevent their seeing objects beyond a slight distance off. The protest, signed and attested by the crew of the Jerry Fowler, was made at Portland, Maine, on the arrival at that port of the Morning Light with those men, within three or four days after the collision; and the representation made by those men at that time of the thickness and darkness of the weather corresponds essentially with the evidence of the crew of the Morning Light on the final hearing.

The District Court held that the evidence showed a case of inevitable accident between the two vessels; or if there was, at the time of the collision between the two vessels, any culpable inattention or misconduct which conduced to produce the collision, the fault therein was a common one to both, arising from the obscure state of the weather, the want of extreme vigilance and precaution in making further signals on board both vessels, or even coming to anchor, and the uncertainty from that cause, to each vessel, what was the proper and prudent course for either to pursue in respect to the other vessel or its own individual navigation. That if it was imprudent and hazardous with the Morning Light, having knowledge that the Jerry Fowler was probably ahead in the direction she was steering, to continue a course which might have been concurrent in both vessels during the night, because the darkness had then become so dense and continuous as to prevent her position being seen by the vessel astern of her, it was no less faulty in the Jerry Fowler to put about in that state of darkness, when not impelled to depart from her previous course by any necessity of naviga-

tion, when such evolution might place and leave her in a helpless condition, in the probable path of the approaching vessel, until the latter should be so near her before she could be seen, to disable either one from escaping a collision. That upon the proofs no necessity was shown for the Jerry Fowler to make a tack for her own safety, or as an act of prudence or good seamanship, a distance of five or six miles off the reefs she intended to avoid, and that no higher necessity was shown for the Morning Light to come to in that state of the weather than for the Jerry Fowler to have done so also. That comparing the testimony given by the crew of the Morning Light with the statement in the protest made directly after the occurrence by the crew of the Jerry Fowler, the fair weight of evidence was that all hands aboard each vessel were bewildered and confused by finding themselves in sudden and dangerous proximity to each other in a thick fog, and that the collision consequent thereto was the result of accident common and unavoidable to both. That each party, under the circumstances, was accordingly bound to bear his own loss. The District Court accordingly dismissed the libel.

On appeal to the Circuit Court, the same view was taken of the evidence, and the decree was affirmed. It was from this second decree that the case came here by appeal.

Mr. Benedict, for the appellants; Mr. W. Q. Morton, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case is brought here by appeal from a decree of the Circuit Court of the United States for the Southern District of New York, sitting in admiralty.

Appellants were the insurers of the brig Jeremiah Fowler, which was lost on the 24th day of August, 1855, while on a voyage from the port of Philadelphia to the port of Boston. Allegations of the libel are, that she was loaded with coal, and that after she had arrived in Block Island channel, and while she was beating in towards Vineyard Sound, she was negligently and wrongfully run into by the brig Morning

Light and sunk, and that the vessel, together with the cargo, became a total loss. Libellants insured the vessel in the sum of thirteen thousand dollars; and having paid the whole amount, they instituted this suit against the Morning Light to recover the value of the vessel, upon the ground that the vessel of the respondents was in fault, and that the collision was occasioned by the negligence and want of proper care and precaution of those who had the charge and management of her deck at the time the collision occurred. Respondents allege that the Morning Light was bound on a voyage from Philadelphia to Portland, and that she was well manned, tackled, and provided. Collision occurred, as the respondents allege, about four o'clock in the morning; and they also allege, that at the time it occurred it was raining heavily, and that in consequence of a dense fog it was intensely dark.

Parties agree that the collision occurred at the time specified in the answer; and the respondents also allege that the wind, at the time, was from the eastward, say east by north, and that their vessel was heading about north by east. Undoubtedly she was on her starboard tack, closehauled on the wind, and like the vessel of the libellants was beating into Block Island channel. Such was the state of things when, as the respondents allege, the lookout on their vessel first discovered the vessel of the libellants, and the concurrent testimony of those on board their vessel is that the vessel so discovered appeared to be crossing the bows of the Morning Light. When the lookout made that discovery he immediately gave the order to the man at the wheel to put her helm hard up; but the allegation is that the two vessels were so near together that it was not possible to prevent the collision. Appellants also allege that their vessel had a competent lookout properly stationed on her deck, and that the vessel was discovered as soon as it was possible to discern her in the dense fog with which she was surrounded.

Suit was commenced in the District Court, and after a full hearing, the district judge entered a decree dismissing the libel, upon the ground that the collision was the result of

inevitable accident. Appeal was taken by the libellants to the Circuit Court, and the respective parties were again heard in that court; and, after full consideration, the decree of the District Court was in all things affirmed, and upon the same ground as that assumed in the District Court. Whereupon the libellants appealed to this court, and now seek to reverse the decree, upon the ground that both the courts below were in error.

1. Appellants contend, in the first place, that their vessel was ahead, and that the other vessel, inasmuch as she was coming up, was bound to keep out of the way. Secondly, they contend that the vessel of the respondents was also in fault, because she did not have a competent lookout properly stationed on the vessel. Thirdly, that she was also in fault, because she did not shorten sail and diminish her headway. On the other hand, the defence is placed chiefly upon the ground set up in the answer, that the collision was the result of inevitable accident; but the respondents also contend that the vessel of the libellants was in fault, because she unnecessarily attempted to go about and change her course while she was under the bows of the Morning Light.

Beyond question the vessel of the libellants was ahead at nightfall before the collision occurred, as the evidence shows that she was seen at that time by the master of the Morning Light, and he testifies that she was to the windward, and five or six miles ahead. The evidence also shows that she was at that time heading north-northeast, and the witnesses say that she was apparently sailing faster than the vessel of the respondents, and that both vessels were sailing on the same tack. Suggestion of the respondents is, that she had changed her course during the night, and some time before the collision, and that she was sailing, at the time it occurred, on the larboard or port tack; and it must be admitted that the position of the respective vessels at that time, and the attending circumstances, give some countenance to that theory. But the testimony of the witnesses for the libellants is directly the other way, and as there is nothing in the case of a positive character to contradict their state-

ments, it must be assumed that they are correct, although it is very difficult to see how it happened that the two vessels came together as alleged, unless one of them had changed her course during the night. Theory of the libellants is that their vessel had *just come about* on to the larboard tack, and that her sails had not filled sufficiently to give her headway, and the theory is essential to the libellants' case, because if their vessel was fully under way on that tack, and in a situation to do so, it would have been her duty to port her helm and give way. Suffice it to say, however, the proof is clear that she *was not under headway*, and perhaps the better opinion from the evidence is that she had just come about, as is assumed by the libellants, and not that her sails were merely aback through the fault of the helmsman, as is assumed by the respondents.

II. Assuming the fact to be so, then it follows that the vessel of the libellants was not in fault, and the question of liability must chiefly depend upon the defence set up in the answer, that the collision was the result of inevitable accident. Examples are to be found in the reported cases where collisions have occurred exclusively from natural causes, and without any negligence or fault, either on the part of the owners of the respective vessels, or of those intrusted with their care and management, and where the facts are so, the rule of law is that the loss must rest where it fell, on the principle that no one is responsible for such an accident. Such was the ruling of the court in the case of the steamer Pennsylvania,* and we have no doubt that the ruling was correct. Ruling of the court in the case of the John Frazer† was to the same effect. Remarks of the court in that case were, that the mere fact that one vessel strikes and damages another does not of itself make her liable for the injury; but the collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a

* Union Steamship Co. *v.* New York Steamship Co., 24 Howard, 313.

† Owners of Brig James Gray *v.* Owners of Ship John Frazer, 21 Howard, 194.

storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it; yet, says the court, she certainly would not be liable for damages which it was not in her power to prevent. So, also, ships at sea may, from storm or darkness of the weather, come in collision with one another without fault on either side; and in that case, say the court, each must bear its own loss, although one is much more injured than the other. Where negligence or fault, however, is shown to have been committed by either party, the rule under consideration can have no application, for if the fault was one committed by the respondent alone, then the libellant is entitled to recover; or if by the libellant alone, then the libel must be dismissed; or if both vessels were in fault, then the damages, under the rule applied in this court, must be apportioned between the offending vessels.

III. Before considering the defence, therefore, it becomes necessary to inquire and determine whether it be true, as is supposed by the libellants, that the vessel of the respondents was in fault. Their theory is that their vessel was ahead, and that the vessel of the respondents was bound to keep out of the way. Granting the fact to be as assumed, still if it was so dark that the vessel ahead could not be seen, the vessel astern cannot be held to be in fault for not complying with that rule, unless she was improperly in that position, or was guilty of some negligence or want of care and precaution.*

Charge of the libellants is, that she had no lookout, and the charge, under the circumstances, is one that deserves to be very carefully considered. Proofs are full to the point, that two of her company, the mate and a seaman, were assigned to that duty; but the question is whether they were properly stationed on the vessel. Burden of the vessel was two hundred and sixty-nine tons, and the ship's company consisted of the master, two mates, the cook, and four men before the mast. According to the evidence, the vessel was

* The Shannon, 1 W. Robinson, 463.

laden with lumber, and her deck load consisted of three tiers of spars about as high as the bulwarks. She had a good light in her forestays eight feet above the main deck, and she had an experienced seaman at the wheel. One lookout was stationed on the larboard side, eight or ten feet forward of the mainmast; and the mate, who was also on the lookout, was on the starboard side, just forward of the foremast; and it should be remembered that the vessel was upon the starboard tack. None of these facts are successfully controverted; but the argument is, that the lookouts were not properly stationed, and it is not to be denied that, in general, some position farther forward would be a better one to secure the object for which lookouts are required.

IV. Reference, however, must in all cases be had to the circumstances, and especially to the course of the respective vessels, and to their bearing in respect to each other. Considering the situation of the vessel of the libellants, assuming it to be such as the libellants suppose, it is by no means certain that the position of the lookout on the larboard side was not as favorable to discover the vessel of the libellants, when *she went into stays and came about* as could have been chosen, and it is quite clear that the position of the mate while his vessel had her starboard tacks aboard was one without objection. They both testify that they were attending to their duty, and there is no ground for doubt that they would have seen the other vessel in season to have avoided the collision, but for the intense darkness of the night.

V. Fault is also imputed to the Morning Light by the libellants, because she did not during the alleged intense darkness "lie to," or shorten sail and check her headway. Steamers navigating in thoroughfares are always required, whenever the darkness is such that it is impossible or difficult to see approaching vessels, "to slow" their engines or even to stop or back, according to the circumstances, and no reason is perceived why the principle of the rule in that behalf may not be applied in a qualified sense to sail vessels where they are navigating in crowded thoroughfares, and when the darkness is so intense that vessels ahead cannot be

seen.* Decisions to that effect may be found, and no doubt they are correct, as for example, it was held in the case of the Virgil,† that the defence of inevitable accident could not be maintained where it appeared that the vessel setting it up was sailing with a strong breeze and under a full press of canvas and with her studding-sails set, although it appeared that it was very dark and hazy at the time of the accident.‡ But such a restriction can hardly be applied to sail vessels proceeding on their voyage in an open sea. On the contrary, the general rule is that they may proceed on their voyage although it is dark, observing all the ordinary rules of navigation, and with such additional care and precaution as experienced and prudent navigators usually employ under similar circumstances. They should never under such circumstances hazard an extraordinary press of sail, and in case of unusual darkness, it may be reasonable to require them when navigating in a narrow pathway, where they are liable to meet other vessels, to shorten sail if the wind and weather will permit.

The weight of the evidence in this case shows, that the wind during the greater portion of the night was perhaps a five or six knot breeze, but it is highly probable that it was much lighter during the fog showers and the period of the extreme darkness which immediately preceded the collision. Neither vessel had any studding-sails, nor any greater press of canvas than is usual in such a voyage, nor is it by any means certain that either had any more sail set than was reasonably necessary to keep the full control and proper management of the vessel. They both had competent officers on deck, good lights in the rigging, and as we think sufficient look-outs, and it appears that neither was guilty of any negligence or unskilfulness.

Some of the witnesses for the libellants deny that the night was as dark as is represented by the witnesses examined by the respondents, but those denials came chiefly

* The Rose, 7 Jurist, 381. † Id. 1174.

‡ The Virgil, 2 W. Robinson, 202.

from those who signed the protest shortly after the disaster, which in substance and effect confirms the respondents' witnesses, and fully justifies the finding in that behalf in the court below. Reasonable doubt cannot be entertained that it was intensely dark at the time of the collision. Both the courts below were of that opinion, and we fully concur in that view of the case, and think it sufficient under the circumstances to express that concurrence without reproducing the evidence.

VI. Reported cases where it has been held that collisions occurring in consequence of the darkness of the night, and without fault on the part of either party, are to be regarded as inevitable accidents are numerous, and inasmuch as there is no conflict in the adjudications, it is not thought necessary to do much more than to refer to some of the leading cases upon the subject.* Where the loss is occasioned by a storm or any other *vis major*, the rule as established in this court is that each party must bear his own loss, and the same rule prevails in most other jurisdictions.† Different definitions are given of what is called an inevitable accident, on account of the different circumstances attending the collision to which the rule is to be applied.

Such disasters sometimes occur when the respective vessels are each seen by the other. Under those circumstances, it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.‡ When applied to a collision, occasioned by the darkness of the night, perhaps a more general definition is allowable. Inevitable accident, says Dr. Lushington, in the case of *The Europa*,§ must be considered as a relative term, and must

* Stainbach et al. *v.* Rae et al., 14 Howard, 538.

† 1 Parsons' Merc. Law, 187; Woodrop Sims, 2 Dodson, 85; The Itinerant, 2 W. Robinson, 243.

‡ The Locklibo, 3 W. Robinson, 318; The Pennsylvania, 24 Howard, 313.

§ 2 English Law & Equity, 559.

be construed not absolutely but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.* Regarding these cases as sufficient to show that a collision resulting from the darkness of the night and without the fault of either party, is properly to be regarded as an inevitable accident, we forbear to pursue the investigation, and wish only to add that we have no doubt the case was correctly decided in the Circuit Court.

The decree of the Circuit Court is therefore,

AFFIRMED WITH COSTS.

GORDON *v.* UNITED STATES.

No appeal lies to this court from the Court of Claims.

GORDON, administrator of Fisher, presented a petition in the Court of Claims of the United States, for damages done to him by troops of our Government, in the war of 1812 with Great Britain. The Court of Claims decided against him, and he appealed to this court. The case was argued in favor of the right of appeal by *Messrs. Goodrich and Winter Davis;* no counsel appearing on the other side. A majority of the court, however,† finding itself constrained to the conclusion that, under the Constitution, no appellate jurisdiction over the Court of Claims could be exercised by this court, and intimating that the reasons which necessitated this view might be announced hereafter—the term being now at its close—the cause was simply

DISMISSED FOR WANT OF JURISDICTION.

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* The Virgil, 1 W. Robinson, 205; The Juliet Erskine, 6 Notes of Cases, 634; The Shannon, 1 W. Robinson, 463; Same Case, 7 Jurist, 380.

† Miller and Field, JJ., dissenting.

Statement of the case.

THE SUTTER CASE.

1. On the 18th of June, 1841, Juan B. Alvarado, then Governor of California, issued to John A. Sutter, for himself and colonists, a grant of land designated as New Helvetia, of the extent of eleven square leagues, as exhibited on the map annexed to the petition for the grant, "*without including the lands overflown by the swellings and currents of the rivers,*" and bounded as follows: on the north, by *Los Tres Picos* (The Three Summits), and 39° 41′ 45″ north latitude; on the east, *by the borders* [*or margins*] of the *Rio de las Plumas* (Feather River); on the south by the parallel of 38° 49′ 32″ of north latitude; and on the west by the river Sacramento. This grant was adjudged valid and confirmed, and a survey of the eleven leagues was made by a deputy surveyor under instructions of the Surveyor-General of California, locating the land in *two parcels*,—one of two leagues, and the other of nine leagues,—separated from each other several miles, and the latter parcel embracing land situated *on each side* of the Feather River; the location, in both of these particulars, conforming to a survey made previously to the petition of Sutter for the grant. Each parcel was located in a compact form, and in conformity to the lines of the public survey. The District Court, under the act of June 14th, 1860, set this survey aside, and, by its direction, a new survey was made, locating the eleven leagues in thirteen tracts of different dimensions and forms, some of which were separated from each other. In directing the location in this manner, the District Court intended that the several selections, which the grantee himself was considered to have made by settlement, or by lease, or sale, or other acts of ownership, should be adopted, and in the order in which they were made, until the whole quantity of the eleven leagues was exhausted. On appeal, this court "fully appreciating the difficulties and embarrassments that surrounded the case," set aside this latter survey, and directed the District Court to confirm the first survey as the more correct location of the grant.
2. By the terms in the grant "lands overflown by the swelling and currents of the rivers," were meant *tule* or swamp lands.
3. *Semble*, that in locating land in California, claimed under confirmed Mexican grants, compactness of form and conformity to the lines of the public surveys must be preserved, to the exclusion, if necessary, of selections of the grantee as indicated by his settlement, or by his sale or lease of parcels of the property.
4. *Semble*, also, that land claimed under a confirmed Mexican grant may be located in two parcels, where, from the character of the country, the entire quantity granted cannot be located in one tract.

THIS case, which involved immense interests in California, and questions greatly agitated in a particular portion of that

State, was an appeal from the decree of the District Court of the United States for the Northern District of the same, approving and confirming the survey and location of a claim to land under a Mexican grant to a certain John A. Sutter; a name abundantly known in the valley of the Sacramento, and which has left traces of some depth in the history of land titles in that region.

Sutter himself, as described by another pen,* was a native of Switzerland, who came to the Department of California about the year 1839; long, of course, before the incorporation of that region with the United States. He was a man of a romantic cast of character, and having naturalized himself as a citizen of Mexico, formed, with the leave of its Government, a settlement near the junction of the Sacramento and American Rivers. In honor of his native country he designated it New Helvetia. The country, at that time, was uninhabited, except by bands of warlike Indians, who made frequent predatory incursions upon the undefended settlements to the south and east of this place. In two or three years after his arrival, Sutter was commissioned by the Governor of California to guard the northern frontier, and to represent the Government in affording security and protection to its inhabitants against the invasion of the Indians and marauding bands of hunters and trappers who occasionally visited the valley for plunder. In the year 1841 he commenced the erection of a fort at New Helvetia at his own expense.† It was surrounded by a high wall, and was defended by cannon. Within this fort there were dwelling-houses for his servants and workmen, and workshops for the manufacture of various articles of necessity. There was a grist-mill, tannery, and distillery attached to the establishment. A number of Indians were domesticated by him, and contributed to cultivate his fields of grain, and to defend the settlement from more savage tribes. He was possessed of several thousands of horses and neat cattle,

* Campbell, J., of this court.

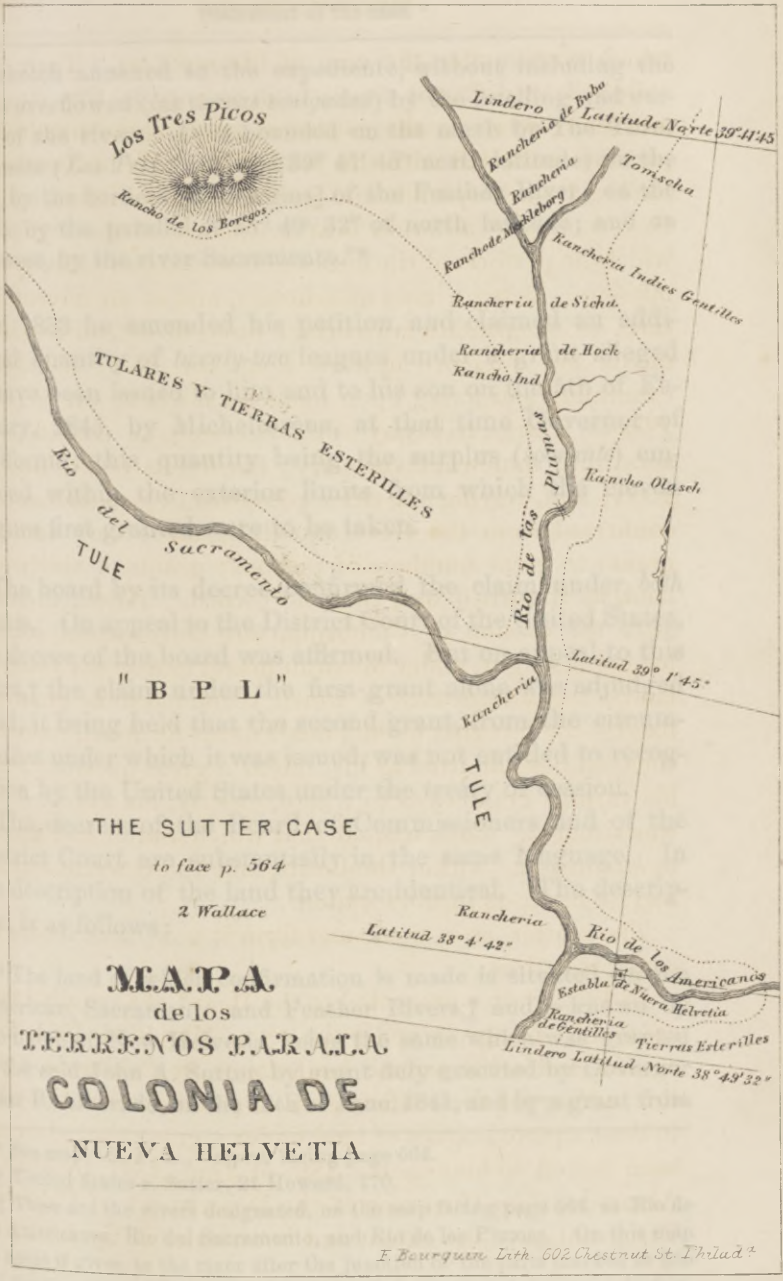
† Designated on the map facing p. 564, as "Establa de Nueva Helvetia."

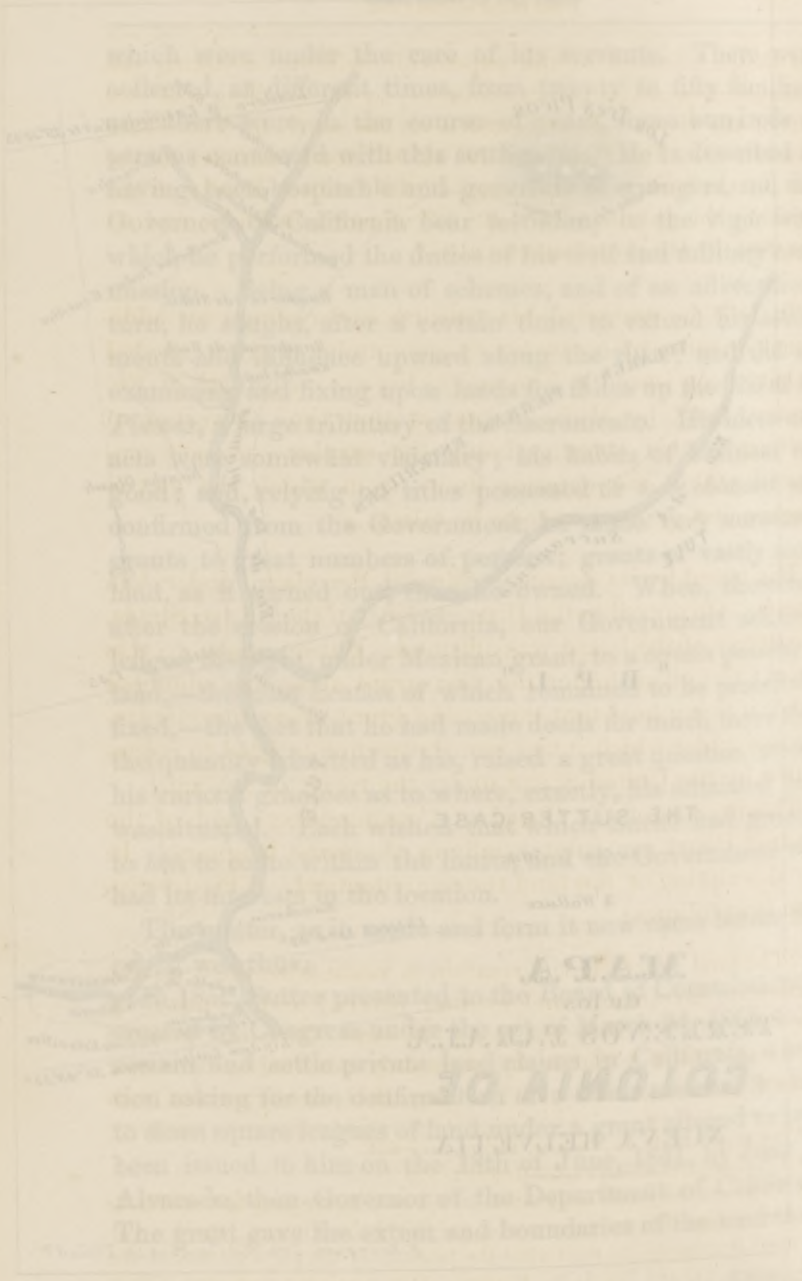
which were under the care of his servants. There were collected, at different times, from twenty to fifty families; and there were, in the course of years, some hundreds of persons connected with this settlement. He is described as having been hospitable and generous to strangers, and the Governors of California bear testimony to the vigor with which he performed the duties of his civil and military commission. Being a man of schemes, and of an adventurous turn, he sought, after a certain time, to extend his settlements and influence upward along the river; and did so, examining and fixing upon lands for miles up the *Rio de las Plumas*, a large tributary of the Sacramento. His ideas and acts were somewhat visionary; his habits of business not good; and, relying on titles possessed or *to be obtained* and confirmed from the Government, he made very numerous grants to great numbers of persons; grants of vastly more land, as it turned out, than he owned. When, therefore, after the cession of California, our Government acknowledged his right, under Mexican grant, to a *certain quantity* of land,—the *exact location* of which remained to be practically fixed,—the fact that he had made deeds for much more than the quantity admitted as his, raised a great question among his various grantees as to where, exactly, his admitted land was situated. Each wished that which Sutter had granted to *him* to come within the limits, and the Government also had its interests in the location.

The matter, as in mode and form it now came before this court, was thus:

In 1852, Sutter presented to the Board of Commissioners, created by Congress under the act of March 3d, 1851, to ascertain and settle private land claims in California, a petition asking for the confirmation of a claim asserted by him to *eleven* square leagues of land under a grant alleged to have been issued to him on the 18th of June, 1841, by Juan B. Alvarado, then Governor of the Department of California. The grant gave the extent and boundaries of the land thus:

"It is of the extent of eleven square leagues, as exhibited in


Los Tres Picos
Rancho de los Borregos
Lindero
Rancherias de Bubo
Latitude Norte 39°-1'45
Rancheria
Tomischa
Rancho de Muckleburg
Rancheria Indios Gentiles
Rancheria de Sicha
Rancheria de Hock
Rancho Ind
TULARES Y TIERRAS ESTERILLES
Rio del Sacramento
TULE
Rio de los Plumas
Rancho Olasel
Latitud 39° 1'45"
"B P L"
Rancheria
TULE
THE SUTTER CASE
to face p. 564
2 Wallace
Rancheria
Latitud 38°4'42"
Rio de los Americanos
Establ.t de Nueva Helvetia
Rancheria de Gentiles
Tierras Esterilles
Lindero Latitud Norte 38°49'32"
MAPA
de los
TERRENOS PARA LA
COLONIA DE
NUEVA HELVETIA
E. Bourquin Lith. 602 Chestnut St. Philad.a



the sketch annexed to the expediente, without including the lands overflowed (*las tierras senigadas*) by the swelling and current of the rivers. It is bounded on the north by The Three Summits (*Los Tres Picos*) and 39° 41′ 45″ north latitude; on the east, by the borders [or margins] of the Feather River; on the south, by the parallel of 38° 49′ 32″ of north latitude; and on the west, by the river Sacramento."*

In 1853 he amended his petition, and claimed an additional quantity of *twenty-two* leagues under a grant alleged to have been issued to him and to his son on the 5th of February, 1845, by Micheltorena, at that time Governor of California; this quantity being the surplus (*sobrante*) embraced within the exterior limits from which the eleven leagues first granted were to be taken.

The board by its decree confirmed the claim under *both* grants. On appeal to the District Court of the United States, the decree of the board was affirmed. But on appeal to this court,† the claim under the first grant alone was adjudged valid, it being held that the second grant, from the circumstances under which it was issued, was not entitled to recognition by the United States under the treaty of cession.

The decrees of the Board of Commissioners and of the District Court are substantially in the same language. In the description of the land they are identical. The description is as follows:

"The land of which confirmation is made is situated on the American, Sacramento, and Feather Rivers,‡ and is known by the name of New Helvetia, being the same which was granted to the said John A. Sutter, by grant duly executed by Governor Juan B. Alvarado, on the 18th of June, 1841, and by a grant from

* See map "B. P. L.," *supra*, facing page 564.

† United States *v.* Sutter, 21 Howard, 170.

‡ These are the rivers designated, on the map facing page 564, as Rio de los Americanos, Rio del Sacramento, and Rio de las Plumas. On this map no name is given to the river after the junction of the parts marked as Rio del Sacramento and Rio de las Plumas. It is continued, however, in fact, under the name of the Sacramento.

Governor Manuel Micheltorena to the said John A. Sutter, and his son. John A. Sutter, Jr., dated February 5th, 1845; the first for eleven square leagues of land, as exhibited on the sketch annexed to the proceedings, and the second for twenty-two square leagues of the *sobrante*, or surplus of land within his rancho, named New Helvetia, as laid down on the map which accompanies the grant; the said land to be located according to the calls of the respective grants, as described and explained in the depositions of John J. Vioget, filed in the case, and within the following limits, to wit: On the south, by a line drawn due east from the Sacramento River, so as to touch the most southerly point of a pond or laguna situated near said river, and about five miles south of the American River, as represented on the map filed in the case, and marked 'B. P. L.' (facing page 564), exhibit to deposition of Juan B. Alvarado, March 15th, 1855, which is also marked on said map *Lindero latitud norte* 38° 49′ 3″; on the north by a line drawn due east from Sacramento River to the southern base of the mountains known as the Buttes, and represented on the said map by the name of *Los Tres Picos;* and from thence until it intersects the eastern boundary of the tract, as represented on said map, and described in the grant, and in the depositions of the said Vioget; on the west by the said river Sacramento, and on the east by the margins of Feather River, inclusive. For more particular description, reference to be had to the copies of the grants filed and proved in the case, bearing date the 18th of June, 1841, and the 5th of Februaay, 1845, to the said map marked 'B. P. L.,' exhibit to deposition of Juan B. Alvarado, March 15th, 1855, and to the deposition of John J. Vioget and Juan B. Alvarado, all of which are filed among the papers in the case."

The mandate of this court, which, on its decision, was remitted to the District Court, to be there executed, recites the decree appealed from entire, and, after mentioning the argument of the case, proceeds as follows:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that so much of the decree of the said District Court as confirms the claim of John A. Sutter to the *eleven* square leagues of land situated on the American, Sacramento, and Feather Rivers, known by the name of New Helvetia,

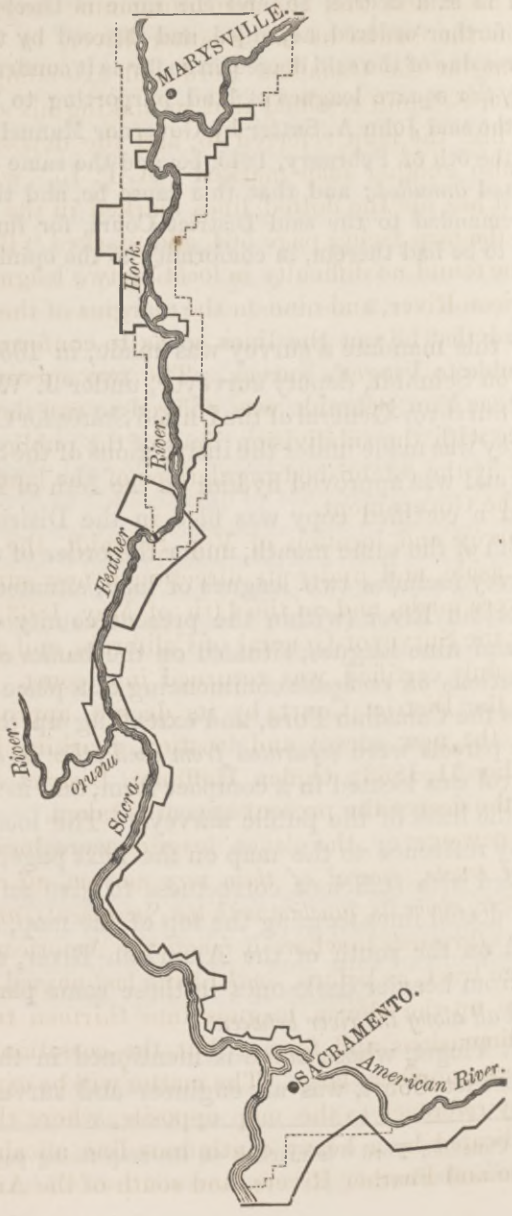
and which was granted to the said John A. Sutter by Governor Juan B. Alvarado, on the 18th of June, 1841, as set forth and described in said decree, be, and the same is hereby *affirmed*. And it is further ordered, adjudged, and decreed by this court, that the residue of the said decree, in so far as it confirms a grant for *twenty-two* square leagues of land, purporting to have been made to the said John A. Sutter by Governor Manuel Micheltorena, on the 5th of February, 1845, be, and the same is hereby *reversed and annulled;* and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings to be had therein, in conformity to the opinion of this court."

Under this mandate a survey was made, in 1859, by one A. W. Von Schmidt, deputy surveyor, under J. W. Mandeville, the Surveyor-General of the United States for California. The survey was made under the instructions of the Surveyor-General, and was approved by him on the 18th of February, 1860, and a certified copy was filed in the District Court, on the 27th of the same month, under the order of the court. This survey includes two leagues of land, situated *south* of the American River (within the present county of Sacramento), and nine leagues, situated on the banks of *Feather River*, portions *on each side* commencing at a place formerly known as the Canadian Ford, and extending up the river.* The two parcels were *separated from each other several miles.* Each parcel was located in a compact form, and in conformity with the lines of the public surveys. The location will appear by reference to the map on the next page, where it is indicated with sufficient correctness to give an idea, by the light dotted lines forming the top of the map, as to one part, and on the south of the American River, as distinguished from heavier dark ones in those same parts of the map, and *all along the river between.*

John J. Vioget, whose name is mentioned in the decree of the District Court, was an engineer and surveyor, and

* This "Canadian Ford" is marked on the map facing page 564 by a small bar across the river.

made a survey of the eleven square leagues in 1840 or 1841, and also the map referred to in the grant to Sutter; and in



his depositions filed in the case he testified that in his survey *two leagues* were located, at the request of Sutter, *south of the American River*, and that the remaining nine leagues were located on the banks of the Feather River, *on each side*, commencing at the Canadian Ford and extending up the river. Von Schmidt testified that in making his survey he had with him the map referred to, and the depositions of Vioget; also another map marked "A. P. L.," which, except that it has not the dotted lines marked in the latter, is similar to the map facing page 564, and marked "B. P. L.;" and that he found no difficulty in locating two leagues below the American River, and nine on the margins of the Feather River; and that he ran the lines so as to conform as near as practicable to Vioget's survey. The two surveys varied somewhat, as Von Schmidt was obliged to run the lines in accordance with the subdivision lines of the public surveys presented by the established regulations of the land department of the Government.

This survey and location of Von Schmidt, the District Court set aside, and under its direction a new survey and location were made, and on the 11th of May, 1863, was approved by the Surveyor-General of California, and a plot of the same, duly certified, was returned into court. On the same day the District Court, by its decree, approved and confirmed the new survey and location, marking it, "Approved, May 11, 1863; Ogden Hoffman, District Judge;" and from the decree the present appeal is taken.

By this new survey, the eleven leagues were located *in a long line of tracts, several of them very narrow, all along the Feather River, above its junction with the Sacramento, and on the Sacramento afterwards* to where it meets the American River, with a large tract, as before, *south* of the last-named stream. This broke up the eleven leagues into thirteen tracts of different dimensions and forms; but the cessation of the continuity was nowhere large. The matter will be explained, perhaps, by reference to the map opposite, where this location is indicated by a heavy continuous line all along the Sacramento and Feather Rivers, and south of the American

River, as distinguished from the lighter dotted one on the same map, at its top and bottom only.

Sutter, as already mentioned, was a man of undefined ideas, with habits of business not the best. And having made grants of much more land than he had, it was plain that whatever decision was made as to their respective precedence, many persons would be losers, under circumstances of much hardship as respected some of them. The District Court, in directing a location in the manner just mentioned, intended that the several selections which Sutter himself was considered to have made by settlement, or by lease or sale, or other acts of ownership, should be adopted, and in the order in which they were made, until the whole quantity of eleven leagues was exhausted. His Honor, the District Judge, however, after a very able exposition of the grounds of the decree, acknowledged the difficulties of a "most embarrassing case." "With no clear rules of law to guide me, unable to discern accurately what even equity and justice demanded, embarrassed by the careless improvidence which has led Sutter to convey away more land than he even supposed he possessed, and far more than the quantity to which by the unexpected decision of the Supreme Court, he has been restricted, with the external boundaries of the tract vague and undefined, and even the original papers, in some respects, ambiguous and contradictory, I have been compelled," he said, "to content myself with endeavoring to settle the case as fairly as was practicable, under the circumstances, and to renounce the hope of obviating every objection, or avoiding the infliction of much hardship. The case is one rather for the '*arbitrium boni viri*' than the subject of a judicial determination proceeding upon fixed and absolute rules."

Numerous objections were taken in the court below, and were urged in this court, to the survey thus ordered by purchasers under Sutter, and by persons claiming rights by settlement under the United States. The objections were not all consistent with each other. One of the intervenors (Gelston), contended that a greater quantity than the amount

given, two leagues or more, should have been located *south* of the American River.

The United States not objecting to the location south of the American River, contended that the eleven leagues could not be located in separate and distinct parcels, but should be located in one body, and in a compact form, and, therefore, that the nine leagues should be taken immediately adjoining the other two, and on the north of the American River, or that the two leagues should be selected from land adjoining the nine on Feather River.

The parties claiming an interest in the premises by settlement under the United States, contended that the whole quantity granted should be located between the Sacramento and Feather Rivers, that is to say, in the forks of these rivers, below the Three Buttes, and that the land upon which the city of Sacramento is situated should be excluded from location as *overflowed land*, reserved by the terms of the grant.

Two intervenors (Packard and Woodruff) contended that the survey made by A. W. Von Schmidt, and filed February 27th, 1860, was the correct survey of the eleven leagues.

A vast variety of testimony was taken in the case, and numerous documents of different kinds, including grants by Sutter, up and down the rivers and elsewhere, were offered in evidence,—the whole bearing more or less directly upon the matters in controversy. The printed record contained nine hundred and eighty octavo pages, and there were maps! in number indefinite. It is sufficient for the proper understanding of the opinion of the court to state, generally, that the evidence showed,—the settlement and occupation by Sutter of the land below the American River, as already stated above; the settlement of colonists under Sutter, soon after he obtained his grant on the *east bank* of the Feather River (or as was asserted and contended in the argument, *before*); a subsequent selection and occupation by him of the tract known as Hock Farm, on the *west bank* of the *Feather* River;* that the whole country embraced within

* The place marked "Rancheria de Hock," on the map B. P. L., facing p. 564; also, the tract "Hock," on map at p. 568.

the exterior limits of the grant, with the exception of small portions, insufficient to satisfy the eleven leagues granted, is sometimes, every two or three years, overflowed by water, and in many places to the depth of several feet; that the greater part of the tract embraced in the survey made by Von Schmidt, and also in the survey approved by the District Court, is thus sometimes overflowed; that within the exterior limits there are also immense tracts of marsh or *tule* lands, which are covered with water every year during the entire winter, and during the greater part of the summer months, and which were unfit for either cultivation or pasturage without draining; and that neither of the surveys mentioned include any portion of those marsh or *tule* lands.

This grant gives the extent and boundaries of the land, as already mentioned, that is to say, as follows:

"It is of the extent of eleven square leagues, as exhibited in the sketch annexed to the expediente, without including the lands overflowed (*las tierras senigadas*) by the swelling and current of the rivers. It is bounded on the north by (los Tres Picos) the Three Summits, and 39° 41′ 45″ north latitude; on the east by the borders (or margins) of the Feather River; on the south by the parallel of 38° 49′ 32″ of north latitude, and on the west by the river Sacramento."

Alvarado, the governor, who issued the grant, testified that the Spanish words, "*las tierras senigadas*" in the original, which are translated "*the lands overflowed*" in the document in the record, mean *swamp or tule lands overflown and unfit for cultivation.*

The parallel of latitude (*lindero latitud*) given in the grant as the southern boundary, falls near the junction of the Sacramento and Feather Rivers, as appears by the map. Alvarado testified that he inserted in the grant the degrees of latitude as they were marked on the map. And Vioget testified that he drew the line across the map a few miles below the American River, and marked it as the southern boundary with the latitude designated; but that the observation taken of the latitude was not correct, owing to his

Argument for a compact survey.

inability to procure correct instruments, which he mentioned at the time to Sutter.

Of very numerous documents offered in evidence, aside from the petition of Sutter and grant to him, and deeds to numerous under claimants, in nearly every place now the subject of claim, a grant to W. A. Leidesdorf, issued October 8th, 1844, a deed of Sutter to Robinson, Gillespie, and others, dated July 1st, 1850, and a map, made by John Bidwell, in 1844, were, perhaps, among the most important.

The grant to Leidesdorf, made more than three years after the date of the grant to Sutter, cedes land situated on the south bank of the American River, and describes it as "*bounded by the land granted to the colony of Senor Sutter.*"*

The deed of Sutter to Robinson, Gillespie, and others, conveys land described as follows:

"Commencing on the north of the Three Peaks, or what is commonly called Sutter's Buttes, at a point on the east bank of Sacramento River, in latitude 39° 41′ 45″; thence running with the parallel of said latitude to the *Rio de las Plumas*, or Feather River; thence down and along the meanders of said Rio de las Plumas, or Feather River, to its junction with Sacramento River; thence up and along the eastern bank of said Sacramento River to the place or point of beginning; and *which said land is embraced in a grant from the Mexican Government, bearing date, Monterey, 18th day of June, eighteen hundred and forty-one.*"

The map made by John Bidwell, so far as it showed the land claimed by Sutter, was copied from the map accompanying the petition of Sutter in the archives of the country.

Mr. Wills, for the United States, appellants: The question before the court is, where shall the eleven leagues of land confirmed to Sutter be located? The question can be answered only by the application of established principles to the facts of the case.

I. The first principle which must be applied is this, that

* See United States *v.* Halleck, 1 Wallace, 440.

the rights of Sutter's vendees must be determined by the rights of Sutter himself, and the lands confirmed to him located in the same manner as if he were the only party before the court.

II. The second principle which must be applied is, the conclusiveness of the final decree of confirmation, precluding all inquiry into the original merits of the case. This principle was applied by this court in *United States* v. *Halleck.**

III. The third principle which must be applied is, that, subject to the previous principles and rules of location, the eleven leagues of land confirmed to Sutter, must be located "according to the laws of the United States;" that is, according to the executive regulations established by the General Land Office for the location of private land claims in California. This is required by one clause of the mandate of the court. It is also required by the doctrine of this court in the first decision of *United States* v. *Fossat.*†

The regulations require,—

1st. That the location and survey shall be made in a body, and in a compact form, according to the lines of the public surveys.

2d. That in cases of sales by the original grantee, they shall be treated as evidence of an election by him, to that extent, of the location of the claim confirmed; provided compactness of form and conformity to the lines of the public surveys be preserved. These must be preserved, even to the exclusion, if necessary, of any of the sales, for the reason that the original claimants themselves are subject to such regulations for the location of their grants as may be prescribed under the laws of the United States, and their vendees, of course, hold in like manner.

These requirements apply to the location of the Sutter grant, wherever it may be attempted to be located, whether at the upper end, at the lower end, or in the middle of the tract of country indicated by the sketch accompanying the

* 1 Wallace, 455, 456; see also The Fossat Case, *infra*.

† 20 Howard, 427.

grant. They cannot be fulfilled by any attempt at a detached, or scattered, or long-drawn location of the grant, made in this case, for sixty miles along the river, in a spirit of compromise, partly at the upper end, partly at the lower end, and partly in the middle. The grant must be located in a compact body, *wholly* at whatever point of location may be made necessary by the decree and by the other facts controlling the location. If the location is to include the north end of the tract, then it must begin there, and extend south in a compact body for quantity. If, on the contrary, the location is to include the south end of the tract, then it must begin there and go north in a compact body for quantity.

The survey approved by the District Court violates these regulations in every particular. It is an ingenious attempt to do the impossible.

Mr. Elihu Johnson, for the intervenor and appellant Gelston.

Mr. J. B. Williams, for intervenors and appellants Algier and others.

Mr. Black, for settlers under the United States: The grant and the confirmation were of lands lying *between the Sacramento and the Feather Rivers*, above the forks of those rivers and below the Three Peaks. The limits of the grant are precisely the boundaries of what, as is well known, now makes Sutter County. The claimants under Sutter are confined to those limits.

The decree of the Supreme Court was, that Sutter was entitled only to the eleven leagues granted by Alvarado, and that quantity should be taken within the limits *set forth in his grant* and the *accompanying map*. The *accompanying map* mentioned in the decree is of course identical with the *accompanying sketch* referred to in the grant. This accompanying sketch is part of the grant itself. No other map or sketch can possibly have any just influence in determining the boundaries of the title.

Sutter, it is true, had a place called his fort, which was

on the south side of the American River; and there he had workshops and servants, a distillery, mill, tannery, and what not. He cultivated there a large quantity of land, and had many horses and cattle. But he did not ask for a title which would cover the land occupied by him *there*. On the contrary, he had made improvements on the Feather River many miles higher up the valley. He *claimed* all the land in that region, and exercised supreme dominion over it. The Hock Farm was the place he had destined for his future home. He did remove most of his stock there in 1841. For one of these places he needed a title as much as for the other; he had no grant for either. He felt secure of the fort as long as he chose to keep it. But the other land he could not hope to keep without a regular title. He could get a grant for only eleven leagues, and that was less than he wanted up the river. He certainly might have petitioned the governor successfully for eleven leagues on the American River. Perhaps, also, he might lawfully have asked for two different tracts to be conceded by the same grant, one on the American and another up at the Peaks. But *he did not do so*. He asked for only one tract, and that one he said was *situated towards the north*, according to the representation in the sketch, and he was careful to *exclude the land overflowed in winter*. He speaks of it as within New Helvetia. Helvetia is the old name of Switzerland. He was himself a Switzer, a romantic man; a man of great adventure, with vast ideas; a sort of feudal lord. The name of *New Helvetia* does not signify that the land which he wanted lies *at* the fort or near it. On the contrary, he called all the country about the fort New Helvetia.

The grant to Sutter is dated the 18th of June, 1841. It does not point to the cultivated and improved lands then occupied by Sutter himself. When the lines come to be specifically described they are given thus: North by the Three Peaks; east by the margins of the Feather River; south by the parallel of 38° 49′ 32″ (which runs a little above the mouth of the Feather), and west by the Sacramento River. If the grant is to be followed, the case is too

clear for controversy. If the grant is to be disregarded, what becomes of the order of this court, that the location shall be made *within the limits set forth in the grant?*

The description given of the location and boundaries of the tract in the petition of Sutter, in the grant to him, and in several deeds executed by him, exclude all land lying south of the American River.

The "margins of the Feather River," as called for on the east, make the *banks* of the Feather the boundary there. "MARGIN" means *edge*, *rim*, *border*, not a strip of land. Besides, the margins, whatever they may be, are *excluded.* The land granted goes *to them* and leaves them out, not *over them*, so as to take them in. The banks of the Feather River, on the western side of that stream, are, without doubt, the true eastern limits of the grant. The call for the east boundary would be nonsense if the south line were below the American River.

The south boundary is the parallel of latitude 38° 49′ 32″, which runs from the Sacramento to the Feather, about eight hundred yards above their confluence. This parallel of latitude is not only fixed as the southern limit of the grant by the express words which define it as such, but the other parts of the grant show conclusively that the true parallel of 38° 49′ 32″ was in the mind of the parties. *It must have been meant by them to put the southern line somewhere above the forks of the rivers*, which are the boundaries east and west. Otherwise, the lines would not inclose any land at all.

A large portion of the land included within this survey is overflowed land. The *overflowed lands* are excluded by the express words of the grant. The city of Sacramento is on ground thus excluded.

Mr. Edwards Woodruff, for intervenors Packard and Woodruff: The survey made by Von Schmidt, deputy surveyor, in 1859, which was approved by the Surveyor-General of California, February 18, 1860, and afterwards set aside by the District Court, was correct, and should be approved.

I. It conforms to the mandate of this court; it embraces

two leagues of land south of the American River, and nine leagues on the margins of Feather River. In this respect it follows the deposition of Vioget, to which the mandate refers.

II. That the land south of the American River was properly included, follows from the language of the decree both of the District Court and of this court; the evidence showing that Sutter solicited this land in his petition, and that the same was granted to him, is briefly stated in the opinion of the court reported in 21 Howard, 170. Besides this, the grant issued to William A. Leidesdorf by the Mexican Governor of California on the 8th of October, 1844, shows the understanding as to the location of the land granted to Sutter of the highest public officer in California at the time, to whose charge the disposition of the public domain of the republic in the department was intrusted. The tract of land which that grant purports to transfer is situated on the south bank of the American River, and is described as "*bounded by the land granted to the colony of Senor Sutter.*"*

III. That land lying on both banks of the Feather River was also properly included, is manifest on inspection of the decree of the court below, and of the mandate of this court. They describe the eastern boundary of the eleven leagues "as the *margins* of the Feather River *inclusive.*"

In *Ferris* v. *Coover*,† the Supreme Court of California, in considering the boundaries of the grant to Sutter, and speaking of the eastern boundary, said:

"The language is peculiar. Feather River is not intended as the boundary, for it would be so designated. It is the *margins* of that river; land extending along the stream. The language was used to indicate the general limit and course of the eastern line. It does not necessarily mean that the eastern line must terminate with the length of the stream, and cease when the Feather River loses itself in the Sacramento."

And, in the same case, commenting upon the case of *McIver's Lessee* v. *Walker*,‡ the same court said:

* United States *v.* Halleck, 1 Wallace, 440. † 10 California, 614.
‡ 9 Cranch, 173.

"The patents called for land *lying on Crow Creek*, describing them by course and distance, and referring to a plat annexed. Neither the lines in the certificate of survey, nor the patents, called for crossing Crow Creek; and, if run according to the course and distance given, would not include the creek or any part of it, or the land in possession of the defendant. But the plat annexed represented Crow Creek as passing *through the tract*, and the plaintiff requested the court to instruct the jury that the lines ought to be run so as to include Crow Creek and the lands in possession of the defendants. The instruction was refused, and the defendants had judgment. The refusal of the instruction was assigned as error, and the Supreme Court, Mr. Chief Justice Marshall delivering the opinion, held that the lines should be so run as to include both sides of the creek, and conform, as near as possible, to the plat annexed to the patents; and the judgment was reversed."*

The Supreme Court of California held, in that case of *Ferris* v. *Coover*, that Sacramento City and the eastern margin of Feather River were both included within the grant to Sutter.

The early colonists introduced by Sutter, composing the families for whose benefit the grant was, in part, issued, were settled by him all along upon the east bank of Feather River.

IV. The lands which are reserved by the terms of the grant are *tule* or marsh lands. Such is the obvious meaning of the terms used. The Supreme Court of California has had occasion to consider this subject, and in *Cornwall* v. *Calver* it said:

"The language of the grant was probably intended as a compliance with the terms of the petition, and has, as we conceive, but one meaning, and that is, to exclude lands which are inundated *during the winter*, and does not apply to lands which are occasionally flooded upon a rise of the rivers, either from protracted rains in the winter, or the melting of the snows of the Sierra Nevada in the spring. The whole country within the

* See other cases there quoted and commented on.

exterior limits of the grant, with the exception of small portions entirely insufficient to meet the quantity specifically granted, is sometimes flooded in this way. The most valuable tracts, both for cultivation and pasturage, are the low lands bordering the streams, over which, every two or three years, the water rests for a few days at a time. It was these lands which, any one in the position of Sutter, at the time he presented his petition to the Government, would naturally have selected, and these lands the survey actually made by Vioget, both on the Sacramento and the Feather Rivers, included. As we read the petition of Sutter, he solicits the eleven leagues, excluding the land which is periodically in the winter inundated, that is, the lands which are regularly inundated during the winter, and refers only to what are known as *tule lands*. No other lands will meet the terms of the petition. These lands are regularly, periodically every winter, inundated. The low lands which are not *tule* lands, are not thus inundated every winter, but only occasionally —often at intervals of three and four years. The tule lands remain, too, inundated to a greater or less extent during the entire winter and spring—until the waters of the Sacramento and Feather Rivers subside to their lowest point. The least rise from the first rains of much length in the winter, covers them with water. They are unfit for cultivation without draining. Within the exterior limits of the grant to Sutter, there is an immense tract of these tule lands, and it is to them that the reservation applies."

The land upon which the city of Sacramento is built, is sometimes overflowed to the depth of several feet, but the water only remains a few days. The land is not *tule* or marsh land.

V. The *topographical* character and formation of the country included within the description in the grant, and delineated upon the map accompanying the petition, is such that the location of the eleven leagues of land must necessarily be made as by the survey of Von Schmidt, that it is so as to embrace two leagues south of the American River, and the remaining nine leagues upon the margins of the Feather River, or else the whole eleven leagues must be located in one body upon the margins of the Feather River,

as much upon the one side of said river as upon the other, and above the Canadian Ford. This is matter of common knowledge in California. No other location than the one or the other of the above can be made, so as to meet the requirements of the grant and map (which exclude tule and swamp lands), in consequence of the peculiar character and conformation of that region of country.

Any location of the whole eleven leagues between the Buttes and the Feather and Sacramento Rivers, which is what is asked for by Mr. Black, would be contrary to the express terms, intent and meaning of the grant, because it would necessarily include many thousand acres of tule and swamp land.

VI. All the courts of the State of California and of the United States, which have ever passed upon the grant to Sutter, have held, that it included land south of the American River, and also, on both sides of Feather River. The Board of Land Commissioners, the United States District Court, and this court, have so held. The Supreme Court of the State has so held in numerous cases.* In *Morton* v. *Folger*, referred to below, the court said:

"Upon the land supposed to be contained within the grant to Sutter, two cities are built; one of them the second in population and wealth of the State; and it is a matter perfectly notorious, that residents of those cities, and occupiers of land lying between them, numbered by thousands, have taken conveyances under Sutter, and expended their money in buildings and other improvements, relying upon the survey *and maps* of Vioget, as evidence that their property was situated within the limits of the grant."

Mr. Justice NELSON delivered the opinion of the court.

The appeal is from the decree or order of the court confirming a survey and location of the eleven square leagues of land granted to Sutter by Governor Alvarado, on the 18th June, 1841. This grant was confirmed by the Board of

* Ferris *v.* Coover, 10 California, 614; Cornwall *v.* Culver, 16 Id. 426; Morton *v.* Folger, 15 Id. 277; Seaward *v.* Malotte, Id. 306.

Commissioners to Sutter, together with twenty-two other square leagues granted to him by Governor Micheltorena, on the 5th February, 1845. The Board of Commissioners, in their decree, state that "the land of which confirmation is made is situated on the American, Sacramento, and Feather Rivers, and is known as New Helvetia," and to be located as described and explained in the depositions of John I. Vioget, filed in the cause: "On the south by a line drawn due east from Sacramento River, so as to touch the most southerly point of a pond or laguna situated near said river, and about five miles south of the American River, as represented on the maps filed in the case, marked B. and B. P. L., exhibit to the deposition of Juan B. Alvarado, March 15, 1855, which line is also marked on said map, *Lindero latitud norte* 38° 49′ 32″; on the north by a line drawn due east from the Sacramento River to the southern base of the mountains known as the Buttes, and represented on the said map by the name of *Los Tres Picos;* and from thence until it intersects the eastern boundary of the tract, as represented on said map and described in the grant, and in the depositions of said Vioget; on the west by said river Sacramento, and on the east by the margins of the Feather River inclusive." "For a more particular description, reference to be had to the copies of the grants A. and C., to the map marked B., and to the depositions of John J. Vioget and Juan B. Alvarado, all of which are filed among the papers in the case." The United States appealed from this decree to the District Court, in which considerable additional testimony was taken on the title and boundaries; and, after argument, the court affirmed the decree of the Board of Commissioners substantially in the words of that decree. From this decree an appeal was taken to this court, and after argument the decree of the District Court was affirmed as to the grant of eleven square leagues, and reversed as to the twenty-two granted by Micheltorena.

The mandate of this court, sent down to the District Court to be executed, recites the decree of that court *in hæc verba*, and then proceeds: "On consideration whereof, it is now

ordered, adjudged and decreed by this court, that so much of the decree of the said District Court as confirms the claim of John A. Sutter to the eleven square leagues of land, situated on the American, Sacramento and Feather Rivers, known by the name of New Helvetia, and which was granted to the said John A. Sutter by Governor Juan B. Alvarado, on the 18th of June, 1841, as set forth and described in said decree, be and the same is hereby affirmed," and the residue of the decree, in so far as it confirms the twenty-two square leagues to John A. Sutter by Micheltorena, be reversed, "and that this cause be and the same is hereby remanded to the said District Court for further proceedings to be had therein in conformity to the opinion of this court."

The first survey and location of the eleven leagues, in pursuance of the mandate, was made by A. W. Von Schmidt, in 1859, a deputy surveyor, under the instructions of J. W. Mandeville, th Surveyor-General of the United States. This survey was approved by this officer February 18th, 1860, and a copy filed in the District Court the 27th of the same month, in pursuance of an order of the court. Numerous objections were taken to this survey, by various persons interested in the location of the grant, and a volume of evidence produced before the court impeaching and supporting the correctness of the same; and the court, after argument, and a very full and elaborate examination, set aside the survey, and ordered another to be made by the Surveyor-General, in conformity with the opinion expressed.

This second survey was made and approved by this officer on the 11th May, 1863, and was confirmed by the District Court on the same day. From this decree or order of confirmation the United States, and several intervenors under the act of 1860, have appealed to this court.

The mandate of this court must be looked to for the description of the out-boundaries of the grant to Sutter, within which the eleven square leagues of land are to be located. They are given in the mandate as derived from the calls in the grant, the map B. P. L. annexed to the deposition of

Juan B. Alvarado, of March 15th, 1855, and the depositions of John J. Vioget. Vioget was a practical engineer and surveyor, and made a survey of the eleven leagues, and also a map of the same in 1840 or 1841, and before the application by Sutter to Alvarado for the grant, and with a view to that application. The map accompanied it, and was referred to in the grant, and annexed to it. There were two depositions of Vioget taken, together with a cross-examination as to each at a different time, which were before the Board of Commissioners, and which are referred to in its decree of confirmation, as well as in the decree of the District Court, and in the mandate of this court, in respect to the location of the grant. According to this survey, two square leagues were located, at the request of Sutter, south of the American River; and the remaining nine were located on each side of the Feather River, extending from what was known as the Canadian Ford on that river up the same.

The survey of Von Schmidt, in 1859, and which was approved by the Surveyor-General, and filed in the District Court the 27th February, 1860, was made substantially in conformity with this survey of Vioget, the map of which is referred to in the grant by Alvarado. Von Schmidt had with him the map B. P. L., and also A. P. L., and the depositions of Vioget; and he found no great difficulty, with these evidences before him of the former survey, in locating the two square leagues below the American River, and the nine on the margins of the Feather River, above the Canadian Ford, extending them up to the northern line, as laid down on the maps. The general outlines, the deputy surveyor states, as respects both parcels, were the same, and that he ran the lines so as to conform to Vioget's survey as near as practicable. They varied some, as it was necessary to run them on subdivision lines, according to the standing instructions of the Land Department.

Mr. Justice Campbell, in delivering the opinion of the court in this case,* when here before, says: "An engineer

* 21 Howard, p. 176.

and surveyor (Vioget), who prepared maps for the claimant, testifies that, in January, 1841, he made duplicate maps for the claimant of the establishment of New Helvetia, and surveyed eleven leagues at that place; and that in 1843 he traced a copy from one of these, and that copy is produced and filed with the petition. It is a fair conclusion," he observes, "from all the evidence, that these maps of Vioget were presented to the Governor, and form the basis of the grant, and make part of it." The survey here alluded to, we have seen, located two square leagues of the land south of the American River, and the remaining nine on the Feather River. Again, speaking of the error of the line of latitude marked on the map, he says: "But the map shows that the line of the southern boundary is south of New Helvetia, and is so related to natural objects represented on it as to be easily determined. Vioget accounts for the error in the designation of the line by the imperfection of the instruments, and proves that a starting corner was fixed and the line traced on the ground. This is better evidence of the true location of the southern line, and conforms to the probability of the case. Upon the whole evidence," he observes, "we find that the grant and map filed with the petition in 1852, before the Board of Commissioners, have been proved."

An objection has been made, that this tract of eleven square leagues has been located in two separate parcels, two leagues below the American, and nine on the Feather River. One answer is, that the original grant with the map accompanying it, thus located it, and which location, as we have seen, has been confirmed by the decree of this court. In the second place, the grant was made of the tract with general out-boundaries, excluding from it lands overflown by the swelling and currents of the rivers, in other words, *tule* or swamp. According to the evidence of both Vioget and Von Schmidt, the quantity for agricultural or fast land, to be contained in the grant, could not be obtained within the out-boundaries without making the location in two different parcels. The location, by the survey of Von Schmidt, in the

two parcels, appears to have been made in as compact a form as was practicable, regard being had to the condition of the grant, to the quantity of land granted, and to the character of the district of country or territory in which it was to be located.

Without pursuing the examination of the case further, we are satisfied that this survey and location by Von Schmidt of the eleven square leagues of land granted to Sutter, is in conformity with the decree and mandate of this court, and should have been accepted and confirmed by the court below. We do not say that it is entirely free from objections, and from our examination of the evidence, we are satisfied that no survey or location of the tract, under the circumstances attending and surrounding the case, could be made that would be free from objection. We refer to the numerous grants made by Sutter of parcels of land, far exceeding the quantity ultimately awarded to him, which, of course, could not be covered by any location that might be made; and also to the case of pre-emption settlers, whose possessions may be included, and would be included, to a greater or less extent, by any possible location consistent with the original decree of confirmation by this court. We fully appreciate the difficulties and embarrassments that surrounded the case upon the evidence in the court below; and the opinions of the learned judge upon the various questions, as they arose, and which appear in the record, furnish abundant evidence of the labor and earnestness with which he endeavored to arrive at right and justice between all parties concerned.

The survey and location, however, which we have felt constrained to adopt, we are inclined to think, will be less disturbing and prejudicial to innocent and *bonâ fide* occupants under grants from Sutter, or on what was supposed to be public lands, than any other that could be made, from the fact that Sutter's possessions, from his first settlement in the country, were south of the American River, and north on the Feather River. These possessions must have been well known to purchasers under him, and also to settlers on what

they supposed to be public lands; and in addition to this, the early survey by Vioget, which was made the latter part of 1840, or beginning of 1841, must also have been well known to the settlers in that section of country.

THE DECREE of the court below, confirming the survey and location of the eleven square leagues to Sutter, approved by the Surveyor-General, May 11, 1863, and filed in court the same day as recited in the said decree, and marked, "Approved, May 11, 1863, Ogden Hoffman, District Judge," must be REVERSED AND SET ASIDE; and the survey and location of the grant by A. W. Von Schmidt, United States Deputy Surveyor, approved by the Surveyor-General, J. W. Mandeville, February 18th, 1860, and a certified copy filed in the District Court, 27th of the same month, be substituted in its stead; and that the case be remitted to the court below, with directions to confirm this survey as the location of the said grant.

Mr. Justice FIELD did not sit in the case, nor take part in its decision.

UNITED STATES v. PACHECO.

1. When the boundaries designated in a decree of the District Court, confirming a claim to land under a Mexican grant in California, embrace a greater tract than the quantity confirmed, the grantees have the right to select the location of this quantity, subject to the restriction that the selection be made in one body and in a compact form; and subject, also, in some instances, to selections made by their previous residence, and by sales or other disposition by them of parcels of the general tract.
2. When the sea or a bay is named as a boundary of land, the line of ordinary high-water mark is intended where the common law prevails. And where a decree confirming a Mexican grant mentions a bay as one of the boundaries of the land confirmed, without any further particulars, the same line will be considered as adopted.

APPEAL from the decree of the District Court of the United States for the Northern District of California, confirming the survey and location of a grant made by the

Mexican Government of California to Pacheco and another, March 23d, 1844, for three leagues of land, situated on the east side of the Bay of San Francisco.

The decree of the District Court confirming the claim of the grantees under the grant, described the land as "known by the name of *Potrero de los Cerritos*, and bounded on the side of the Mission of San José by the Sanjon de los Alisos (Ravine of the Willows), on the north by the creek of the Alameda (Arroyo de la Alameda), and on the west by the bay, containing about three square leagues." The ravine and the creek here referred to as boundaries connect with each other, and with the bay inclose a tract of greater quantity than the three leagues confirmed. On the side of the bay there is salt or marsh land of about two leagues in extent. The whole of this land is covered by the monthly tides, at the new and full moon, and a part of it is covered by the daily tides.

The decree of the District Court was affirmed on appeal by the Supreme Court. Subsequently, a survey was made of the quantity confirmed, under the act of June 14th, 1860, and approved by the District Court. The survey embraced the greater part of the marsh land which is covered by the monthly tides, and excluded that part or the greater portion of it which is covered by the daily tides. From the decree of approval the United States took the present appeal in the interest of settlers on the upland, and the question before the court was as to the correctness of the survey.

The Government contended that the boundary designated as the bay, should be so run as to include all the marsh land; in other words, that by the bay as a boundary in this case was meant the line of low-water mark; and assuming that the boundaries given in the decree do not close, also contended that a fourth line must be determined by the quantity confirmed, and so drawn as to exactly include it. The respondents insisted that they had the right to locate the quantity granted to them anywhere within the exterior boundaries named in the decree of confirmation, subject only to the condition, that the location be made in one body and

in a compact form; which condition was followed in the present case.

The grant referred to a map; but that included both marsh land and upland, and did not indicate that one should be taken before the other.

Mr. Wills, for the United States; Mr. Crane, contra.

Mr. Justice FIELD delivered the opinion of the court.

The decree of the District Court confirms the claim of the respondents to the extent of three square leagues, and describes the land as bounded, on the side of the Mission of San José, by the Sanjon de los Alisos (or Ravine of the Willows); on the north by the Arroyo de la Alameda (creek of the Alameda); and on the west by the Bay of San Francisco. As the ravine and creek connect with each other, the boundaries given inclose on all sides the tract, from which the three leagues are to be taken. On the side of the bay there are about two leagues of salt or marsh land. The whole of this land is covered by the monthly tides at the new and full moon, and a part of the land is covered by the daily tides. And the objection taken to the survey approved by the District Court, is that it does not include this marsh land as part of the tract confirmed. The objection is made on the supposition that the lines given by the decree do not close; that a fourth line is necessary to complete the boundaries, and that this fourth line must be determined by the quantity confirmed, and so drawn as to include it; and that by the bay as a boundary in this case is meant the line of low-water mark.

The position that the lines given do not close, rests upon a mistake as to the fact, and of course requires no other answer than this statement. Within the boundaries given, the respondents had the right to select the location of the quantity confirmed to them, subject only to the restriction that the selection be made in one body and in a compact form. This right of location, possessed by Mexican grantees when a specific quantity is confirmed lying within exterior

boundaries embracing a greater quantity, is, in many cases, controlled by their previous residence, or by sales or other disposition made by them of portions of the general tract. The parcels occupied for a residence, or disposed of, are treated as selections already made, from which the parties cannot recede. But in the present case there were no considerations of this kind to control the election of the respondents: and it is not denied that the land embraced by the survey is in one body, and in a compact form.

The position, that by the bay as a boundary is meant, in this case, the line of low-water mark, is equally unfounded. By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails.* And there is nothing in the language of the decree which requires the adoption of any other rule in the present case.

If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican Government, the result will be equally against the position of the appellants.

The map, to which the grant refers, does not determine the point; it includes both marsh land and upland, and does not indicate that either shall be taken by the grantees before the other. The greater part of the marsh land which is covered by the monthly tides is in fact embraced by the survey, and that part which is excluded, or the greater portion of it, is covered by the daily tides. If the grantees were also entitled to the portion excluded, they could have asserted their right by an appeal from the decree approving the survey. It does not lie with the Government to complain of the decree in this particular.

DECREE AFFIRMED.

* 3 Kent, 427.

Statement of the case.

READ *v.* BOWMAN.

1. A declaration that a certain improvement, containing in reality one principal and three distinct minor improvements, was patented on a day named, is supported by evidence that four patents—reissues—were subsequently granted on an original patent of the date named; such original having, in its specification, described all and no more than the improvements specified in the four reissues. The reissues relate back.
2. Where the purchaser of a claim for a patent agrees that, as soon as the patent is issued, he will give his notes, payable at a future date, the fact that no patent has issued until *after* the day when the last note, if given, would have been payable, is no defence to *assumpsit* for not having given the notes; the patent having finally issued in form.

READ & WHITAKER were inventors of four improvements in reaping and mowing machines, the principal one being what was called a "tubular finger-bar;" and in 1856 were in partnership, under the name of Lloyd, Whitaker & Co., with two persons named Lloyd & Bowman; these last-named persons using the improvements with them, though not in any way inventors. On 27th December, 1856, Read & Whitaker applied for a patent; their application giving authority to Mr. Hanna, of Washington, whom they appointed their solicitor, "to alter or modify the drawings, specifications, and claims thereunto attached, in such manner as circumstances might require, or to withdraw the application altogether should it be deemed advisable, and in that event to receive and receipt for such sums of money as should be returnable under the act of Congress in that case made and provided." Pending this application, and before any letters were granted, Read agreed to sell out his interest to *Whitaker* for $4500; of which $1500 was to be paid, and was paid in cash. The instrument of sale recited that, "Whereas Read & Whitaker have invented *an* improvement, for which they have *applied for letters patent;* and whereas, Whitaker has agreed to purchase of Read his interest in and to *said* invention, in consequence of letters patent, granted or to be granted; now, therefore, I, the said Read, in consideration, &c., hereby assign, &c., to Whitaker, the full and exclusive

right to said invention, *as set forth and described in the specifications which I, in company with Whitaker, have prepared, executed, and filed* with the Commissioner of Patents at Washington, preparatory to obtaining letters patent therefor. To have and to hold," &c. Then, in a separate paragraph, the assignment proceeds, for the same consideration ($4500), *and the further consideration of one dollar*, to assign to Whitaker Read's right, title, and interest in and to three claims to inventions made by Read & Whitaker, for which *the specifications had not been fully made*, describing them.

The specifications above referred to contained a description of all the improvements in the case, which were plainly but parts of one invention.

Contemporaneously with this assignment, Whitaker, as one party, and "Bowman & Lloyd" signing as another, executed an engagement to Read for $3000, the balance of the consideration of the transfer from Whitaker to him. The contract, in opening, recites, that Read had assigned to *Whitaker* all his title in certain *inventions and improvements* (both plural) made by Read & Whitaker, in improvement of grain-reapers and grass-mowers, &c. (for full particulars reference being made to said assignment), "for which the said *Whitaker* has agreed to pay the said Read as follows: $1500 on the 1st January, A. D. 1859, and $1500 on the 1st January, A. D. 1860, with interest." And the contract then thus concludes:

"Now, therefore, we, the said *J. Lloyd, F. H. Bowman, and J. T. Whitaker*, do hereby agree, for a valuable consideration to us paid by the said Read (the receipt whereof we do hereby acknowledge), *as soon as the patent for the improvement in the grain-reaper and grass-mower aforesaid is obtained by the said Read and Whitaker*, to execute unto the said Read our joint and several notes for the said amounts, payable as aforesaid, with interest as aforesaid."

The dates when the notes were to come due must be observed. After this time Read retired from business; the

three other persons continuing it, and using all four improvements.

The "specifications" referred to in Read's assignment, as filed by him and Whitaker with the Commissioner of Patents, presented in reality *four* improvements. Mr. Hanna, their solicitor, withdrew three of the claims; and on the 11th of August, 1857, accepted a patent for *one* of them only, as specified in a specification amended by him; the patent embracing all the improvements in its specification, but the claim being restricted to the principal improvement, that of the "tubular finger-bar." On the 12th of February, 1859,—this date, too, must be noted,—"Bowman & Lloyd," who now ceased to use any of the improvements, notified to Read that, as more than a sufficient time had elapsed for procuring the patent for improvements, and as the same had not been procured, they (Bowman & Lloyd) considered themselves discharged, and the contract void, so far as *they* were concerned. About one year after this notice, that is to say, on the 7th February, 1860, Read did obtain *four* patents—*reissues* upon the patent of August 11, 1857, which reissued patents, it was admitted, did contain the said four improvements, being all the improvements in the matter.

Read accordingly brought assumpsit against Whitaker, Bowman & Lloyd, for breach of contract in not executing their two notes for $1500 each; the declaration alleging that, subsequently to making the agreement, "to wit, on the 11*th day of August*, 1857, the said improvement was duly patented;" nothing being said about any surrender or about the reissues; and the one patent of August 11, 1857, being alone offered in proof.

The question below was, whether this declaration was sustained by the evidence; and whether Lloyd & Bowman were discharged. The court held the declaration sufficient on the reissued patents being granted; that both Bowman & Lloyd were bound, just as Read was; that Bowman & Lloyd were chargeable with notice of Mr. Hanna's authority, and were bound by such changes and modifications as he made. Verdict was given for the amount of the notes with interest.

Argument for the plaintiff in error.

Judgment having gone accordingly, the defendants brought the case here on error.

Goodwin, for the plaintiff in error: The contract about the notes shows plainly that Whitaker was the principal debtor. It is "the said *Whitaker*" who "has agreed to pay the said Read." Lloyd & Bowman do not contract to *pay* at all. Indeed there was no equity to raise an obligation for them to pay. Read's assignment was to "Whitaker," and to him alone. He alone got a permanent and beneficial interest. What Lloyd & Bowman do is this: they—after that Whitaker has promised to *pay*—agree that they with him will give their notes. Is it not plain that they did this as his sureties? Where a contract is to pay the debt of another, without any new consideration to the party so contracting, the obligation is to be construed as one of suretyship,* and, of course, to be construed strictly. The surety is bound in the manner and under the circumstances pointed out in his obligation. He may stand to its very terms, and if a variation is made without his assent, he is discharged.

This obligation of the sureties was not absolute, but was contingent upon the condition precedent, that a patent for the specified improvements should first issue. If no patent ever issued, although Whitaker was still liable to Read for the sum agreed, Bowman & Lloyd could not be called upon for its payment.

Then the issue being a condition precedent, such condition must have been performed within a *reasonable* time; prior, at least, to the time when the debt for which they thus contingently bound themselves matured: obtaining a patent subsequent to such time was not sufficient. But all the obligation of Whitaker became due on or before the 1st day of January, 1860; the reissued patents all bear date subsequently. From the date of the contract, therefore, to its maturity, the condition precedent to Bowman & Lloyd's liability remained unperformed.

* Rees *v.* Barrington, 3 Leading Cases in Equity, by Hare & Wallace, 3d edit. 837.

Argument for the plaintiff in error.

Moreover, by the terms of the contract it was necessary that a patent should issue for all the improvements specified. In their mechanical nature, one may have been greater than another. In their legal magnitude, all stand on one base. The patent of 11th August, 1857, the only patent offered in evidence, being for only *one* of the four, was not a performance of the condition.

Under the simple allegation of the issue of a patent on that day, it was not competent to prove the surrender of such patent, and the reissue of the four patents nearly three years afterwards. This evidence being excluded, there was nothing before the jury but the patent of August 11th, 1857, and the verdict should have been for the defendants.

The true construction of the last clause of the contract is, to regard it as containing solely the contract of Bowman & Lloyd, in the same manner as if the earlier part had been signed by Whitaker, with the clause omitted; and then the clause indorsed upon the contract, or written beneath it, and signed by Bowman & Lloyd only. Any other view involves the absurdity of making Whitaker both absolutely and contingently liable for the same debt by the same instrument. The contract of the respective parties, though contained in the same writing, must in construction be so severed as to be consistent with itself; and any other construction than that for which we contend, either changes the *absolute* liability of Whitaker to pay, which is clearly fastened upon him by the previous part of the contract, into a *contingent* liability dependent upon a condition to be performed, or enlarges the obligation of Bowman & Lloyd, which is contained only in this final clause, from a *conditional* into *an absolute* liability, a construction which would make the instrument inconsistent and contradictory.

Bowman & Lloyd are not chargeable with notice of the authority of Mr. Hanna. The contract refers to the *specifications* as containing the *description* of the *inventions* for which a patent was to be issued, and is only notice of what such inventions were, and not of the power of attorney. Even if *notice* of the appointment of Hanna as the attorney, and of

his authority, can be implied from the contract, it would be no evidence of the *assent* of Bowman & Lloyd to the exercise of such power to *withdraw or lessen the patent.* On the contrary, the notice of such power would no more be evidence of such assent, than the knowledge of the like authority existing in the inventors themselves under the Patent Law would imply such assent. The contract made with Bowman & Lloyd by the patentees would, in fact, restrict both the patentees themselves and their attorneys from the subsequent exercise of such power of withdrawal or modification, so far as Bowman & Lloyd were concerned, without the consent of Bowman & Lloyd, and would require the patent to be obtained for all the specified improvements, as set forth in the agreement, in order to hold Bowman & Lloyd under that contract.

To construe the power given to Mr. Hanna by the patentees as binding upon Bowman & Lloyd, and implying their assent to its exercise, would contradict the terms of the contract, for Bowman & Lloyd were not to be liable unless a patent were *first* issued, but Mr. Hanna was authorized to withdraw the entire claim and receive back the patent fee. You cannot imply Bowman & Lloyd's assent to the withdrawal of any part of the claim any more than of the whole, for all the evidence of such assent is what is furnished by the writings themselves, and they give the same authority to withdraw all as any part.

Mr. Roberts, contra: There is no evidence that Lloyd and Bowman were sureties. Had the consideration moved wholly to Whitaker, it would not have proved that fact, for a promise is not necessarily that of a surety because the consideration moves to another. But it is evident that Lloyd and Bowman were interested in the purchase, for they received, had, and used the thing bought. The assignment was made to Whitaker, probably, because he was a joint inventor. Even if they were sureties, that makes no difference; for sureties are as much bound by the true intent of instruments as principals.

Argument for the defendant in error.

Had not the pleader in drawing the *nar.* alleged the issue of a patent, we should have insisted that there was no condition precedent to be performed by Read. The law is that if a promise is made to pay a sum of money at a time fixed, with a condition annexed which may never be performed, the promise is not dependent but absolute. In *Harlow* v. *Boswell*,* the promise was to pay in twelve months, *or so soon as the promisor should sell to the amount of the note out of a certain commodity.* Treat, C. J., said the note was payable absolutely at a day certain. In *McCarty* v. *Howell*,† the note read, "Four months after date, or so soon as I collect a certain note against A. Davis, I promise to pay," &c. Breese, J., after stating that the note was to be construed most strongly against the promisor, and that it was payable absolutely, put a quietus upon the defendant's argument by stating their respective positions thus: "By our construction the note would read, 'Four months after date I promise to pay,' &c., 'but if A. D. pays his note before that time I will pay then.'" By the other construction it would read, "I will pay this note at four months, but if A. D. does not pay his note to me I will never pay it." The *reductio ad absurdum* would be no less apparent in the present than in that case, if the position indicated were assumed. Mr. Read had parted with property valued at $3000 over what had been paid for it, and with all control over it; the purchasers had it in their power never to perform the condition, on the hypothesis assumed, by delaying the obtaining of the patent until after the time the notes were to be given, and thus to defeat a right of action and still keep the property. And this is the true reason why such a promise is absolute. It is because the promisor has it in his power to defeat the condition. Who can say that the plaintiffs in error did not, in this very case, delay the grant of the reissues, for a month and seven days, upon the idea of saving to themselves $3000?

With regard to Mr. Hanna: By the agreement between

* 15 Illinois, 56. † 24 Id. 341.

Read and Whitaker, it was understood between them that the specifications might be altered, modified or changed by this person. When, therefore, the letters patent were issued, upon the specifications, whether as they originally stood, or as modified, Whitaker was bound, by the letter and spirit of the contract, to execute the notes. This determined the obligation of Bowman & Lloyd. It must be considered that the parties entered into this contract with all the rights with which the patent law clothes inventors, one of which is, that a defective specification can be amended. Hanna modified the specifications, by striking out all but one claim. The parties are presumed in law to have been informed by their attorney that this had been or would be done; and hence the distinction in the assignment, both in respect to the *one* invention, as distinguished from the other three, and in respect to the consideration of the assignment, by making a class of one claim, and another distinct class of the other three, so that, although the whole were assigned to Whitaker, they well understood, at that time, that the patent then issued or to be issued, covered but the one claim. Read undertook for nothing, except that the inventions were patentable, to be shown by the issue of a patent. He had parted with all his interest in the invention, and had no right to interfere with Whitaker's proceedings in obtaining the patent in any form he wished. If he had interfered to prevent its issue upon the one claim, he would have thereby furnished a perfect defence to this action.

The second patent legalized the rights of the patentee from the date of the first patent. The reissue was still a patent for the original invention, and if these effects can be given to it, it was properly declared on as it was.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The principal question in the case arises upon the exceptions of the defendants to the instructions given by the court to the jury.

Opinion of the court.

Other exceptions were taken by the defendants to the rulings of the court, and to the refusal of the court to instruct the jury as requested; but the whole substance of the controversy between the parties, and of the errors assigned in the record, is involved in the exceptions to the instructions of the court. Defendant in error and the first-named plaintiff were inventors of a certain improvement in reaping and mowing machines, and were joint-owners of the improvement. They applied to the Patent Office for letters patent, and employed a patent solicitor, to prosecute their claim before the commissioner. Application was filed on the eighteenth day of May, 1857, and it is conceded that the specifications accompanying the same contained a description of the entire improvement. Pending the application, and before the letters patent were granted, Whitaker, the principal defendant in the court below, agreed with his associate inventor to purchase of him, for the sum of four thousand five hundred dollars, all the right, title, and interest which the latter had or might have in and to the invention, in consequence of the letters patent granted or to be granted therefor; and in consideration of that sum the plaintiff in the court below, who was the other inventor, assigned and set over to the party first named the full and exclusive right to all of the invention, as set forth and described in the specifications; and the contract was that the assignee should have and hold the invention to him and his assigns, as fully as the same would have been enjoyed by the assignor if the assignment and sale had not been made. Introductory part of the instrument described the invention as an improvement in reaping and mowing machines, for which the inventors had applied for letters patent. Assignor also, by the same instrument, "in consideration aforesaid, and also of one dollar" to him paid, assigned and set over to the same assignee, all right, title, and interest in and to three certain claims to inventions, described as made by the same inventors, and for which the specifications had not been fully prepared. Suit was brought in this case, by the assignor in that instrument, to recover the sum of three thousand dol-

lars as the unpaid balance of the consideration for the title and interest of the invention as conveyed.

Declaration was an assumpsit, and was founded upon a contemporaneous written agreement, signed by the assignee in that assignment, and the other two defendants. Agreement declared on refers to the instrument of assignment, describes the subject-matter assigned as improvements "to grain-reapers and grass-mowers, belt-tightener," &c., specifies the entire consideration, states that the balance unpaid is three thousand dollars, and that the same is to be paid in two annual instalments, with interest at ten per cent. per annum, and concludes with what is the material clause in the controversy. Substance of the clause is that the defendants agreed to execute to the assignor of the invention their joint and several notes "for said amounts, payable as aforesaid, with interest, as aforesaid," as soon as the patent for the improvement in the grain-reaper and grass-mower aforesaid is obtained by the said inventors. Material allegations of the declaration are, that the letters patent described in the agreement were, on the eleventh day of August, 1857, duly obtained, and that the defendants, after due notice thereof, neglected and refused to give to the plaintiff their joint and several notes as they had agreed to do. Plea was non-assumpsit, and the verdict and judgment were for the plaintiff.

I. Principal defence is that by the true construction of the agreement, no right of action against the last two defendants was to accrue to the plaintiff, unless letters patent for all the improvements specified in the assignment were obtained within a reasonable time, and that inasmuch as the patent of the eleventh of August, 1857, was for one *only* of the four specified improvements, the plaintiff, as against those defendants, is not entitled to recover. Reference must be made to the circumstances under which the contract was made, as affording the means of applying the language employed in the instrument to the subject-matter of the agreement. Parties agreed that there were four improvements, but they all related to grain-reapers and grass-mowers, as

the machines are called in the written contract. Specifications of the patent of the eleventh of August, 1857, embraced all of the improvements described in the assignment, but the claim of the patent limited the invention to the tubular finger-bar, therein described, which is by far the most important feature of the entire improvement, and really constitutes the principal merit of the invention. Description of the improvement in the assignment is that it is an improvement in reaping and mowing machines, and there can be no doubt that it was regarded by the parties as constituting the principal matter of the assignment and transfer. But the other improvements are embraced in the assignment, and cannot be separated from the consideration specified in the instrument. Two of the claims are described as the subjects of one application, and the other, as an invention for a belt "tightener," operated by a right and left hand screw. They were four in all, and in point of fact were all described in the original specification, and are the same as those described in the reissued patents set forth in the record.

First one, as before stated, consists of an improvement in the construction of the finger-bar in reaping and mowing machines, substituting a rolled tubular finger-bar in the place of the solid bar previously used.

Second one consists of an improvement in the arrangement and combination of the raker's seat with a supporting wheel, and the frame and finger-bar of the machine.

Third one consists of an improvement in the mode of mounting the driving wheel, and of driving the pulley that communicates motion to the belt and reel pulley.

Fourth one consists of an improvement for tightening the belt which draws the reel for the purpose of gathering the grain into the sickle.

Obviously the improvements are but parts of the same invention, and the evidence shows that the parties to the assignment had invented them all before the date of that instrument. Precise date of the invention does not appear; but it does appear that all of the parties to the written agree-

ment were partners in 1856, and that the partnership used the improvement in the manufacture of machines. When the plaintiff assigned his interest in the invention to the first-named defendant he retired from the firm, and the other partners continued the business, using all four of the improvements. Express reference is made, both in the assignment and in the agreement, to the pendency of the application for a patent, in respect to the principal improvement, and in the latter, both to the pending specifications and to those which were "not fully made." Such reference to the specifications and pending proceedings render it allowable to examine those documents in connection with the assignment and agreement, as means of ascertaining the true intent and meaning of the parties.

Pending application for the patent was dated the 27th day of December, 1856, and was signed by both of the inventors. Authority was therein conferred upon their solicitor to alter or modify the drawings, specifications, and claims thereunto attached, in such manner as circumstances might require, or to withdraw the application altogether should it be deemed advisable, and in that event to receive and receipt for such sums of money as should be returnable under the act of Congress in that case made and provided.

Pursuant to the authority conferred by both the inventors, he amended the specifications and received the patent described. Effect of the assignment was not only to transfer the whole title of the several improvements to the assignee, but also to confer upon him the entire control of the pending application for letters patent. He could cancel the authority of the solicitor, or he could suffer it to remain without restriction or limitation. Plaintiff reserved no control in the matter, and it does not appear that he ever attempted to interfere in the premises. Purchase of the assignee was an absolute one, and he was bound to pay the consideration at all events. Plainly the other defendants were not parties to the assignment, nor were they parties to the promise of the assignee to pay the consideration, as therein specified and repeated in the introductory part of the written agreement.

Opinion of the court.

Their promise is contained in the last clause of the instrument, and it is conditional; but it is a mistake to suppose that it is not a joint one with the assignee. Neither the assignee nor the other two defendants promised to give their notes for the consideration, excepting on the happening of the condition therein specified. Legal effect of the promise by all three was, that they would give their joint and several notes for the two unpaid instalments, "payable as aforesaid, with interest aforesaid," as soon as the patent for the improvement in the grain-reaper and grass-mower aforesaid was obtained by the inventor. Obligation to perform was made dependent upon the future and undetermined action of the patent officer. Applicants for patents may, by law and the usages of the bureau, amend their specifications, and do everything authorized to be done by the patent solicitor in this case. Assignee knew what authority he and his associate inventor had conferred upon the solicitor, and it must be understood that the other defendants also knew what was the law upon the subject and the general usage of the Patent Office. Instructions of the court, therefore, were right, that when the letters patent were issued, the assignee was bound, by the letter and spirit of his contract, to execute his notes. Defendants are right in supposing that a surety may stand upon the very terms of his contract; that he will be discharged if any alteration is made in his agreement, without his knowledge or consent, which prejudices him, or which amounts to the substitution of a new agreement for the one he executed.*

But sureties are as much bound by the true intent and meaning of their contracts which they voluntarily subscribe as principals. They are bound in the manner, to the extent, and under the circumstances as they existed when the contract was executed. *Roth* v. *Miller*.† Strong doubts are entertained whether any one of the defendants can be regarded

* Bonar *v.* McDonald, 1 English Law and Equity, 8; McWilliams *v.* Mason, 5 Duer, 276; Maher *v.* Hall, 5 Barnwall & Cresswell, 269; Bouler *v.* Cox, 4 Beavan, 380; Islyn *v.* Hartell, 8 Taunton, 208.

† 15 Sergeant & Rawle, 100.

as a surety; but it is unnecessary to decide that question at the present time. Terms of the contract, or that part of it under consideration, were based on the undetermined action of the Patent Office, and in consideration of that fact it must be assumed that the parties not only knew that the specifications might be amended or withdrawn, but that they contracted in view of the probability that such changes might be made.*

Patentees, also, are clothed with the power, whenever the patent granted shall be inoperative or invalid by reason of a defective or insufficient description or specification, if the error arose from inadvertency, accident, or mistake, to surrender the same; and thereupon the Commissioner of Patents, upon the payment of the duty, is authorized to cause a new patent to issue. Reissue must be for the same invention, and in judgment of law it is only a continuation of the original patent; and, consequently, the rights of the patentee, except as to prior infringements, are to be ascertained by the law under which the original application was made.†

Original patent in this case was surrendered, and on the 7th of February, 1860, four distinct reissues were granted. Prior patent, as already explained, embraced all those improvements in its specifications, but the claim was restricted to the principal improvement. Object of the surrender was to correct that part of the specification known as the claim, and it is admitted by the defendants that the reissues cover all the improvements specified in the assignment, and no more than what was embraced in the original specifications. Under the circumstances, we are of the opinion that the instruction of the court that the declaration is sufficient was correct. Considering the state of the record, we have not thought it necessary to reproduce the instructions of the court, but have preferred to state our views of the law applicable to the case, and only wish to add that the instruc-

* Barclay *v.* Lucas, 1 Term, 291, n.; Miller *v.* Stewart, 9 Wheaton, 703; 4 Stat. at Large, 122.

† Shaw *v.* Cooper, 7 Peters, 315; Grant *v.* Raymond, 6 Peters, 244; Stanley *v.* Whipple, 2 McLean, 35.

tions of the court were in all substantial respects correct. The decree of the Circuit Court, therefore, is

AFFIRMED WITH COSTS.

HOGAN *v.* PAGE.

1. A patent certificate, or patent issued, or confirmation made to an original grantee or his "*legal representatives*," embraces representatives of such grantee by contract, as well as by operation of law; leaving the question open in a court of justice as to the party to whom the certificate, patent, or confirmation should enure.
2. The fact that A., many years ago, did present to a board of commissioners appointed by law to pass upon imperfect titles to land, a "claim" to certain land, describing it as "formerly" of B., an admitted owner; the fact that the board entered on its minutes that A., "*assignee*" of B., presented a claim, and that the board granted the land to "the *representatives*" of B.; and the fact that A., with his family, was in possession of the land many years ago, and cultivating it, are facts which tend to prove an assignment; and as such, in an ejectment where the fact of an assignment is in issue, should be submitted as evidence to the jury.

ERROR to the Supreme Court of Missouri; the case being thus:

After the cession, in 1803, by France, of Louisiana, to the United States, Congress passed an act* establishing a board of commissioners at St. Louis, for the purpose of settling imperfect French and Spanish claims. The act provided that any person who had, for ten consecutive years prior to the 20th December, 1803, been in possession of a tract of land not owned by any other person, &c., "should be confirmed in their titles."

In 1808, one Louis Lamonde presented a claim for a tract of one by forty arpens, "formerly the property of Auguste Condé." The minutes of the board, of November 13th, 1811, disclosed the following proceedings:

"Louis Lamonde, assignee of Auguste Condé, claiming one by forty acres, situate in the Big Prairie district of St. Louis, pro-

* Act of 3d March, 1807, 2 Stat. at Large, 440.

duces a concession from St. Ange and Labuxière, Lieutenant-Governor, dated 10th January, 1770.* The board granted to the *representatives* of Auguste Condé forty arpens, under the provisions of the act of Congress, &c., and ordered that the same be surveyed, conformably to possession, &c."

The minutes did not record the fact that any *assignment* of this land from Condé to Lamonde had been presented to the board, or that other proof was made of such conveyance.

This decision of the board, among many others, was reported to Congress, and the title made absolute by an act of 12th April, 1814. In 1825, Lamonde obtained from the recorder of land titles a certificate of the confirmation.

Hogan, claiming through Lamonde, now, A. D. 1850, brought ejectment at St. Louis against Page for a part of this land. Lamonde was an old inhabitant of St. Louis, who had died some ten years before the trial at a very advanced age; and there was some evidence on the trial that he and his family cultivated this lot in the Grand Prairie at a very early day, before the change of government under the treaty of 1803; and evidence that by the early laws of the region these interests passed by parol.

The court below decided that the plaintiff was not entitled to recover upon the evidence in the case.

Mr. Gantt, for the defendant here and below, in support of this ruling, insisted here that, as no assignment or transfer of Condé's interest in the concession was proved before the land board or at the trial, the confirmation could not enure to the benefit of Lamonde, so as to invest him with the title; and that, in the absence of the assignment, the confirmation "to the representatives of Auguste Condé" enured to the benefit of his heirs.

Messrs. Browning, Hill, and Ewing, argued contra for the plaintiff, that, as Lamonde presented his claim to the board,

* This concession, about which there was no dispute, was to Condé.

as assignee of Condé, and as such set up a title in his notice of the application, the act of the board should be regarded as a confirmation of his right or claim to the land; and the cases of *Strother* v. *Lucas*,* *Bissell* v. *Penrose*,† and *Landes* v. *Brant*,‡ in this court, were referred to as supporting this view of the confirmation.

Mr. Justice NELSON delivered the opinion of the court.

On looking into the cases cited on the part of the plaintiff, it will be seen that the confirmations which there appeared were either to the assignee claimant by name, or in general terms, that is, to the original grantee and "his legal representatives;" and when in the latter form, it was the assignee claimant who had presented the claim before the board, and had furnished evidence before it of his derivative title, and which had not been the subject of dispute. The present case, therefore, is different from either of the cases referred to.

A difficulty had occurred at the Land Office, at an early day, in respect to the form of patent certificates and of patents, arising out of applications to have them issued in the name of the assignee, or present claimant, thereby imposing upon the office the burden of inquiring into the derivative title presented by the applicant. This difficulty, also, existed in respect to the boards of commissioners under the acts of Congress for the settlement of French and Spanish claims. The result seems to have been, after consulting the Attorney-General, that the Commissioner of the Land Office recommended a formula that has since been very generally observed, namely, the issuing of the patent certificate, and even the patent, to the original grantee, or *his legal representatives*, and the same has been adopted by the several boards of commissioners. This formula, "or his legal representatives," embrace representatives of the original grantee in the land, by contract, such as assignees or grantees, as well as by operation of law, and leaves the

* 12 Peters, 453. † 8 Howard, 338. ‡ 10 Id. 370.

question open to inquiry in a court of justice as to the party to whom the certificate, patent, or confirmation, should enure.

Now, upon this view of the case, we think the court below erred in ruling, as matter of law, that the plaintiff was not entitled to recover. The question in the case is, whether or not the evidence produced by the plaintiff on the trial before the jury tended to prove that there had been an assignment by the one of forty arpens from Condé to Lamonde, prior to his notice of the claim before the board of commissioners in 1808? If it did, then it should have been submitted to the jury as a question of fact, and not of law. The transaction was ancient, and of course it could not be expected that the evidence would be as full and specific as if it had occurred at a more recent period.

The piece of land is but a moiety of the original concession to Condé; and it appears that previous to the change of government, and while Condé was living, Lamonde and his family were in possession cultivating the strip, in the usual way in which these common field lots were occupied and improved. And very soon after the establishment of a board at the town of St. Louis, for the purpose of hearing and settling these French and Spanish imperfect grants, we find him presenting this claim before the board, setting up a right to it as his own, and asking for a confirmation; and in the proceedings of confirmation, the board speak of it as a claim by Lamonde, assignee of Condé.

The title did not become absolute in the *confirme*, whoever that person might be, till the passage of the act of 1814; and in 1825, Lamonde, for he appears to have been then alive, procured from the recorder of land titles the certificate of confirmation.

We are of opinion that these facts should have been submitted to the jury, for them to find whether or not there had been an assignment or transfer of interest in this strip of one by forty arpens from Condé to Lamonde. Especially do we think that the question should thus have been submitted, as it appears that at this early day and among these

simple people, a parol transfer of this interest was as effectual as if it had been in writing.

JUDGMENT REVERSED with costs, and cause remanded with directions to issue

NEW VENIRE.

MINNESOTA COMPANY *v.* ST. PAUL COMPANY.

1. Where a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a Federal court, the bill is properly filed in such Federal court as distinguished from any State court; and it may be entertained in such Federal court, even though parties who are interested in having the construction made would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States.

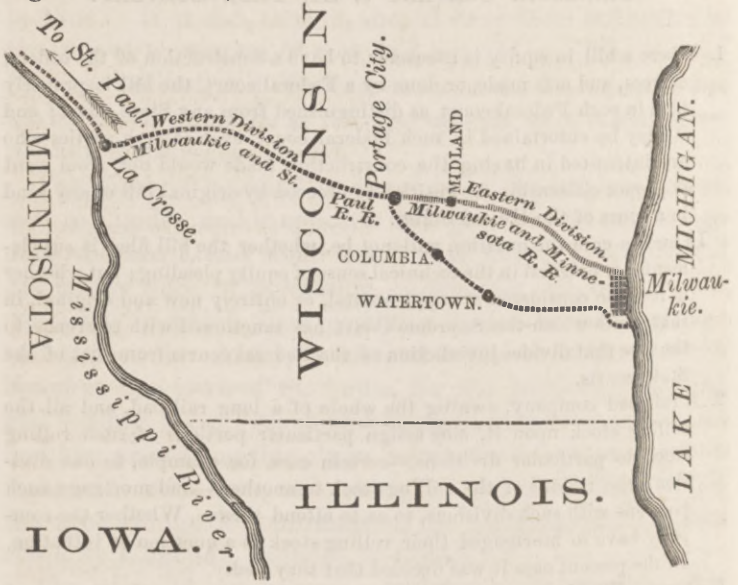
   In such a case the question will not be, whether the bill filed is supplemental or original in the technical sense of equity pleading; but whether it is to be considered as supplemental, or entirely new and original, in that sense which the Supreme Court has sanctioned with reference to the line that divides jurisdiction of the Federal courts from that of the State courts.

2. A railroad company, owning the whole of a long railroad, and all the rolling stock upon it, *may* assign particular portions of such rolling stock to particular divisions,—certain cars, for example, to one division; the residue of the rolling stock to another,—and mortgage such portions with such divisions, so as to attend them. Whether the company have so mortgaged their rolling stock is a question of intention. In the present case it was decided that they had.

3. *Quære:* Whether a marshal's sale is valid in any case, unless supported by a judicial order previously made. It is not valid where made under the marshal's wrong interpretation of an order which the court did in fact make; not valid in such a case even where the court confirmed of record the marshal's sale; the court's attention not being specifically directed to the marshal's mistake, nor any issue raised as to what the court really meant, nor decision made, on such issue raised, that the marshal's act should remain firm.

THE La Crosse and Milwaukie Railroad Company was chartered by the legislature of Wisconsin to build a road across that State from Milwaukie to La Crosse, and began

to build at Milwaukie, proceeding westward. The legislature also gave the company the right to mortgage, for the purpose of raising money, any particular division of their road separately. Under this provision of the statute, and for the purpose apparently of mortgaging them separately, the company divided the main road into two divisions, nearly equal in length, called the Eastern Division and the Western Division; the Eastern Division extending from Milwaukie to Portage City, ninety-five miles, and the Western from Portage to La Crosse, one hundred and five miles. Upon *each*



of these *divisions* of the road, as well also as upon the *entire* road, AND upon the *rolling stock*, either of each division, *or* of the entire road,—this exact matter of whether the rolling stock mortgaged did belong to the road as a *whole*, or to it in its *divided* character, being one of the questions in this suit,—it gave certain mortgages; among them these:

ON THE WESTERN DIVISION.

1856, *December* 31.—A mortgage to Bronson, Soutter and

ON THE EASTERN DIVISION.

1854, *June* 30.—A mortgage to Palmer, sometimes called the

Knapp, commonly called the Land Grant Mortgage. This mortgage conveyed also a road, not important to be here spoken of, from Madison, &c.

The descriptive part of this mortgage was as follows:

"All and singular the several tracts, pieces, or parcels of land which now are, or may *hereafter be*, or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute, or be a part of the roads of said railroad company from Madison, &c., and *from Portage City to La Crosse;* and also all and singular the superstructure of *said* roads, whether now made, or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to *said* roads, whether now built and made, or to be built and made hereafter; *and also all and singular the locomotive engines and other rolling stock, and all other equipments of every kind and description which have already been, or may hereafter be, procured for or used on said roads, or either of them; and all the materials, tools, implements, utensils*, and other personal property which have been, or may hereafter be, procured for or used in connection with said roads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of *said railroad company*, of every kind and description, relating to said roads."

First, and sometimes the Palmer Mortgage.

The descriptive part of the mortgage was as follows:

"All their said road, from its eastern termination, in the city of Milwaukie, to Portage City, being ninety-five miles in distance, constructed, and to be constructed, together with all and singular the railways, land procured or occupied, or so to be, for right of way *within the limits aforesaid*, together with bridges, fences, privileges, rights, and real estate owned by said company for the purposes of said road, or which may hereafter be acquired or owned by them *within the limits aforesaid;* and all the tolls, income, issues, and profits to be had from the same, and all lands used for and occupied *within the limits aforesaid* by depots and stations, with all buildings standing thereon, or which shall be procured therefor, together with all *locomotives, engines and tenders, passenger cars and freight cars, shop-tools and machinery, now owned or hereafter to be acquired by said company, and in any way belonging or appertaining to said railroad, now constructed or to be constructed within the limits aforesaid*, including all its property, real and personal, pertaining to said railroad, within *said* limits, and all its rights, credits, and franchises *thereunto* appertaining."

The mortgage went on—after the descriptive part above given—to say:

"But nothing herein contained shall be so construed as to prevent the said company from selling, hypothecating, or otherwise disposing of any lands *or other property* of said

company not necessary to be retained for the roadway, depots and stations, nor required for the construction or convenient use of *that part of said road*, nor from collecting moneys due said company on stock subscription or otherwise; nor shall anything herein contained be so construed as to prevent the said parties of the first part from collecting and appropriating towards the construction, use and repair of the remaining parts of said road *westward towards the Mississippi River*, all stock subscriptions, donations, or loans of money, lands or other property which may have been, or may hereafter be, made for that purpose; but said parties of the first part shall have full right so to proceed, without let or hindrance from said party of the second part. And the *remaining portion of the said railroad* which, by the said parties of the first part, may be constructed, shall be held in use by the said parties of the first part, to their own benefit and behoof forever, so far as the claims of the said party of the second part, or his successor, might otherwise be construed as in conflict therewith. It being distinctly understood that the conveyance made by this indenture is only for so much of the present or hereafter to be acquired *rights, interest and property* of the said company, parties of the first part, as are or shall be vested, or belong or appertain *to that part of said railroad extending from Milwaukie to Portage City* aforesaid, and being in distance ninety-five miles."

1857, *August* 17.—A mortgage to G. C. Bronson and T. J. Soutter, commonly called the Second Mortgage. This mortgage also conveyed the Eastern Division and a road not important to be

here spoken of, from Watertown to Midland. Its language was thus:

"And also, all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description, *which have already been or may hereafter be procured for, or used on, said railroads, or either of them;* and all the materials, tools, implements, and utensils, and other personal property, which have been or may hereafter be procured for or used in connection *with said railroads, or either of them;* and also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads from Milwaukie to Portage City, and from Watertown, by way of Columbus, to Midland aforesaid; and it is hereby declared to be the intention of the parties to convey to and vest in said parties of the second part all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, *in respect to said railroad from Milwaukie to Portage City, and from Watertown, by the way of Columbus, to Midland,* as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped."

OVER THE WHOLE ROAD.

1858, *June* 1. *A Mortgage to W. Barnes.*—This mortgage conveyed the whole road from Milwaukie to La Crosse, and all the rolling stock, personal property, franchises, choses in action, and property of the debtor company, real, personal, and mixed. Its descriptive part need not be more fully given.

The Barnes mortgage, though given last, was first fore-

closed. Sale under it was made in May, 1859. The purchasers organized themselves into a company, as the statutes of Wisconsin allow in like cases, and took the name of the *Milwaukie and Minnesota Railroad Company;* often, for brevity, styled the Minnesota Company simply; conceiving and asserting that they had succeeded to all the rights, property, and franchises of the old company,—subject, of course, to prior mortgages.

In December, 1859, Bronson, Soutter, and Knapp, the trustees in the Land Grant mortgage on the Western Division, filed a bill in the District Court of the United States for the District of Wisconsin, having Circuit Court powers to foreclose their mortgage, making the mortgagor company, the Minnesota Company, and others, defendants.

At the same time, that is, in December, 1859, Bronson and Soutter, trustees in the second mortgage (on the Eastern Division), proceeded, in the same court, to foreclose *their* mortgage, making the same defendants.

All the mortgagees in each of these mortgages, the first, or Palmer; the second, or Bronson and Soutter; and in the Land Grant, or Bronson, Soutter, and Knapp, were citizens of the State of New York, *and were entitled, therefore, to sue, as they did sue, their mortgagor company in the Federal courts.*

In 1860, the District Court, in a creditor's suit in favor of one Howard against the old company, appointed Hans Crocker receiver of the whole road and rolling stock, and he entered into possession under this appointment. In the Western Division foreclosure suit, the same person was appointed receiver of the Western Division and rolling stock pertaining thereto; and afterwards, in the Eastern Division suit, an order was made appointing him also receiver of the road from Milwaukie to La Crosse, and all the rolling stock and franchises, "subject, nevertheless, to a previous order of court appointing him to be the receiver of the western portion of said road, from Portage City to La Crosse."

The two foreclosure suits—of the Land Grant on the Western Division, and of the second mortgage on the Eastern—progressed in the District Court to final decrees, and the

orders and proceedings were as follows, the judge who made them having delivered an opinion that the rolling stock was a fixture of the road:

ORDERS OF REFERENCE.

(March 11, 1861.)

WESTERN DIVISION CAUSE.

"That the masters ascertain and report the *whole* amount of rolling stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage, and also in the first and second mortgages respectively."

EASTERN DIVISION CAUSE.

"That the masters ascertain and report the whole amount of rolling stock on the whole road, and that they specify the quantity thereof *that is covered by and included in* the first mortgage, and also in this mortgage, and in the mortgage of Bronson, Soutter, and Knapp" [*i. e.*, the Land Grant mortgage, or mortgage on the Western Division].

REPORTS OF MASTERS.

(September 1, 1861.)

WESTERN DIVISION CAUSE.

"We have ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill in this cause, $569,635.78; and an additional amount of $53,600 has been purchased since the filing of this bill, making the whole amount to $623,235.78.

"And we have ascertained and report that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to $31,979.64, and numbered 330 [the numbers of forty cars were here given, up to No. 408], &c., are covered by and included in the mortgage executed to the complainants [Bronson, Soutter, and Knapp] as set forth in the bill, the said cars having been purchased by the proceeds of a portion of the bonds to which this mortgage is collateral; and all the *remainder* of the said rolling stock is covered by and included

EASTERN DIVISION CAUSE.

"We have ascertained the whole amount of rolling stock on the whole road. The amount thereof, at the cost price, was, at the date of filing the bill of complaint in this cause, $569,635.78; and an additional amount of $53,600 has been purchased since the filing of the bill, making the whole amount now on the road $623,235.78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to $31,979.64, and numbered 330 [the numbers of forty cars were here given, the same cars as mentioned in the left hand column], &c., are covered by and included in the mortgage of Bronson, Soutter, and Knapp, and no other; and all the *remainder* of the said rolling stock is covered by and included in the first mortage upon the said railroad, and in the complainants'

in the first [*i. e.*, the Palmer] mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Bronson and Soutter on the 17th day of August, A. D. 1857."

mortgage specified in the bill of complaint."

These reports, therefore, which found the amount and cost of the rolling stock, gave forty cars, designated by numbers, to the Western Division and to the Land Grant mortgage, and the residue to the Eastern Division and the mortgagees of *it*. The complainants in both suits were apparently dissatisfied. The parties seeking to foreclose on the Eastern Division wanted not only all that the masters gave them, but the forty cars that were allowed to the Western Division; while the parties seeking to foreclose on the Western Division wanted not only the forty cars allowed them, but all the other rolling stock; with some exceptions which they stated. The respective complainants accordingly filed

EXCEPTIONS TO THE MASTERS' REPORTS.

WESTERN DIVISION CAUSE.

"4th. For that the masters have certified that all the rolling stock on said road (except forty box cars, which are specially named in their report) *was covered by and included in the first mortgage* upon the said railroad, *and in the mortgage upon the said railroad executed to Bronson and Soutter*, bearing date on the 17th day of August, A. D. 1857.

"Whereas, the masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of $53,600) was covered by *and included in the mortgage given* to the said complainants, and described in the bill of complaint in this cause; and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens;

EASTERN DIVISION CAUSE.

"For that the masters have certified that of the rolling stock forty box cars, amounting, at the cost price thereof, to $31,999.64, and numbered 330, 332, &c., &c., *are covered by and included in the mortgage to Bronson, Soutter, and Knapp, and no other*; whereas, the said masters should have certified *that the said rolling stock was covered by and included in the mortgage of the complainants* in this action."

and that, as to the rolling stock purchased by said receiver above mentioned, 105-200ths thereof was covered by the mortgage described in the complaint; and that, to that extent, the complainants' said mortgage was a first lien thereon."

The court, having heard the parties, made the following

ORDERS ON THE EXCEPTIONS.

WESTERN DIVISION CAUSE.

"Ordered, *that the fourth exception* of complainants be overruled, except as to the forty box cars *which are covered* by this mortgage.

"And further ordered, that on said exception the said report be so modified that *all the other stock* that was on said road when the receiver was appointed, *except the said forty box cars, is covered by and included in the First Mortgage of the road from Milwaukie to Portage City;* and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,943.62, be applied to the *said first mortgage* and *the mortgage in this bill*, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver."

EASTERN DIVISION CAUSE.

"Ordered, that the report of the masters, allowing forty box cars to be covered by the Land Grant mortgage of said company to Bronson, Soutter, and Knapp, be confirmed.

"And that the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the said company from Milwaukie to Portage City.

"And that all the rolling stock on said road that has been purchased or procured since the court has had possession by its receiver, be applied *pro rata*, in proportion to the revenues of the road, to the first said mortgage and the said Land Grant mortgage."

In January, 1862, final decrees of foreclosure and sale were made in both causes, as well the one relating to the Eastern Division, as the other relating to the Western.

In the Western Division, the decree says:

"The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows, viz.:" (Here follows the

description of premises quoted from the mortgage.) "With forty box cars, numbered 330, &c. (the numbers being all set out), and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. ☞ *The remaining rolling stock is subject to prior mortgages.*"☜

In the Eastern Division cause, the Bronson and Soutter mortgage, the decree quoted the description of the premises from that mortgage, as given before, but added no direction to sell any rolling stock.

After the decree in the Western Division cause, the marshal advertised that division, and also all the rolling stock on the whole road; the forty box cars, and the proportion of rolling stock purchased by the receiver, mentioned in the decree, to be sold *absolutely;* and the remaining rolling stock "*subject to prior mortgages.*" The sale took place as advertised,—two persons, Pratt and White, *citizens of Wisconsin*, becoming the nominal purchasers. The sale as made, that is to say, with the remaining rolling stock sold, "subject to prior mortgages," was reported to the District Court, and confirmed by that court as reported. Nothing, however, in the record showed specifically, that the attention of the court was called to the fact that the marshal had attempted to sell the *whole* rolling stock. After the confirmation of this sale, Pratt and White organized—as under the laws of Wisconsin it was lawful for them to do—the Milwaukie and *St. Paul* Railway Company; sometimes for brevity called the St. Paul Company, simply; and this company applied by petition to the District Court, in the Land Grant case, showing the purchase by Pratt and White at the foreclosure sale, the organization by them of said company, and asserting that this company had acquired the right to work the

* This sentence in italics and between the indices—or the exact form of it—was the cause of one main difficulty in the case.

Eastern Division as well as the Western, and to exercise all the franchises of the debtor company, "in running, operating, and controlling said railroad in its entire length, from the city of Milwaukie to the city of La Crosse, and that such right so to run, operate, manage, and control the same, is prior and superior to the rights of any of the defendants in this cause, and prior and superior to the rights of the mortgagees in the mortgage to said Bronson and Soutter, on the Eastern Division, under which said Crocker is acting as receiver, inasmuch as the said mortgage to the said complainants is prior in date and lien to the mortgage to said Bronson and Soutter."

Upon this petition the court, May 7th, 1863, made an order, directing the receiver to deliver to the St. Paul Railway Company, the Western Division of said railroad and appurtenances between Portage City and La Crosse, "*and the rolling stock and property specially described in the decree;*" and ordered that the receiver take perfect inventory of all rolling stock other than *the forty box cars specially mentioned in the decree*, and of all personal property belonging to the debtor company, and report the same to the court.

On the 12th of June, 1863, the court made orders in the two causes, as follows,—the reasons for them being stated by the judge who made them, to be a duty which the court owed alike "to the public and the parties, to secure the use of a continuous *route without interruption or deviation of trade or travel between the termini*," *Milwaukie and La Crosse.*

WESTERN DIVISION CAUSE.

"On consideration of the petition of the Milwaukie and *St. Paul* Railway Company, it is ordered by the court that there be delivered over to the said company, all and singular the railroad between the city of La Crosse and Portage City, its roadbed and track, with its depots, station houses, engine houses, and all other property belonging to said railroad

EASTERN DIVISION CAUSE.

After reciting the petition of the St. Paul Co., &c. &c.,

"Ordered by the court, that the order appointing a receiver in this case be modified in the manner following, *subject to any further or other order rescinding, altering, or modifying this order now here made:* That the receiver let the said Milwaukie and *St. Paul* Railway Company into the

between the said points; and the forty box cars mentioned and described in the decree.

"And also the share or proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree.

"And also, *subject to other or previous liens or claims*, the possession of the rolling stock on hand when the receiver took the same under the order of the court.

"And it is further ordered by the court, that the said receiver be and hereby is discharged as such from the management and control of the said Western Division of said railroad under the appointment in this case, subject, however, to the final settlement of his accounts, *and subject to the orders* made or to be made in this case, and in the other cases in which he was appointed or may hereafter be appointed."

possession of the Eastern Division of the La Crosse and Milwaukie Railroad from Portage City to Milwaukie, with the appurtenances and property and rolling stock thereto belonging. And that the said railway company, subject to the further order or orders of the said court, operate said Eastern Division of said railroad in connection with the said Western Division thereof, so that one continuous line of railroad between La Crosse and Milwaukie may be operated and conducted as directed in the original charter of the La Crosse and Milwaukie Railroad Co., without hindrance, interruption, or diversion, the same as if the whole line of road continued to be in one company, in pursuance of said charter, and not otherwise."

[The St. Paul Company was ordered to let the receiver see the accounts continually; keep the Eastern Division and its rolling stock in order; pay over to the receiver, at stated times, balances, &c., and give bond to abide orders, &c.]

Under these orders of June 12, 1863, all the rolling stock of the whole road was delivered to the St. Paul Company, who, in consequence, took a general control of all things.

The orders in the Eastern Division cause were brought before this court, December, 1863, and declared void, as having been made after a statute had taken away from the District Court the powers which in making them it exercised.* Still, however, the St. Paul Company kept possession; and a new line of railroad having been made between Milwaukie and Portage City, by way of Watertown (see diagram at page 610), it was obvious that it might carry business and travel through from La Crosse to Milwaukie completely well and yet ruin the Minnesota Company in the process.

* Bronson *v.* La Crosse Railroad, 1 Wallace, 405.

This last-named company now filed a bill on the equity side of the Federal court for Wisconsin, in which, or in the predecessor in law of which, the Land Grant mortgage had been foreclosed against the St. Paul Company,—White and Pratt the purchasers, and Soutter and Knapp (Bronson being dead), to have matters rectified, as it conceived, both generally and particularly.

The bill set forth the different mortgages, the foreclosure of that of Barnes, the Minnesota Company's now ownership, thereunder, of the equity of redemption of all the road, rolling stock, and franchises of the old La Crosse and Milwaukie Company, the foreclosure of the Land Grant mortgage (stating that the Minnesota Company had not answered, though made defendants therein), the marshal's sale and confirmation of it, as already mentioned. It alleged that the Land Grant mortgage left *un*mortgaged over half a million of dollars in value of this rolling stock, that the decree of the court did not order it to be sold, and that the District Court only placed it in possession of the St. Paul Railway Company, as it did the Eastern Division of the road, for the purpose of enabling that company to run the road from Milwaukie to La Crosse as one road. That notwithstanding this, the Milwaukie and St. Paul Company were building and would soon complete a railway from Milwaukie, by way of Watertown, to Portage City (see again the diagram at page 610), independent of and to be used in competition with the said Eastern Division, now owned by the Minnesota Company, complainants in the bill; that they gave out that, by the purchase of Pratt and White, and subsequent organization, they had acquired a right to separate and disconnect the said railroad from Portage City to La Crosse from the said Eastern Division from Portage City to Milwaukie, and on the completion of the road by Watertown would transfer the rolling stock from the Eastern Division to this *southern* connecting line; and by *so* connecting Milwaukie and La Crosse and diverting the rolling stock, render the roadbed of the Eastern Division wholly useless until restocked, which could be done only at great expense; all this being in fraud

of the rights of the Minnesota Company and to their great and irremediable injury.

It stated the character of these two foreclosures, that of the Land Grant on the Western Division, and of the second or Bronson and Soutter mortgage on the Eastern Division, as follows:

"Your orator shows that in the suit to foreclose the mortgage upon the Western Division, no persons or corporations were made parties defendant, except those having or claiming to have an interest in the said Western Division; and that in the suit commenced to foreclose the mortgage upon the Eastern Division, no persons or corporations were made parties, except those having or claiming to have some interest in the said Eastern Division; *and that in neither of the said suits did the said complainants therein pray or claim any relief as against the complainants in the other suit;* but the said two foreclosure suits were in all respects, and in every particular, separate and independent suits, as the respective mortgages, which they respectively were exhibited to foreclose, were separate and distinct mortgages upon separate and distinct premises.

"Your orator further shows that neither the said mortgage upon the Western Division, nor the said mortgage upon the Eastern Division, pretended to specify or particularly describe the amount of rolling stock intended to be thereby conveyed; and that in neither of the suits commenced to foreclose said respective mortgages, did the bill of complaint pretend to enumerate or describe the precise rolling stock, or amount of rolling stock included or intended to be included in and conveyed by the mortgage which it was exhibited to foreclose, or which belonged thereto at the time said bill was exhibited. But your orator, as owner of the equity of redemption of the said Western Division, and the rolling stock and franchises pertaining thereto, was made a party defendant to the said bill of complaint, which was exhibited to foreclose the said mortgage on the Western Division; and your orator in the said Western Division mortgage foreclosure suit, and as against the complainants in that suit, was the owner of and entitled to reserve, claim and have all the railroad rolling stock and franchises which had belonged to said debtor company, except that which was included in and encumbered by the said Western Division mortgage. And your orator,

as the owner of the equity of redemption of the said Eastern Division, and rolling stock and franchises pertaining thereto, was made a party defendant to the bill of complaint in the suit commenced to foreclose the said Eastern Division mortgage; and in that suit, and as against the complainants in that suit, your orator was the owner of and entitled to claim, reserve and have all the railroad, rolling stock and franchises, which had belonged to the said debtor company, except that which was encumbered by and included in the Eastern Division mortgage."

The bill also charged that no proceedings had ever been had in the Land Grant cause or otherwise, to ascertain the relative proportions of the net earnings of the Eastern and Western Divisions, so as to determine what proportion of the rolling stock purchased by the receiver passed under the Land Grant sale; that the St. Paul Company, being in possession of the whole road and rolling stock, claimed ownership of all the rolling stock, or nearly all, and were asserting title and employing their possession, to the great injury of the Minnesota Company.

It has been already mentioned that Bronson, Soutter, and Knapp, the mortgagees in the Land Grant mortgage (as in fact was the case with all the mortgagees), were citizens of New York; they therefore properly foreclosed their mortgage, in which corporations of Wisconsin were the parties in interest as defendants, in the Federal court. *The present bill*, however, being filed by the Minnesota Company, a corporation of Wisconsin, against the St. Paul Railway Company, another corporation of that *same* State, and against White and Pratt, citizens of *it*, as well as against Soutter and Knapp, survivors, stood on a different ground. As an original bill, it would plainly have not lain, under the rules which regulate this subject in the Federal courts.

The bill accordingly represented itself as "supplemental" to the Land Grant foreclosure bill, and claimed the benefit of the proceedings in that cause; praying that the Minnesota Company might be decreed to be the owner of all the rolling stock on the road at the time of the appointment of the receiver, except the said forty box cars; that an account

might be taken to ascertain the relative net earnings of the two divisions; and that thereupon, according to the principle of, and basis fixed by said Land Grant decree, it might be adjudged and definitely determined and declared by this court what proportion of rolling stock purchased by the receiver really and equitably belonged to the Minnesota Company and to the St. Paul Company respectively; and that a separation of said stock purchased by the receiver might be ordered, or that it should be sold, and the avails paid over to the respective companies according to their proportions. It prayed also a proper allowance for rent for the use of their rolling stock on the Western Division, and that the avails might be applied to the interest due on the mortgage. It prayed finally an injunction on the appointment of a receiver, and for other and general relief.

To this bill the St. Paul Company demurred, assigning for cause, want of jurisdiction, want of equity, &c., the fact that the bill was not supplemental, and that the parties were citizens of the same State. The court below having sustained the demurrer, two questions were now presented here:

1. Was this bill, in any sense, supplemental or ancillary, so that it could attach itself to the original proceeding, and thus, according to the practice of the Federal court, be entertained; though in itself and independently,—from want of proper and differing citizenship in the parties,—not capable of being thus treated.

2. If it was, did the complainant present any case calling for equitable relief?

Messrs. Cary and Carlisle, for the appellee.

I. *As to the Jurisdiction.* The complainant is a corporation organized under the laws of Wisconsin and situated in that State. The St. Paul Railway Company, one of the defendants, is in like manner a corporation of that State, and Pratt and White, and other defendants, are also citizens of Wisconsin. It is obvious that from want of proper citizenship in the parties, the suit cannot be maintained in the Federal

court as an original suit. The appellant accordingly relies on the subject-matter of his bill—its character as a supplemental bill—to bring the case within the jurisdiction. Is the bill then a supplemental bill. Plainly not, we think. It does not seek to alter or reverse the original decree; to add to or vary it. It states a new cause of action. It asserts that the St. Paul Railway Company has been guilty of trespass or conversion of certain personal property which the complainant owns, and that it sets up a claim to that property and to the Eastern Division of the La Crosse Railroad, which pretence and claim the complainant insists is unfounded. It therefore asks the aid of the court, in effect, *first*, to declare, settle, and quiet its title to said property; *second*, to have a settlement and compensation by way of damages; and, *lastly*, that the wrong-doer shall be restrained in future.

Are not the grievances for which remedy is here asked, the subject of original bill—all of them? The fact that the St. Paul Railway Company was formed by the purchasers at a sale under a decree of the United States court, does not make the company a ward of that court. The company has no special privileges there, and owes that court no peculiar allegiance. John Doe, of Wisconsin, might have committed the same wrongs against the complainant that are alleged against this defendant. Would it in that case be contended that he could be punished, or that those wrongs could be redressed except by an original suit? If by an original suit, confessedly, on account of the citizenship of the parties, it could not be in the Federal court. So in this case. If the St. Paul Company have no title to this rolling stock, as the complainant alleges, it is liable to an action at law for the taking.*

The pleader has, indeed, styled his bill a "supplemental"

* Mr. Cary stated as an incidental fact in the controversy, that the complainant had brought an action of trespass on the case for this property in the Circuit Court for the District of Wisconsin, which was now pending there; an action not against the St. Paul Company, because the citizenship of the companies would not allow that, but against certain non-resident directors of that company, who had directed the taking.

one; but styling it supplemental, does not make it so; nor is it a "supplemental bill" when tested by any of the definitions which settle the different sorts of equity bills, or when compared with any precedents in books of equity pleadings. The court is, of course, familiar with and will apply them. By settled equity practice, a defendant in an original suit cannot prosecute a supplemental bill. Such a bill can be brought only by the complainant, or by those who stand in his place. Moreover, by equity practice, a supplemental bill cannot be entertained in any case where the decree in the original action has been completely executed, which this decree has been; for the foreclosure suit is ended: Bronson, Soutter and Knapp have performed fully their writ. There can be no supplemental action to a thing which has been completely finished. In short, such a use of equity mechanism as it is here attempted to make, we venture to assert would never have been thought of by counsel possessed of less resources and devotion to his clients than the able one—subtle, bold, and strong alike—opposed to us.

Again. The St. Paul Railway Company, and Pratt and White, are new parties; they have never litigated this question; consequently, as to them, the bill is original, and the court cannot take jurisdiction. The point we here make was raised in a very early case in this court.* Certain aliens had obtained judgment against a citizen of Georgia, and proceedings had been instituted on the equity side of the court to reach his property in the hands of several parties, and a decree entered directing its sale. Subsequently a supplemental bill was filed against Elizabeth Course to reach property in her hands. The supplemental bill did not describe her as a citizen of the State of Georgia. In the Supreme Court it was objected that the court had not jurisdiction as to her for that reason. And in answer to this objection, counsel, in support of the bill, said, *arguendo:* "It is not necessary to describe the parties in the supplemental suit, which is merely an incident of the original bill, and

* Course et al. *v.* Stead et al., 4 Dallas, 22.

must be brought in the same court." But the court held the objection well taken, and reversed the decree. In *Cross* v. *De Valle*,* the same doctrine was recognized no longer ago than the last term.

II. *As to merits.* There are certain facts inferable enough from the case as stated; facts, not in any way denied by the bill, and which go far to settle the question. They are thus:

The La Crosse and Milwaukie Railroad Company was but one corporation, had but one legal existence, and as one entity, owned all its property, both real and personal. Moreover, it was originally chartered to build, and in fact did build, but one line of road, that from Milwaukie to La Crosse; and at the time when the receiver took possession, the road so built was used and worked, and always had been used and worked, as one "through" and continuous line of road; all belonging to one company and all belonging in the same right. All of the company's rolling stock was purchased for and owned by this unit company, and it was *all purchased for and used on* the entire length of road without any division or separation. It is not alleged in the bill—and truth would be violated if it were—that there was ever any division of the road for any purpose whatever, except that the company, for convenience of raising funds, made their first mortgage of the east 95 miles, and subsequently mortgaged the west 105.

The general unity and entirety of the road is admitted; and the fact that a railway company's rolling stock is common to its whole line, and does not belong to a particular part thereof, is a matter of common observation and knowledge, of which the court will take notice, as the common rule in all cases of a continuous and unit way.

Now, all the mortgages cover in express terms the rolling stock of the road. The language in each mortgage is much the same, literally. In spirit and legal effect it is all the same, exactly. There can be no doubt that the descriptions

* 1 Wallace, 14; see also, Dunn *v.* Clarke, 8 Peters, 1.

were copied the one from the other, and that in making the several mortgages the same identical rolling stock was intended to be conveyed, to wit, the rolling stock of the La Crosse and Milwaukie Company used on its road.* The argument of the other side must assume, of necessity, that the rolling stock of this one great company—this integer and unit route — was divided and subdivided; clamped down and affixed to meted and bounded parts; to parts, rather, fractured and severed from a proper whole. How can this assumption be truly made in the case of a great "through route," worked rapidly, night and day, with "Lightning" and "Express" as with other trains,—where speed and "no change of cars" is an object of first importance? How can you—in the case of a road two hundred miles in length, a road which is one of the great roads of the Continent, one on which rolling stock must, of course, be used in values of hundreds of thousands of dollars—assert that but *forty* box cars belong to its Western and largest division, while all the rest are attached as a fixture fastened down immovably to its Eastern? Can counsel tell us how these forty box cars, without a single locomotive, are propelled? Or in what way, with no rolling stock but the forty box cars themselves, the mighty traffic of this road, giving, as a former case exhibits, $800,000 of receipts,† is carried on with expedition and success? Certainly, we are to observe the language of the mortgage deeds; but we are not to strangle all justice and sense in the meshes of a technicality as unmeaning as verbose.

We, therefore, insist,—

1st. That each one of these several mortgages covered and included all the rolling stock belonging to the La Crosse and Milwaukie Company, and which had been procured for or

* Mr. Cary stated, as a fact in the case, and one which, he observed, was inferable enough from the language of the Land Grant mortgage itself, that at the time it was executed no part of the line of road described in it was built. The rolling stock mortgaged could, he thus argued, apply to no stock but that in use on the Eastern Division.

† See *supra*, p. 514.

used on said railroad from Milwaukie to La Crosse; and that there is no sufficient ground to say that it is a fixture to any specific portion.

2d. That these several mortgages became a lien upon the said rolling stock from the date of their execution, and that said liens have priority now in the order of time of their execution.

3d. That the La Crosse and Milwaukie Railroad Company, after giving these mortgages, cannot dispute the right of any one of the mortgagees to all of this rolling stock; and as the mortgage to Barnes is made subject to the other mortgages, the Minnesota Company stands in no better position than would the La Crosse Company; and is, therefore, estopped to dispute our title.

We, therefore, infer, and, inferring, insist that the question before the court below was one—not of the extent of the Land Grant mortgage—but one of the *priority of liens.* Viewed as we thus view the matter, the expression of the decree of sale, which in the statement of the case (p. 618) is signalized by index hands, and which has been the subject of different constructions,—"*the remaining rolling stock is subject to prior liens*,"—becomes both clear and reasonable. The history of the case, then, stands thus: The court below made its decree of foreclosure and sale in the *Land Grant case*, and directed a sale of all the rolling stock on the road, as described in that mortgage. After giving the description as contained in that mortgage, and especially describing this portion, which, by the reference to masters, the Land Grant had been found to be a first lien upon, it followed this with the adjudication that "*the remaining rolling stock is subject to prior mortgages.*" It made, in other words, a decree to sell all the rolling stock specially described, free from incumbrance; for the court had decreed that, as to that, our mortgage was a first lien, and all the remainder of the rolling stock subject to incumbrances prior in date. Thus understanding it the marshal proceeded. His advertisement of sale so expressly stated it. The sale was so made, and reported to the District Court, setting forth that the portion

of rolling stock specially named was sold free from all incumbrance, and all the remainder subject to the lien of prior mortgages. The sale was afterwards, on hearing, confirmed as made. The deed of the marshal to the purchaser, and from the purchaser to the St. Paul Railway Company, was of the property as sold. Can any history be more plain, more probable or apparently just? We think not; and we add that none can be more conclusive. The court must perfectly have known whether the marshal had rightly understood and rightly executed its decrees of sale; and by confirming the sale, it declares that he had rightly done both; rightly *understood* as well as rightly executed them.

But even if the court—in originally making the order of sale, and at the time *when* it made them—did not mean that this other rolling stock should be sold, "subject to *prior* mortgages," but meant, on the contrary, that it should be excluded from sale altogether as being the subject of other mortgage ownerships—admitting this for argument's sake, the only way in which we admit it at all—what is the effect, in law, of the marshal's action, subsequent to the orders, upon the property, his return of that action to the court, and the court's confirmation of it? The case thus supposed is this: The court gives the marshal an ambiguous order; an order capable of two interpretations. The marshal reads it in one way, one natural enough; and proceeds, on this interpretation, to execute it. He reports to the court exactly how he has executed it; and the court, in form, confirms his act. We say nothing about the immense weight which this act of the court, in confirming the order as the marshal interpreted and executed it, has in showing what the court meant *originally*. That point, for argument's sake, we have here abandoned. We are here arguing as to the effect of an interpretation subsequent to and confessedly different from the original. Why may not such a train of thought as this have passed perfectly well through the court's mind? "The marshal, it seems, has misunderstood us. But we did not express ourselves well. His mistake was natural. Our language may mean either of two things,—what the marshal assumed us to

mean, as well as or better than anything else. Moreover, on reflection, we see that for the true interests of all parties, and for the public interests also, it is best that we should have meant this. We will ratify the marshal's interpretation, and so affix the meaning which others have taken as the most natural, and which we ourselves now think would have been the best, had we expressed it." What is there unjudicial, or in any way irregular, in a mental process such as this? What the court did mean was in its own breast; *in petto* wholly. No record is violated; nor anything done but simply interpret an obscure sentence. And if such a process was had, is there not an end of the question? That the operation was had, seems proved by what the court finally did; by the fact, to wit, that in the orders of June 12th, 1863, it did deliver the whole rolling stock to the St. Paul Company, "subject," in effect, only to "prior mortgages;" precisely, in fact, as if it had originally meant, that it should thus be sold. Such is our case.

Under this order, subsequently so made, the St. Paul Railway Company took possession of the Western Division, of the forty box cars, of their proportion of the rolling stock purchased by the receiver, and also of all the rolling stock on the road when the receiver took possession of the same as purchaser. That said division, the forty box cars and the proportion so purchased by the receiver, they took free and clear from all incumbrances. As to the residue of the rolling stock, they took it, they admit, subject to mortgages previously given by the La Crosse and Milwaukie Company; the "prior mortgages" of the decree of sale. They have ever since so held and do now hold it, as they suppose; and they submit that the appellant is not at liberty to question their title so here asserted.

Mr. Carpenter, contra.

Mr. Justice MILLER delivered the opinion of the court.

The first question raised by the demurrer relates to jurisdiction.

For the purposes of this question we are to take the facts set up by the bill [his Honor had stated the main ones] and demurred to, as true, and consider whether they make a case for the jurisdiction of the Circuit Court of the District of Wisconsin, which has become successor of the District Court in that district.

The present suit grows immediately out of and is a necessity which arises from the suit, by Bronson, Soutter, and Knapp, to foreclose the Land Grant mortgage; under the decree in which suit the Western Division of the La Crosse and Milwaukie Road was sold, and also all the rolling stock of the company belonging to both divisions, to the Milwaukie and St. Paul Railway Company. The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it.

The road and rolling stock, which are the subject-matter of this controversy, were placed in the hands of a receiver in the progress of that suit; and he was in possession of the rolling stock when, by an order of the District Court, made June 12, 1863, in that suit, and a similar order of the same date, in another suit, it was all delivered to the Milwaukie and St. Paul Railway Company.

At the last term of this court,* we decided that, by the act creating the Circuit Court for the District of Wisconsin, the District Court lost its power to make such orders, and that they were void. The consequence of this ruling is, that in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of the receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties.† If it has been taken illegally from the custody of the receiver, it is

* Bronson *v.* La Crosse Railroad Company, 1 Wallace, 405.

† Freeman *v.* Howe, 24 Howard, 460.

equally clear that the court has not lost thereby the jurisdiction over the property, or the right to determine where it shall go; so far as that right is involved in that suit. This is the very object of this bill, and it is rendered all the more necessary by that which the court has done, as well as that which it has failed to do. In the case of *Randall* v. *Howard*,* these principles are fully stated as applicable to a proceeding in a State court, and are given as reasons why the Federal court would not interfere; although the parties had the right, so far as citizenship could give it, to litigate in the courts of the United States.

It is objected that the present bill is called a supplemental bill, and is brought by a defendant in the original suit, which is said to be a violation of the rules of equity pleading; and that the subject-matter, and the new parties made by the bill, are not such as can properly be brought before the court by that class of bills.

But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law. The case before us is analogous. An unjust advantage has been obtained by one party over another by

* 2 Black, 585.

a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court and subject to its order.

It is objected that Pratt and White and the Milwaukie and St. Paul Railway Company were not parties to that suit, and cannot therefore be compelled to yield their right to litigate with a citizen of Wisconsin in the courts of that State.

Pratt and White are mere nominal parties, who were the agents and attorneys of the corporators composing the Milwaukie and St. Paul Railway Company, and purchased the property at the marshal's sale for them. They and the company may both be considered as purchasers at that sale; and it is in their character of purchasers, and on account of the possession which they obtained on petition of the company, and the rights they claim under that purchase, that they are now brought before the court. If the court has jurisdiction of the matters growing out of that sale, and order of possession, as we have already shown that it has, then it has jurisdiction to that extent of these parties without regard to their citizenship. It would, indeed, be very strange if these parties can come into court by a petition, and get possession of that which was the subject of litigation, and then when the wrong they have done by that proceeding is to be corrected, they shall be permitted to escape by denying that they were parties to the suit. In the case of *Blossom* v. *The Milwaukie and Chicago Railroad Company*,* this matter was fully discussed, and it was there held, that a purchaser or bidder at a master's sale, subjected himself *quoad hoc* to the jurisdiction of the court, and became so far a party to the suit by the mere act of making a bid, that he could appeal from any subsequent order of the court affecting his interest.†

* 1 Wallace, 635.

† De la Plaine *v.* Lawrence, 10 Paige, 602; Calvert on Parties to Suits in Equity, pages 51, 58, and note to page 61.

The objection to the jurisdiction must therefore be OVERRULED.

We next proceed to inquire whether the bill makes a case calling for relief.

This involves the consideration of the mortgage of complainants in the original suit, and of several orders and decrees of the District Court, all of which are the subject of conflicting constructions by the parties and their counsel.

In reference to the roadbed which is covered by these various mortgages, there is no diversity of opinion; but in reference to the rolling stock, it is contended by appellees that these several mortgages were successive liens on all the rolling stock of the company, and by appellant that they are liens only on the rolling stock belonging to, or in some way identified with, that part of the road included in each mortgage respectively. At first blush it would seem that in a road used continuously as one road, there could be no such definite relation between any particular division of the road and any particular portion of the stock. But as it was competent for the company which owned all the road and all the stock to assign certain stock to one division, and certain other stock to the other division, when the roads were divided for the purpose of making mortgages, we cannot assume as a fact that there was no such allotment of the rolling stock; but must look to the language of the mortgages themselves, to see if any such intention is expressed. If it is not, then obviously the other view prevails, and the mortgages are successive liens on the whole stock.

The language in the descriptive part of the Palmer mortgage, and that in the corresponding part of the mortgage on the Western Division, when considered in reference to the rolling stock alone, may not be free from doubt as to its construction.* But when we consider it in reference to the clear purpose of the parties to make the mortgages distinct, and different as to everything else conveyed by them, we con-

* See them con-columned, at page 611; the former in the right column, the latter in the left.—REP.

clude that it was intended that the rolling stock covered by each mortgage was that which was properly appurtenant to each particular division of the road.

It is not so important that we be right in this, however, as we are satisfied that the District Court in the foreclosure suit decided this question; and as that decision is in full force and unreversed, it must conclude the parties to the present suit, all of whom claim under the decree of the court.

The complainants in the original foreclosure suit made defendants of all the judgment creditors of the company who had liens subsequent to themselves, and made the Milwaukie and Minnesota Company defendant, who held under the subsequent mortgage to Barnes, with a view to cut off their equity of redemption; but they did not make defendants of Bronson and Soutter, who held a subsequent mortgage on the Eastern Division, and a subsequent lien on the rolling stock, which complainants would also desire to extinguish, if they had believed it covered the same rolling stock which theirs did. By omitting these mortgagees they show their own construction that their mortgage, and that of Bronson and Soutter, did not cover the same stock; which could only be because it was appurtenant to the Eastern Division.

About the time that foreclosure suit was commenced, a suit was instituted in the same court to foreclose the second or Bronson and Soutter mortgage on the Eastern Division; but the holders of the Palmer mortgage were not made defendants to either suit. The two suits progressed *pari passu* to a final decree; but while the Western Division went to sale, an appeal stayed proceedings in the Eastern Division case, and no sale has yet been made under that decree. Very shortly after these suits were commenced, the court made an order of reference in each of them to masters in chancery, who were the same masters in both cases. These references were for the purpose of ascertaining the amounts due on the bonds, the amounts due certain judgment creditors, and the amount of rolling stock on the whole road, and the amount included in each mortgage. The language of

the order of reference on this latter point in the original suit in this case is as follows:

"And it is further ordered that said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by this mortgage, also in the first and second mortgages respectively."

The reference in the other case is in language almost identical.

Now it is argued that the object of this order was to ascertain and settle the priorities between these different mortgages. No such inference can be made from its language, for it says nothing about priorities in date, or superiority of lien. There was no occasion or reason for ascertaining those priorities in that suit, for the respective parties were not before the court, and could not be bound by its decree. It would not even bind complainants, because there would be no mutuality in the estoppel. It is an impeachment of the legal attainments of the court and of the counsel to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and if passed upon by the court, could affect nobody's interest in the slightest degree.

But the language of the order clearly implies a different thing. The object is to ascertain, what is covered by one mortgage to the exclusion of the other; an object which had manifest pertinency to the duty which the court was called upon to discharge. The judge who made these orders delivered an opinion at the trial, in which he decides that the rolling stock of a railroad is a fixture; and if we suppose him to have considered that which was mortgaged to Palmer and to Bronson and Soutter as a fixture on the Eastern Division, and that which was mortgaged to Bronson, Soutter, and Knapp, as a fixture on the Western Division, we have a clear idea of what he wished to ascertain, in view of the decrees he was to make in the two suits.

We have next the report of the masters on this subject, which is as follows:

"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, $569,635.78, and an additional amount of $53,600 has been purchased since the filing of the bill of complaint, making the whole amount $623,235.78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, and numbered 330, &c. [giving the numbers], are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause, the said cars having been purchased, and by the proceeds of a portion of the bonds to which this mortgage is collateral; and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to G. C. Bronson and J. T. Soutter, and bearing date on the seventeenth day of August, A. D. 1857."

In the foreclosure suit of the Eastern Division, these same masters reported on the same day:

"We have ascertained and do further report, that of said rolling stock, forty box cars, amounting, at cost price thereof, to $31,979.64, and numbered 330, &c., are covered by and included in the mortgage of Bronson, Soutter, and Knapp, and no other;"

and then adds, that the remaining rolling stock is covered by the mortgage to Palmer, and to Bronson and Soutter; that is, the mortgage on the Eastern Division.

It is impossible in examining these reports to doubt that the commissioners understood that they were directed to ascertain what rolling stock was covered by each mortgage, in order that only such might be sold under the decree in that case, and that they reported that of all the rolling stock on the road, forty box cars alone were subject to the mortgage in the present case, and that all the other stock was subject to the mortgage in the other suit. At all events,

they were directed to ascertain what was subject to the mortgage in this suit, and they reported the forty box cars, and did not report any more. This much is beyond dispute from the language of the report in this case.

Counsel for complainant excepted to this report. His fourth exception is that instead of certifying as they did, the masters should have reported,

"That all the rolling stock on said road was covered by and included in the mortgage given to said complainants, and described in their bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock superior to all other liens."

This exception was overruled by the court, and the report of the masters confirmed so far as this branch of the subject is concerned.

We regard this as a judicial decision, that complainant's mortgage did not cover the rolling stock which was covered by the previous mortgage to Palmer, and that it only covered the forty box cars, and such proportion of the rolling stock purchased by the receiver as the net earnings of the Western Division bears to the net earnings of the Eastern Division. This order modifying and confirming the report of the masters settled the rights of the parties, and by that decision, they must stand until it is reversed on appeal, or set aside by some direct proceeding for that purpose.

The final decree ordering the sale proceeds upon the same view of the rights of the parties. After ordering a sale of the property mortgaged, and copying the language given in the mortgage as descriptive of what was mortgaged, the decree adds:

"With forty box cars, &c., and such portion or share of the rolling stock purchased and procured by the receiver, costing $147,942.63, as the net revenues of the portion of the road covered by this mortgage bears to the balance or other end of the road, since the appointment of the receiver. The remaining rolling stock is subject to a prior mortgage."

That is to say, having decided that what is covered by the other two mortgages is not covered by this; it is not subject to sale in this suit.

The marshal, however, who was directed to make the sale instead of a master commissioner, did sell all the rolling stock, and that sale was confirmed by the order of the District Court of May 5, 1863.

It is too clear for argument, that a sale by the marshal, unauthorized by the decree, is without any validity. Does the order of the court confirming the sale make it valid?

Upon principle the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nullity, and we doubt if a court can make it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions or other proper pleading, as to the question whether any particular piece of property had been included in the *decree, or order of sale*, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. There is every reason, on the contrary, to believe, that the court had no suspicion that the marshal had sold more than the decree authorized.

On the 7th day of May, two days after the order of confirmation, the Milwaukie and St. Paul Railway Company, presented their petition for the discharge of the receiver, and for possession of the property which they had purchased. The court thereupon made an order "that the receiver deliver over to said Milwaukie and St. Paul Railway Company, the said road and appurtenances between Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*" The only rolling stock specially described in the decree was the forty box cars, and the proportion of stock purchased by the receiver. The fact that this was ordered to be delivered to the purchasers and no more, is almost conclusive of two things: first, that the judge understood his decree and previous rulings as we have interpreted them; and, second, that he had no idea that he had con-

firmed a sale of all the rolling stock on the road, to the purchasers at the sale. It is true that over a month later, he ordered the Eastern Division of the road and the remainder of the rolling stock into the possession of the same company. But this was done to enable them to run the whole road as a through route, on the principle of public policy, and that it was better for all parties concerned. This he declared in an opinion delivered at the time, and it is substantially indicated in the orders themselves.

In the light of these facts, we cannot give to the order of confirmation in this case the effect of making valid the marshal's sale, however the rule might be on that subject in other cases. But we do not mean to intimate that in any case a sale by a marshal, or master in chancery, can be valid, when there is no decree to support it. Cases in this court* would seem to decide that it cannot.

The order of June 12, 1863, delivering possession of this property to the Milwaukie and St. Paul Railway Company, has been declared by this court to be void for want of jurisdiction, and has been set aside by the court which made it. It therefore affords no support to defendants in this claim to the rolling stock in dispute.

We have thus examined with care and patience the mortgage, and the various orders and decrees of the District Court, on which the claim of the Milwaukie and St. Paul Railway Company to the ownership of this property depends. There is in all of them some want of clearness and precision, including the mortgage itself. Before the court ordered the sale, it should have made clear all these ambiguities. It evidently attempted to do so, and we think if it has not in all cases effected that purpose fully, it has furnished the criteria by which it can be done. And although the language of its orders is not always free from doubt, we have been able to satisfy ourselves of the court's intentions.

The title of appellant is clear on the record, unless it has

* Shriver *v.* Lynn, 2 Howard, 43; Brignardello *v.* Gray, 1 Wallace, 627.

been divested by these proceedings. We think that they do not confer title to the rolling stock on the Milwaukie and St. Paul Railway Company, nor divest the appellant, except as to the forty box cars, and the proportion of the stock purchased by the receiver, which the net earnings of the Western Division bore to the net earnings of the Eastern Division, and that they also decide that the mortgage under which they claim, did not include any more.

ORDER OF THE CIRCUIT COURT sustaining the demurrer to complainants' bill, and the decree of the court dismissing it, REVERSED, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice NELSON, in whose opinion concurred CLIFFORD and FIELD, JJ., dissenting.

The complainants in this bill, who set up a right to the equity of redemption in the Bronson and Soutter mortgage, insist that the whole of the rolling stock on the old La Crosse and Milwaukie Road, with a trifling exception, is subject to the lien of this mortgage on the Eastern Division, the foreclosure of which is pending; and that a proper allowance of rent for the use of it on the Western Division should be made, and the avails applied to the interest due on the mortgage; and further, that the question involved was litigated and so decided in the foreclosure suit on the mortgage of the Western Division.

We have looked into the position of the counsel for the complainants, and have come to the conclusion that it is not maintained.

For aught that appears, all the rolling stock of the old company was purchased by it for the use and benefit of the whole of the road, out of the common funds of the company, and a lien was given upon it in each and all of the mortgages of that company on the two divisions, the Eastern and Western, and also upon it in the mortgage of the whole road to the complainants. These liens would take effect as matters of law according to priority. Any other disposition

of them would be unjust and in violation of good faith to the bondholders, for the security of the payment of whose bonds the mortgages were given.

The District Court, however, seems to have entertained the idea, that any of the rolling stock purchased by the proceeds of the bonds of a particular mortgage should be exclusively subject to the lien of that mortgage, and made a reference for this purpose; and on the coming in of the report, acting upon this idea, decided that some forty box cars purchased by the proceeds of the bonds of the first mortgage on the Western Division, should be sold and the proceeds applied exclusively to this mortgage, and that all the rest of the rolling stock on the road (meaning the whole road), when the receiver was appointed, was covered by the first mortgage of the road from Milwaukie to Portage (meaning the Palmer mortgage), and all purchased since the appointment of the receiver be applied to this first mortgage, and the mortgage in the bill of foreclosure, in the proportion therein mentioned.

The decree of foreclosure, after describing the property to be sold, and particularly the forty box cars and the share of the stock purchased since the appointment of the receiver, adds, "The remaining rolling stock is subject to prior mortgages."

In the report of the sale by the marshal, he states, that he sold of the rolling stock the forty box cars, and the share of the stock purchased since the receiver was appointed, free and clear of all incumbrances; but the remainder of the rolling stock was sold, subject to the lien of mortgages prior in date to the mortgage under which the sale was made. This report of the sale by the marshal was excepted to, but after argument the exceptions were overruled, and the sale confirmed, and although the complainants here were party defendants in that suit of foreclosure, no appeal was taken from the decree of confirmation.*

We are of opinion, therefore, that the question as to the

* Blossom *v.* Milwaukie, &c., R. R. Co., 1 Wallace, 655-7.

ownership or the liens upon the rolling stock in question were not adjudicated by the court below in the foreclosure suit on the mortgage upon the Western Division, and that the question is open for this court to determine.

We agree that the rolling stock upon this road covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words, is in technical language a fixture to the road, so far as in its nature and use it can be called a fixture. But it is a fixture extending over the entire track of the road from Milwaukie to La Crosse. It is not a fixture upon any particular division or portion; but attaches to every part and portion. It was purchased, as we have before said, for aught that appears, by the common funds of the old La Crosse and Milwaukie Company, and which were derived from its various resources,—subscriptions of stock, sale of bonds secured by mortgages, earnings of the road after a part or the whole line was fitted for the running of the cars; and the mortgages or other incumbrances on the road made by the old company, whether on a portion or on the whole line, take effect according to the priority of lien. These liens, so far as respects the rolling or moving stock, attach to them a right to have the cars run upon the road, upon its entire line, as the value of the lien depends upon this use of the property. The lien was acquired in contemplation of this use, for without it a mortgagee or lienholder of the commonest observation must have seen the security would be next to worthless. The great value of the road and rolling stock, as a security, consists in the use and operation of the same as a railroad line in the carriage of passengers and freight; it is the combined use maintained and enforced that enables the lien creditor to realize the security contemplated when the credit was given.

Our conclusion, therefore, is, that the mortgagees of the Eastern line have by virtue of the liens of their mortgages such an interest in the rolling stock, as to entitle them to the appropriate use of it in running the road for the carriage of passengers and freight; and that the Milwaukie and St

Note.

Paul Company, by reason of their title under the mortgage foreclosed on the Western Division, acquired the same right; and also, that the complainants by virtue of their title under the mortgage foreclosed, acquired a similar right, and that neither has acquired an exclusive right or title to any portion of the rolling stock. We say nothing as to the persons or parties who may be entitled to liens on their property, as these questions are not before us; nor the evidence that would enable us to determine the same, nor could they be determined under this bill. Our conclusion is that the decree below should be affirmed.

NOTE BY THE REPORTER.

IT will be seen in the foregoing report that one of the questions decided in the inferior court was, that rolling stock is a fixture. The question was argued in this court with ability on both sides. But though the decision here is not inconsistent with that idea, but on the contrary, as the reporter supposes, rather affirmative of it, the point was apparently one not necessary to be specifically passed upon, and is not discussed in the opinion. The matter is, however, one of such practical and increasing importance that the reporter supposes he will gratify the profession by giving in this collateral way an extract from the brief of the appellant's counsel, Mr. Carpenter, who endeavored to support the modern view.

IS ROLLING STOCK A FIXTURE?

The term *fixture* was early seized upon by legal writers to supply a deficiency in their technical terminology; but was not entirely reclaimed from its popular use and fixed in that strictness and uniformity of meaning requisite to scientific certainty; and as used by legal writers, it has, continually fluctuated between a technical and a popular use. We have, therefore, many kinds of fixtures; and many exceptions and qualifications to each kind. A fixture is one thing between landlord and tenant; a different thing between vendor and vendee; is one thing in the economy of trade; another for the purposes of agriculture. Originally, the term denoted those movable things which had become immovable by connection with the

freehold. But presently it came to mean those things, which although attached to the freehold, could, under certain circumstances, be removed. In its popular use it meant something affixed or fastened to the freehold; and in the early cases, and many of the later ones, we find the popular definition of the term sweeping everything before it. An article was held to be a fixture or not, from the presence or absence of a screw fastening it to the floor.

By the great majority of cases, ancient and modern, there is no doubt that a fastening was essential to constitute the thing in question a part of the freehold; and nothing kept in place by mere gravitation was held to be a fixture. It is not less true that from the first we have the doctrine of constructive annexation equally well established. In *Liford's Case*,* it is said to have been decided in the fourteenth year of Henry VIII, that a millstone, removed from a mill to be picked, was nevertheless constructively a part of the freehold, and passed by deed conveying the mill. In England, title deeds have been held to be fixtures; and deer in a park, and fish in a pond, to pass with the estate.

The right to remove articles as fixtures has been carried farther in favor of tenants and to encourage trade than in any other cases; yet this right has been somewhat limited; and it has been held that where an engine, in no way attached to the freehold, could not be removed without injury to the building in which it was set up, that the tenant could not remove it. There are cases in England of more recent date, still farther tending to put this subject upon a reasonable, as distinguished from a philological ground; and to hold that a thing is to be regarded as real or personal property, according to its relation to, and connection in use with, the freehold, rather than from the manner in which that connection may be accomplished. And it has been expressly decided that actual fastening is not necessary to make a thing part of the estate.

In the United States we have three different rules established by different States.

1. The thing must be so fastened to the estate that its removal would seriously injure the freehold, beyond the loss of the thing removed.

2. If the chattel is essential to the use of the real estate, and actually, though slightly attached, it will pass with the freehold.

3. If the thing be essential to the use of the real estate, and has uniformly been used with it, then it passes, though not fastened to it.

As an original proposition, the third rule seems the most satisfactory. Take for instance a manufacturing establishment. The building is constructed to receive the various machines necessary for carding wool, spinning yarn, weaving and dressing cloth, and this business is carried on in the building. One machine is so light, or its motion so violent, that it must be steadied by some fastening to the floor; the next is heavy enough to keep in place by its own weight. Now there is no reason in saying that one machine will, and the other will not, pass with the freehold. Both are essential to

* 11 Reports, 50, b.

Note.

the same business, one is useless without the other, and both are in the mind of the purchaser when he buys the establishment. It seems absurd to say that, to be sure of getting all the machinery, he must nail it down to the floor, when perhaps fifty men could not start it a hair. The purpose for which the thing was constructed, and the manner in which it was enjoyed in connection with the freehold, should determine whether it is real or personal estate.

Following this view, it was held, in *Farrar* v. *Stackpole*,* that where machinery was essential to the purposes for which the building in which it was used was erected, that this fact alone constituted it real estate, whether it was nailed down or whether only held down by the laws of gravitation.

Other cases† are to the same effect; although a far greater number of cases could be cited to the contrary, both from England and American reports.

In *Walker* v. *Sherman*,‡ actual fastening was held essential; but in a more recent case, *Snedeker et al.* v. *Warring*,§ this distinction is overruled, and the law of fixtures put upon sensible ground and according to the doctrine in the above cases. In the latter case, a statue and sun-dial were held part of the real estate. The court say, "If the statue had been actually affixed to the base, by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence; and its connection with the land is looked at principally for the purpose of ascertaining whether that *intent* was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands."

We come now to give this law of fixtures an application to the present subject-matter.

Suppose a corporation created by law to build, equip, and work a railroad, and for no other purpose. It mortgages its roadbed, between certain limits, all its depots and station buildings, its right of way, and all appurtenances between those limits; and all the franchises, privileges, and rights of the company of, in and to, or concerning the same. The road is useless without the rolling stock. Here is a case then falling fully within the principle of earlier cases;‖ the real estate worthless without the rolling stock,

* 6 Greenleaf, 157.

† Lawton *v.* Salmon, 1 Henry Blackstone, 259; Fairis *v.* Walker, 1 Bailey, 541 (S. C.); Voorhis *v.* Freeman, 2 Watts & Sergeant, 116; Pyle *v.* Pennock, Id. 390; Goodrich *v.* Jones, 2 Hill, 142.

‡ 20 Wendell, 636. § 2 Kernan, 170.

‖ Farrar *v.* Stackpole; Voorhis *v.* Freeman; and Pyle *v.* Pennock.

which has been used *only* upon the road; and the rolling stock, so essential to the use of the road, utterly worthless for any other or different use. We have already seen the senseless fiction of fastening done away with; and we have but to apply the principles of the cases cited, and we shall come to the result that the rolling stock is in the nature of a fixture; and as such must be conveyed by the mortgage conveying the estate. It has not, indeed, *exactly* the same connection with the realty that the statue had in *Snedeker* v. *Warring;* it is not held or kept in *one* place by fastenings, or by its weight. But this circumstance is of no consequence if the principle deducible from the cases above cited is to govern. If a billiard table were fastened to the floor so as to be conceded a fixture, would not the balls and cues pass also? A bucket in a well may be detached, and it is movable, running from top to bottom of the well, yet it is a fixture by common consent. A shuttle in a loom is thrown from place to place by the motive power of the machinery, yet it is an essential part of the machine. It is not inconceivable that rails and cars might be so constructed as that the car should be held upon the rail by certain material contrivances, and yet be propelled from one station to another; from one end of the road to another, by steam power. In such a case none would doubt that the cars were a fixture. Can it be said that the manner of accommodating and adjusting the cars to the rails can make any difference? "The railroad, like a complicated machine, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's planing machine, or any other combination of machinery, as to take from a railroad its locomotive and passenger cars. Such an obstruction would cause the operations to cease in both cases."*

Then, again, following the principle of *Snedeker* v. *Warring*, the *destination of the rolling stock, the intention of a company* to pass it, will have an influence in determining whether such stock is real or personal property. This consideration would be as conclusive in regard to the furniture of a railroad as it was in regard to the statue, where it was presented; and even more so. The statue might have been sold by the sculptor for the adorning of any residence; though in fact it was made for the particular use. The right to buy and own rolling stock is a franchise, and can only be exercised as an accessory to the operation of a railroad. Any buying or selling of cars, engines, &c., by the company, for the mere purpose of speculation, would be unauthorized and illegal. Here, then, is a consideration showing that a company intends the rolling stock to be used only for the road, or, in other words, to become a permanent accession to the real estate of the company. The intention of the owner, the use for which the property was designed, the connection between the road and the cars, and the essential relation between them, for the purposes of revenue, all combine to declare the rolling stock real estate.

In *Pierce* v. *Emery*,† the Portsmouth and Concord Railroad Company had

* McLean, J., in Coe *v.* Pennock et als. † 32 New Hampshire, 484.

mortgaged all their property, real and personal, and all their franchises. The court held that the rolling stock acquired subsequently to the execution of the mortgage belonged to the mortgagee. The court say, "The object of the act being to give the bondholders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law authorizing the mortgage as to give the bondholders security upon the road itself, as the general subject-matter of the mortgage, and upon the changing and shifting property of the road as part and parcel, by accession, of the thing mortgaged."

In *Phillips* v. *Winslow*, in Kentucky, it was held that, in equity, the rolling stock acquired subsequent to the execution of the mortgage, passed as an accession or fixture.

In Redfield on Railways,* it is said, indeed, that rolling stock is an *accessory*, though not a *fixture*. The distinction is, perhaps, one of words. In the strict technical sense of the word, as used in the old cases, rolling stock is not a *fixture;* but within the reason and philosophy of the modern cases it would seem to be so. If it must not be *called* a fixture, in deference to the old cases, it is yet an *accessory of that sort*, which has every element of one; and to be regarded accordingly, however named.

The conclusion is, that rolling stock, put and used upon a railroad, passes with a conveyance of the road, even without mention or specific description.

THE FOSSAT OR QUICKSILVER MINE CASE.

1. An appeal lies to this court from a decree of the District Court for California, in a proceeding under the act of 14th of June, 1860 (12 Statutes at Large, 33), commonly called the Survey Law.
2. If no appeal from such a decree be taken by the United States, they may appear in this court as appellees, but cannot demand a reversal or change of the decree.
3. If a California land claim has been confirmed by a decree of the District Court under the act of 3d of March, 1851 (9 Statutes at Large, 631), and the decree of confirmation fixing the boundaries of the tract stands unreversed, a survey under it is the execution of that decree, and must conform to it in all respects.
4. The Survey Law of 14th of June, 1860, gives the District Court no power to amend or change the decree of confirmation.
5. When the title-papers designate the beginning-place of a straight line, and fix its course by requiring that it shall pass a known and ascertained point to its termination at a mountain, such line cannot be varied by the fact that a rough draft (a Mexican diseño) on which it is

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* Page 576, note.

drawn, was not true at all to scale, and that on it the line strikes two ranges of mountains in such a way as to leave certain unnamed elevations on the draft, which, with more or less plausibility, it was conjectured, but only conjectured, were meant to represent certain peaks in nature well known, more to the east or west than by reference to other objects on the draft they in nature hold.

ABOUT fifteen miles south from the southern end of the Bay of San Francisco, and separated from it by irregular mountain slopes, lies a vale, called the *Cañada de los Capitancillos*, or Valley of the Little Captains.* The northern limit of this valley is an elevation called the Pueblo Hills; hills picturesque enough; with nothing else, however, as yet, specially to mark them. Descending or turning these, the traveller is *in* the vale.

Along the *south* edge of the valley runs a ridge of hills, range of mountains, or *Sierra;* for by each of these terms, as by several others, the elevation might properly *or* improperly be named. A value different from that of the Pueblo Ridge belongs to these. These are filled with cinnabar of unrivalled purity and richness. Here is the ALMADEN MINE; a mine, that with others near it, the Guadalupe, San Antonio, &c., is estimated at $20,000,000,—the gem of quicksilver mines in the New World, perhaps of the entire earth. This range we call the *Mining* Range, or *Mining* Ridge. The opposite map may assist a comprehension.†

Immediately south of, or behind this Mining Range, and detached from it, for the most part, by a steep, narrow,

* According to Mexican traditions, the valley was occupied in early days by two Indians of very diminutive stature, whose bravery, however, was so noted that each was the chief of his tribe. The name of "Little Captains," came from them.

† The reader must be particular to note, that both on this map and on the two more rough topographical sketches given in the case, the ordinary rule of position in regard to maps is reversed. The top of the map as the reader looks at it, or in the cases of the diseños at pp. 654, 656, as he turns the book round to read what is on them, is the south; the bottom north; the right the west, and the left the east. The two rough Mexican diseños were thus originally made; and conforming other maps to them has been found more convenient than to adopt the more usual method. The compass on the sketch at p. 654, shows the thing.

broken, and irregular depression, gorge, or valley, rises a ridge, range, or *Sierra*, different, as it was generally regarded,

SOUTH.

NORTH.

from the other, though by some persons regarded as the main part of the same range. This elevation we designate as the *Azul* Range, or *Azul* Ridge.*

* The portion *between* these two ranges, marked on the map "Ridge," must be distinguished both from the Azul and the Mining Ridge or Range. *It*, as stated directly, is a *low, connecting* ridge.

The *northern* limit of the valley we have said is the Pueblo Hills. The top of these is about 1000 feet above the level of San Francisco Bay, and 400 above the lowest part of the valley immediately south of them.

The Mining Ridge at its greatest elevation rises several hundred feet higher than the Pueblo Hills in front of it, across the valley. The Almaden Peak, one peak of this ridge, at its eastern extremity, is 1500 feet above this level; but the elevations of the ridge generally, as they extend towards the west, diminish in height, and are broken by various depressions, which permit easy access from the valley on the north to the foot of the depression or valley at the base of the Azul Range. The Azul Range, behind, rears *its* head suddenly up, far above the Mining Range before it, to the height of 4000 feet above the level of the sea.

The Mining Range extends from east to west, and parallel with the Azul Range. It runs about five miles. On its slopes, as well on that towards the valley on the north, as on that which makes one side of the ravine upon the south, the best and most permanent grazing of the region is to be found. At its widest place it is more than a mile and a half from base to base, measuring directly through; and it slopes off gradually at both ends. It is connected with the Azul Range by a ridge *four hundred feet* lower than itself, and *twenty-four* hundred lower than the Azul Range. It is a water-shed, on one side of which are the sources of the Capitancillos and on the other those of the Alamitos. The one stream runs between the two ranges, and turns to the north at the western end of the Mining Range. The other flows eastward, and turning the eastern end of the range as the other had done the western, crosses the valley till its course is arrested by the Pueblo Hills. Here, turning its course to run along *their* base, it runs westward till it meets the other stream, and forming with it the Guadalupe River, the two discharge their waters through its channel into San Francisco Bay.

At the place where the Alamitos strikes the Pueblo Hills,

it is joined by a mountain stream called the *Arroyo Seco*,* a point which the reader must observe.

Nearly in the centre of this valley stands a little hill,—*Loma*, as it is called in Spanish,—its side or skirt sloping irregularly by a series of graceful undulations towards the plain; its descending curve thus forming that which it required no great imagination to call a "lap."

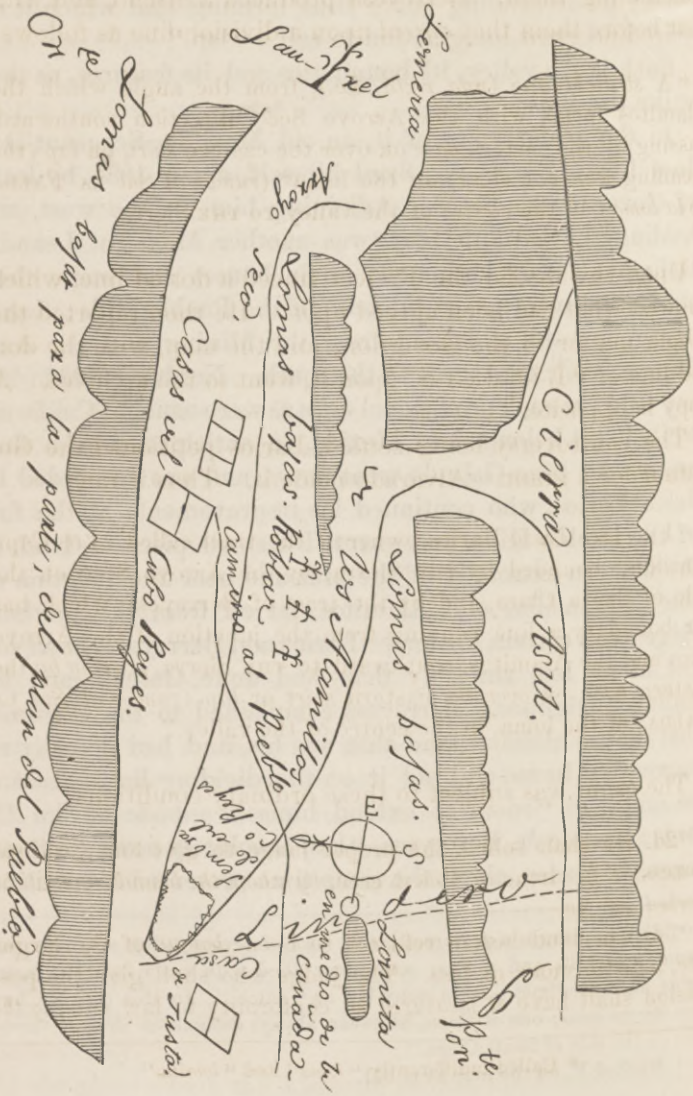
Such is the valley, its boundaries and its features, as they strike the eye.

In the eastern part of it, an old Mexican, Sergeant Don José Reyes Berreyesa, fixed himself, about 1834, by leave of Governor Figueroa. Adjoining him on the west, and holding the western part, was another Mexican, Leandro Galindo. They both built their houses and made their chief improvements at the base of the Pueblo Hills; that is to say, opposite and away from the Mining and the Azul Ranges, their exposures to the south. Neither of them had any title but such provisional ones as were usual in California while it yet belonged to Mexico, in anticipation of a final grant. In time Galindo went away, and was succeeded by Justo Larios, who continued his improvements at the foot of the Pueblo Hills, and granted a small piece of land, at the western extremity of the hills and near the junction of the Capitancillos and Alamitos, far off from the southern ridges, to a certain Foster.† Larios and Berreyesa, however, got along less amicably than had done Galindo and his military neighbor. Berreyesa complained to the Governor that Larios claimed land that was his, and had actually removed his house and set it on the dividing line. Larios, he said, had "room to extend himself outside of the *Cañada;*" while *he*, Berreyesa, "had absolutely nowhere to enlarge." Larios, about the same time presented *his* petition,

* The meaning is a dry creek; this sort of *arroyo* being common in a country of hills and plains; sometimes filled with water from the mountains, and sometimes a mere stony bed or "gulch." In this case we have two *arroyo secos;* one of them, however, always designated as the "*arroyo seco* on the side of Santa Clara."

† Marked F. on the map at p. 651.

complaining of Berreyesa as overbearing, and disposed to be rapacious. The matter disturbed the happy valley, and threatened to become a feud. Governor Alvarado referred



both petitions to the Prefect, the highest judicial officer in his department, and directed him to call the parties before him, to confront them with one another, hear their proofs, and to report the result of his investigation. The Prefect did this. The parties came before him, and he succeeded in conciliating them. Berreyesa produced a diseño, and with that before them they *agreed* upon a division-line as follows:

"A *straight* line (*una recta*, &c.), from the angle which the Alamitos forms with the Arroyo Seco, direction southward, passing by the eastern *base* OR over the eastern *skirt*, OR *lap* (the meaning was not clear), of the loma* (*rumbo al Sul* LA FALDA *de la loma*), in the centre of the valley TO THE Sierra."

Upon this diseño the Prefect traced a dotted line, which showed what had been agreed upon. He then reported the whole matter to the Governor; and the map, with the dotted line or "L-i-n-d-e-r-o" upon it, went to the archives. A copy is opposite.

The controversy being settled, Larios petitioned the Governor for a grant. Alvarado made it. Thus it ran:

"I declare Justo Larios owner of the tract called 'Los Capitancillos,' bounded by THE Sierra, by the Arroyo Seco on the side of Santa Clara, and by the tract of Berreyesa, which has for boundary a line running from the junction of the Arroyo Seco and the Alamitos, southward to THE Sierra, *passing by* the eastern *base*, OR *over the* eastern *skirt* or *lap* (*rumbo al Sul* LA FALDA) of the loma, in the centre of the valley."

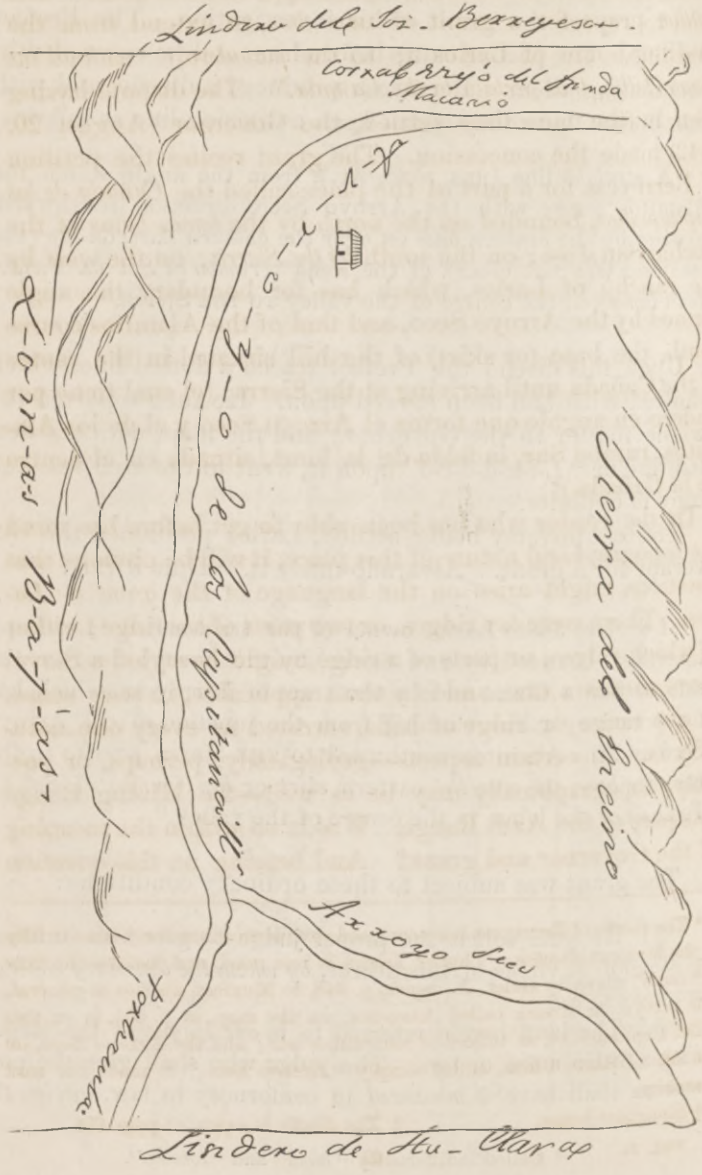
The grant was subject to these ordinary conditions:

"2d. He shall solicit the proper judge to give him juridical possession in virtue of this decree, *by whom the boundary shall be marked out*, &c.

"3d. The land herein referred to is *one league* of the larger size, a little more or less. The judge who shall give the possession shall have *it measured* in conformity to law, *leaving the*

* Called indifferently "*loma*" and "*lomita.*"

surplus which remains to the nation for the purposes which may best suit him."



Statement of the case.

The diseño submitted by Larios appears on the page opposite.*

About this same time Berreyesa applied for a grant. His *petition* prays for a grant of two *sitos*, to extend from the dwelling-house of Larios up to the *matadero*,† "*with all the lomas (hills), that pertain to the Cañada.*" The dispute having been in the meantime settled, the Governor (August 20, 1842) made the concession. The grant recites the petition of Berreyesa for a part of the place called the *Cañada de los Capitancillos*, bounded on the north by the *lomas bajas* of the Pueblo San José; on the south *by the Sierra;* on the west by the rancho of Larios, which has for boundary the angle formed by the Arroyo Seco, and that of the Alamitos course south, the base (or skirt) of the hill situated in the centre of the Cañada until arriving at the Sierra: (el cual tiene por lindero en angulo que forma el Arroyo Seco y el de los Alamitos, rumbo Sur, la falda de la loma, situada en el centro de la Cañada.)‡

To the reader who has been able to get before his mind the topographical nature of this place, it will be obvious that questions might arise on the language of the *grant to Larios.* There were *two* ridges, or two parts of *one* ridge; either of which ridges, or parts of a ridge, might be styled a *Sierra. Sierra* means a saw, and is a term applicable, in *some* sense, to any range or ridge of hills, serrated as every one naturally is. In certain aspects—geologically, perhaps, or possibly, topographically may be as well—the Mining Range was part of the Azul Range. Was it so within the meaning of the Governor and grant? And bearing on this question

* The diseño of Berreyesa is a very good one; better than forty-nine in fifty of the Mexican diseños. That of Larios is less good, and justifies the title of "daub" given by Grier, J., *supra*, p. 448, to Mexican diseños in general. The arroyo, or stream called Alamitos, on the map, at p. 651, is on this called Capitancillos, as indeed it sometimes was; and the Arroyo Seco, on the side of Santa Clara, called simply "Arroyo Seco," is made the west boundary.

† Slaughter-house.

‡ The diseño is *supra*, at page 654.

of philology would come perhaps another like it: "What meant in law the word *Cañada?*" Los Capitancillos was a cañada. But did this mean a valley so pure and simple that no elevation whatever could break its plain? or might it hold the Mining Ridge and let the *vaster* Azul Heights overtop the whole, and leave both plain and mine to insignificance below? These were questions which the United States might have to litigate against Berreyesa and Larios both united.

Then assuming the Mining Ridge to be part of the valley, and the United States to be thus disposed of, there might come another question—a question for Larios and Berreyesa, after disposing of the Government, to litigate between themselves. What did *falda* truly mean? It was a term the very favorite of poetry; and with a sense elegantly answered—answered with truth as well—by our English "lap," or "skirt," or "fold." Was this the sense in which the old Mexican soldier and his lately litigious neighbor understood it, when making peace for themselves, they made one of the greatest lawsuits which the world has seen for others?

Even conceding *falda* to mean the base of the hill, and that the parties had meant to pass *it*, another question might still arise upon the very *lindero* and map which at first seemed so plain as to render question impossible. The line was to pass the base; but did the *diseño* of Berreyesa, on which it was traced, not show that it also meant to pass the Mining Ridge (on this map plainly marked, and bearing the name of *lomas bajas*), so as to leave much its greater part with *him*. In nature could any line drawn from the junction of the creeks south, past the base, do this? Then on his diseño certain elevations were marked, both on the Mining Ridge and on the Azul Ridge behind. One on the Mining Ridge was especially prominent at its eastern end. Were there any known peaks, in nature, on these ridges? If so, could any line drawn as we have mentioned be made and leave them in that relative position where the diseño seemed to place them? The difficulty may be comprehended by any

reader who compares the map at p. 651, a map of the actual related topography, with the diseño of Berreyesa, which gives the parts, but in positions less relatively true.

On these niceties of language—on such constructions of rude drafts—depended, in part, the question, whether this Mine of the Almaden—the glory of the *Cuchilla de la Mina*, or *Cuchilla de la Mina de Luis Chabolla*—should belong to a few citizens or to a whole republic; to the representatives of Justo Larios, to those of "the sergeant Berreyesa," or to the United States as national domain.

The grant was of the valley. The point of departure was confessedly the junction of the creeks Alamitos and Arroyo Seco. A line running "southward" "to the Sierra" *Azul*, ended the rights of the United States in the matter. A line running "southward" at the *base* of the loma, as distinguished from one which should be sustained in its curving folds, ended Berreyesa's also. If, therefore, the line was to be run *to* the Sierra Azul, and *at* the base of the loma, south and straight from the union of the creeks, the mine belonged to Larios, or to whoever might be his fortunate successor.

The questions were worth a controversy.

By 1852, California was a State of the American Union, and three-quarters of the property granted to Larios had become vested in one Fossat; the remaining fourth (which was in the direction of the mission property of Santa Clara, and at the extreme west of the valley) being owned by the Guadalupe Mining Company.* Fossat now presented his petition to the land commissioners appointed by the act of Congress of March 3, 1851, to settle the respective rights of the United States and claimants under the former Government to lands in California, for a confirmation of his claims derived from Larios. The board decided in favor of it, and the United States appealed to the District Court; Berreyesa, however, being no party to the specific proceedings.

* The quarter of a league conveyed to the company, is indicated on the map at page 651, in shade.

That court, saying nothing whatever in its *opinion* on the question of *where* the line meant to be fixed on by Larios and Berreyesa would strike the Azul Range (if prolonged to that extent) as respected the Almaden Mine, and as respected the now known and actual topography, went into an argument to show that it must at least come somewhere *to* that range, and over the Mining Range; in other words, that the west portion of the Mining Range, whatever that portion might be, did not belong to the United States.

The court accordingly decided that the grant was good for the place known as *Los Capitancillos*, bounded and described on the south by the Azul Range, as distinguished from the lower hills or Mining Ridge; on the west (about which there was no question) by Arroyo Seco on the side of Santa Clara. The *decree*, then, went thus as respected the eastern line:

"On the east by a line running from the junction of a certain other rivulet, called *Arroyo Seco*, and the *Arroyo de los Alamitos*, southward to the aforesaid main Sierra, passing by the point or part of the small hill situated in the centre of the Cañada, which is designated in the expedientes and grants of Justo Larios and José Reyes Berreyesa as '*la falda de la loma*,' and crossing the range of hills designated above as the *Cuchilla de la Mina*, or *Cuchilla de la Mina de Luis Chabolla*, and in which are situated the said Guadalupe, San Antonio, and New Almaden Mines, and which is the same range of hills designated '*Lomas Bajas*' on the diseño or map in the aforesaid expediente of José Reyes Berreyesa, the said eastern line herein described being intended to be the same line agreed upon as the line of division between the lands of Justo Larios and José Reyes Berreyesa, as expressed in the respective expedientes and grants of said Justo Larios and José Reyes Berreyesa, and delineated by the dotted line on the said diseño or map in the expediente of José Reyes Berreyesa; in the location of the said line reference to be made to the description thereof in the said expedientes and grants, and the delineation thereof on the said diseño or map in the expediente of José Reyes Berreyesa, which expedientes, grants, and diseño, or map, are on file and in evidence in this case."

The northern boundary of the tract was declared to be that shown in the diseño or map of Larios; which was in effect the stream, marked on his draft as the Arroyo Capitancillos, but on the map styled the Alamitos.

Confirmation was thus made of the *whole* tract granted to Larios, with the exception of the two adjacent parcels thereof lying on the westerly end of said tract, and claimed by the Guadalupe Mining Company. This gave him a tract of about a league and three quarters.

The court in its opinion noted, indeed, that only *three* of the boundaries were designated in the grant, the southern, the western, and the eastern; but inclined to think that the description of the tract by name, as *Los Capitancillos*, a known valley, and the delineation on the diseño of Larios of the two ranges of hills within which it was contained, sufficiently indicated the location of the northern boundary, the mention of which was omitted in the grant; especially as the call was for a league *pocos mas o minas*,—a league more or less.

From this decree the United States appealed to this court.* This court considered that there was more weight in the last point which the court had noted than the court itself gave to it, and reversed that decree; Campbell, J., who gave the opinion, remarking in different parts of it as follows:

"The District Court confirmed the claim of the appellee to land limited by specific boundaries, and ascertained those boundaries, as they exist on the land, with precision. Under this decree the grant to Larios includes *seven thousand five hundred and eighty-eight* $\frac{90}{100}$ *acres*.†

"We concur in the opinion of the Board of Commissioners and of the District Court, that affirms the validity of the grant of the Governor of California to Justo Larios, and the regularity of the conveyances through which the claimant deduces his title."

The court here gave an account of the dispute between Larios and Berreyesa, and of the settlement of it, and went on:

"The Governor granted the land to Larios, to be his property,

* 20 Howard, 413. † About a league and three quarters.—REP.

subject to the approval of the Departmental Assembly, and *to the performance of conditions.**

"The *southern*, *western*, and *eastern* boundaries of the land granted to Larios are *well* defined, and the objects exist by which those limits can be ascertained. There is *no call* in the grant for a *northern* boundary, nor is there any reference to the diseño for any natural object or other descriptive call to ascertain *it*. The grant itself furnishes no other criterion for determining that boundary than *the limitation of the quantity*, as is expressed in the third condition. *This is a controlling condition in the grant.* The delivery of juridical possession, an essential ceremony to perfect the title in the land system of Mexico, was to be accommodated to it. The diseño presented by the donee to the Governor to inform him of his wants represents the quantity to be *one* league, a little more or less. This representation is assumed to be true by the Governor, and *it forms the basis* on which his consent to the petition is yielded.

"He prescribes to the officer to whom he confided the duty of completing the title to measure a specified quantity, leaving the surplus that remains to the nation as preparatory to the delivery of judicial possession to the grantee. The obligation of the United States to this grantee will be fulfilled by the performance of the executive acts which are devolved in the grant on the local authority, and which are declared in the two conditions before cited. We regard these conditions to contain a description of the thing granted, and in connection with the other calls of the grant they enable us to define it. *We reject* the words, 'a little more or less,' *as having no meaning* in a system of location and survey like that of the United States, and that the claim of the grantee is valid for the quantity clearly expressed *If the limitation of the quantity had not been so explicitly declared*, it might have been proper to refer to the petition and the diseño, or to have inquired if the name, Capitancillos, had any significance as connected with the limits of the tract, in order to give effect to the grant. *But there is no necessity for additional inquiries. The grant is not affected with any ambiguity.* The intention of the Government of California is distinctly declared, and there is no rule of law to authorize us to depart from the grant to obtain evidence to contradict, vary, or limit its import.

* Given on page 655.

Statement of the case.

"The grant to Larios is for *one* league of land, to be taken *within the southern, western, and eastern boundaries* designated therein, and which is to be located, at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California, by the executive department of this government. The external boundaries designated in the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee.

"The decree of the District Court is reversed, and the cause is remanded to that court with directions to *enter a decree conforming to this opinion.*"

The case was again heard below, and on new evidence, tending, most of it, to the subject of the southern boundary. On the 18th of October, 1858, the District Court again gave an opinion, and again made a decree. The opinion was a further argument on the evidence, new and old alike, to show that the Azul Range was the true south boundary,—"the most important, if not the only point discussed," the court says, "on the hearing," and which the court treat as "the question to be determined." Nothing is argued about the eastern boundary. The decree again decreed that the grant was a valid one. Its southern and western boundaries were in substance as already above set forth. The eastern boundary was thus again disposed of.

"The eastern boundary is a straight line commencing at the junction of a certain rivulet, called Arroyo Seco, with the Arroyo de los Alamitos, and thence running southward to the aforesaid main sierra or mountain range, passing by the point or part of the small hill situated in the centre of the Cañada, which is designated in the expedientes and grants of Justo Larios and José Reyes Berreyesa as '*la falda de la loma,*' and crossing the range of hills designated above as the '*Cuchilla de la Mina,*' or '*Cuchilla de la Mina de Luis Chabolla,*' in which are situated the said Guadalupe and New Almaden mines, and which is the same range of hills designated '*Lomas Bajas,*' on the *diseño* or map in the *expediente* of José Reyes Berreyesa on

file in the case, the said eastern line crossing, also, the said Arroyo de los Alamitos and terminating at the base of said main sierra; and the said eastern line herein described, being intended to be the same line agreed upon as the line of division between the lands of Justo Larios and José Reyes Berreyesa, as expressed in the respective expedientes and grants of said Justo Larios and José Reyes Berreyesa, and delineated by the dotted line on the said diseño or map in the expediente of José Reyes Berreyesa; and in the location of said line, reference is to be made to the description thereof in the said expedientes and grants and the delineation thereof on the said diseño or map in the expediente of José Reyes Berreyesa, which expedientes, grants, and diseño or map, are on file and in evidence in this case."

It was ordered that the fourth line should be run so as to include one league only; and the title was confirmed on that basis.

The United States *again* appealed to the Supreme Court;* but a motion was made to dismiss the appeal because the decree below was interlocutory. The court did dismiss the appeal, and in the opinion say as follows:

"The court determined (when the case was here before), 'that a grant under which the plaintiff claimed land in California, was valid for one league, to be taken within the southern, western, and eastern boundaries designated therein, at the election of the grantee and his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the Government. The external boundaries of the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it; and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee.'

"This motion to dismiss the present appeal is resisted, because the inquiries and decrees of the Board of Commissioners for the settlement of Private Land Claims in California, by the Act of 3d of March, 1851, in the first instance, and of the courts of the United States, on appeal, relate only to the question of

* 21 Howard, 445.

the validity of the claim, and by validity is meant its authenticity, legality, and in some cases interpretation, but does not include any question of location, extent, or boundary,—and that the District Court has gone to the full limit of its jurisdiction in the decree under consideration, if it has not already exceeded it."

The court then examining this matter and declaring what the admitted duties of the District Court were, adds:

"But in addition to these questions upon the vitality of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim. In affirming a claim to land under a Spanish or Mexican grant, to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee."

And this court concludes its opinion thus:

"But, after the authenticity of the grant is ascertained in this court, and a reference has been made to the District Court, to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice. It is the opinion of the court that this appeal was improvidently taken and allowed, and must be dismissed; and that the District Court proceed to ascertain the external lines of the land confirmed to the appellee, and enter a final decree of confirmation of that land."

On the filing of this mandate of dismissal, the Surveyor-General of California was ordered to survey the land confirmed in conformity with the decision of the District Court, made 18th October. He made the survey, which was approved by the Surveyor-General, 18th December, 1860, and

filed it, with a map, in the court below, 22d January, 1861. The survey and map, as was testified by the deputy surveyor Hays, and one Conway, a clerk in his office, who assisted in making it, was made in conformity with the decree which they had before them. That survey is indicated on the map, at page 651, by a heavy connected line.

It appeared, also, that Berreyesa had at one time caused a private survey to be made of his tract, and this survey showed that the line lay essentially as marked by this heavy connected line. Another made for the Guadalupe Mining Company located it in the same way. A public survey, made by Surveyor-General Hays, in 1855, located it also thus.

Not long before the above-mentioned order of the District Court was made, Congress passed the act of June 14, 1860,* commonly called the "Survey Act," which authorizes the District Court to allow persons *not parties to the record* to intervene in matters of the survey and location of confirmed private land claims, and to show the true location of the claim. For that purpose they may produce evidence before the court, and on such proof and allegations the court shall render judgment. In regard to appeals, the whole language is simply, "And no appeal shall be allowed from the order or decree as aforesaid of the District Court, unless applied for within six months."

The survey was accordingly ordered into court. It made the Azul Range, as distinguished from the Mining Range, the southern boundary. The *eastern* line was drawn, as the reporter supposes,—for he never saw the plat,—from the junction of the two creeks Seco and Alamitos south, past the *base* of the loma; so leaving the mine on the land of Larios.

Berreyesa, Foster, and others, who had not been parties to any of the immediate previous proceedings, now excepted to it.

Berreyesa excepted because the western boundary of *his* land constituted the eastern of that of Larios, "to wit, a line beginning at the junction of the creeks Alamitos and Seco,

* 12 Stat. at Large, 33.

and running southerly to the main Sierra and Sierra Azul, crossing the *Lomas Bajas in the manner shown by the diseño* of the land granted to said Berreyesa; whereas the survey confirmed in this case locates the eastern line so as to include a tract of land within the exterior lines of the land granted to Berreyesa, and not granted to the said Larios."

Foster excepted because the tract being carried over far to the south, and being confined to *one* league, his small tract was left out. So, on similar grounds, did other parties who subsequently abandoned their exceptions.

The United States, by the District Attorney, entered a formal appearance, but made no objection to the survey at any stage of the hearing, suggested no argument, and offered no evidence against it.

Fossat, who represented Larios, came in to protect the survey, averring that it was right, and should stand.

The District Court,—considering that no decision had ever yet been made by it as to the *eastern* boundary; not understanding, apparently, that any supposed decision with regard to that line had been passed on by the Supreme Court in either of the decisions quoted in the preceding part of this statement; conceiving further, it would seem, that under the new act of 1860 (the "Survey Act," passed *after* the second decision in this court was made), the court below might, on the intervention of Berreyesa, then for the first time heard in this particular cause, determine the eastern line, irrespective of any decree obtained by either party in a proceeding which it considered as a proceeding between himself only and the United States,—proceeded to settle the eastern line; and in some degree, it was argued, to treat all things *de novo*. A great deal of new evidence was taken in regard to this eastern line; evidence bearing also on the southern line. The scope of much of the former was to show entire error of scale in Berreyesa's diseño, and that regulating the eastern line by certain objects, clearly enough indicated on this diseño, *other than the loma*, the line could not be drawn south from the junction of the creeks past the loma to the point where that diseño showed that it meant to

come. The matter will be understood better further on in the case. The result of the whole was that, affirming the Mining Range as the south boundary; that is to say, carrying the tract to the Azul Range, as being the true Sierra, the District Court now made an east line, somewhat such as is exhibited by the light dotted line on the map at p. 651. The line began at the junction of the two creeks, thence ran south to the eastern base of the loma; thence south 55° west to a point where another angle was made; thence south 34° west to the Azul Range. The effect was, that while Larios or his representative got *some* part of the Mining Ridge, the eastern line was made to reach that ridge at a point so far west that the ALMADEN MINE, the great object of contest, and the largest portion of the ridge, fell into the tract of Berreyesa.

From this decree the claimants under Larios appealed to this court. So did Foster. *The United States took no appeal*, and the representatives of Berreyesa, of course, were desirous to maintain the decree.

The whole case was now before this court,—the case as it was presented by all the evidence taken in all the proceedings below. This was the case viewed as an original case.

But on this occasion it was here also, of course, as it might be affected by what had been decided in it on the two different occasions when it was here before on appeal, and when the court had expressed itself, and had given mandates, such as have been previously stated in this report. The effect of the District Court's *own* two decisions on its power to decide further was also to be considered; its power, perhaps, under the Survey Law of 1860, to change the decree of confirmation.

As an original case,—the detached parts in which it presented itself below, and on the three different hearings being brought together, and all presented in sequence,—the matter was essentially thus: the *diseños* of both Larios and Berreyesa, the last with the *L-i-n-d-e-r-o* upon it, being, of course, parts of the case everywhere.

1. *As to the southern boundary:* Witnesses were brought to

show that the ranges were one sierra, and so that the tract did not include any part of the Mining Ridge. Mr. Veach, a geologist, swore thus:

"The Mining Ridge is detached from the main mountain by a stream that runs from east to west, making a sharp hill between the higher mountain and the plain; but *I* look upon this as only a bench-like portion of the mountain, which has been separated from it by the gorge cut down by the stream. The reason why I so consider it is the *gorge*-like character of the valley of the little stream, and the sharpness of the ridge, and the elevation of the bottom of the gorge so considerably above the level of the valley; it is, I should judge, 300 feet above it. From *geological* considerations, also, *I* should consider this ridge clearly and distinctly a portion of the mountain. The ridge does not present the spur-like character which would show its detachment from the mountain, for it runs parallel with the general course of the latter."

Mr. Matheson, engaged in the public surveys of the United States, testified in the same way:

"I do not consider that there is a main sierra separate from any other portion of the sierra. The Mine Ridge is merely a spur, and connected by a ridge with the main sierra. You can travel from the valley *right up* to the highest point of the ridge."

Referring to the diseño of Larios (p. 656), it will be noted that his tract, as there indicated, came *to* a range of hills called *Sierra del Encino* ("range of *the* live-oak," or, less accurately, perhaps, in a grammatical point of view, "live-oak range.")*

Oaks, it was shown, grew everywhere about here. "There are a considerable number of them," said one witness, "on the mountains back of the Mine Ridge, and also on the plains north of it. *There are also a considerable number of them found generally on the northern slope of the ridge*, and presenting a very beautiful green appearance."

* The plural would be *Sierra de los Encinos.*

Then there was on this diseño but one sierra indicated. The tract did not include it by passing over to any other behind it. No second range was marked. No streams of any kind answering to any in nature ran on this diseño at the foot of the range, though streams did, in fact, run at the foot of the Azul Range. At the foot of the Pueblo Hills, where a stream ran, in fact, one ran also on the diseño.

Moreover, the residence of Larios—that in which he had succeeded Galindo—was, like the home of Berreyesa, on the *north* edge of the tract, at the foot of the Pueblo Hills.* Larios was living in this part of the valley. No tract of *one* league, not very irregular in shape, could include the Mining Ridge without excluding nearly all the land along the base of the Pueblo Hills. The maps, moreover, reversed the ordinary law which governs the construction of maps, and make the top represent the south, the bottom the north, the right the west, and the left the east; hence, an inference that the point from which everything was viewed was the north edge of the valley. An experiment showed, also, that the diseños of Berreyesa and of Larios were much the same in size; and taking the two, and putting them edge to edge in the manner of "Indentures,"—fitting the edge which indicated the western side of Berreyesa's tract against that which indicated the eastern side of that of Larios, the Pueblo Hills, as marked on each, being fitted and made the starting-point,—that the *Sierra del Encino* of the draft of Larios ranged itself opposite to the *Lomas Bajas* (the Mining Ridge, undoubtedly) of Berreyesa's, and not against the *Sierra Azul*, so plainly, on the draft of Berreyesa, distinguished from it.†

On the other hand, witnesses showed that, in many re-

* On Berreyesa's diseño, as the reader will see, these hills marked as "Lomas Bajas, para la parte del plan del Pueblo." On that of Larios they are styled simply "L-o-m-a-s B-a-j-a-s."

† From the necessity of getting the whole of both diseños *in* the page, and so of making the scale of Berreyesa small enough to let in the "Cierra Azul," this thing is not so well shown by the two diseños given to the reader. The scale of Berreyesa's is the smaller.

spects, the two ridges might be considered different, and by many were so; that the separation, if sometimes called a gorge or ravine, was as often, or oftener, called a valley. Then one witness, an American, who had lived since about 1835 in California, and near the place, testified that the Mining Ridge had been known by the name of *Cuchilla de la Mina*, and as a thing separate from the Azul Range, often known by the name of *Sierra Santa Cruz*, the former being *connected* with the latter only by a ridge at one place. It was shown also, too, that Larios was quite illiterate, "unable to handle a pen," and that his diseño had been made for him by a friend of his named Rios, from oral description given him at Monterey, away from the land, Rios himself never having been on the land, nor knowing anything about it. He had not, however, drawn that of Berreyesa. The testimony—that of photography included—showed, moreover, and this past any question, that while the elevations hereabouts, and the plain, also, were fruitful in oaks, there was upon the Azul Range one umbrageous oak of venerable years and extraordinary size, standing on a spur of the mountain, projecting boldly from the mass of the range, and presenting so clear an outline to an observer in certain directions as to be visible for fifteen miles; a prominent feature in the landscape. It was testified, in fact, to be so well known to the people of the neighborhood as to have acquired the name of "*Encino Coposo de la Sierra Azul.*" Further, on the diseño of Berreyesa the Mining Ridge was styled *Lomas Bajas*, which means "Low Hills;" and the term Sierra was given to the Azul Range,—"Cierra Azul." Hence, ground for an inference that the term "Sierra," in the parlance of that place and time, had become appropriated to the Azul Range, and that "Lomas Bajas," or Low Hills, was the common title of the Mining Range.

The *L-i-n-d-e-r-o*, it will be observed, crosses the Mining Ridge, and goes to the Azul Mountains, here designated Sierra Azul.

2. *Then as to the eastern boundary.* In favor of the claim

of Larios, there of course was the *L-i-n-d-e-r-o* and its history.

On the other hand, and in favor of Berreyesa and of the line as settled by the decree below, the testimony of Mr. W. J. Lewis, an acute-minded and well-educated surveyor, went to prove that the compass on the diseño of Berreyesa was erroneous to the extent of 45°, the north point being represented that much to the eastward; that the actual position of the loma was much more to the east, and near to the junction of the *Alamitos* and *Seco* than that diseño indicates; that standing at the junction of the creek, and looking south, the range of the Azul did present one peak at the west, Mount Umunhum, higher than any near it; and one peak at the east, Mount Bache, much higher than any near *it*, and higher even than Mount Umunhum.* Two elevations, answering or not answering this character, are presented, it will be seen, on the diseño of Berreyesa. So in nature at the Mine, which is near the eastern end of the Mining Ridge, there is a peak known as the Mine Peak, and from that peak there is a continuous descent to the Alamitos Creek. On the diseño of Berreyesa, at the eastern edge of the *Lomas Bajas*, or Low Hills (meant confessedly to represent the Mining Ridge, in some part, or to some extent), there was or was not, at its east end, such an elevation and descent. Then it was shown by Mr. Lewis—who had spent months here, and made surveys and observations of every natural feature of the region—that while indicating different objects very well, the diseño was drawn without any reference to scale whatever; relative position being wholly misrepresented. The house of Larios, for example, which was in fact thirty feet wide, was made to cover a fifth of the width of the valley, there a mile wide.

Mr. Lewis, accordingly, thought that he could see in the diseño an intent to represent the three peaks, especially the

* Mount Umunhum is 3440 feet above the sea; Mount Bache, 3780 feet, or 350 feet more. The position of Mount Bache is not, from want of space, accurately indicated on the map at p. 651. It is sufficiently so, however, to explain things. In nature it stood more to the east and south.

two former.* *Assuming this to be so*, and comparing the diseño with nature, there would be a great error. In nature, less than one mile in length lay eastward of the division based on the L-i-n-d-e-r-o, and over four and a half miles lay to the westward; whereas, the part of the ridge represented on Berreyesa's diseño as lying to the westward of the line, would be but five-sixths of a mile, and all the rest was east, on Berreyesa's own land. Hence, the loma, or lomita, not being shown in a position true to scale, an inference that Mount Umunhum—an unmistakable object, and the Mining Peak another—should govern the location in preference to the lomita, nearer the starting-point and less definite, *as this surveyor conceived.* The difficulty was that, by the terms of the grant, the line was to be drawn at the *falda de la loma*, which the interests of Larios interpreted "base of the hill." If the line could *cross* the hill, going over its "skirt" or "lap" *to a perfectly ascertained point* at the other side of the valley, a decree fixing the eastern line as Lewis fixed it could be supported. The case as to the meaning of *falda* was thus: one witness being Mr. Hopkins, "keeper of the Spanish archives in the office of the Surveyor of the United States for California, well acquainted with the Spanish language, and in the habit of translating documents;" who had in fact made one translation of this grant.

Q. You have translated the word "*falda*" by the word "skirt;" have you considered well the exact definition of the word "*falda*," and is it exactly expressed by the word used in your translation?

A. I have carefully examined the definition of the word "*falda*," as laid down in the standard lexicons of the Spanish tongue. I have examined the word as used by ancient and modern writers of the Spanish language, and I can think of no word in the English language which more clearly or legitimately

* Mount Bache, as Mr. Lewis supposed, was meant to be designated by the elevation over the letter C in "Cierra;" Mount Umunhum being at the right of the same ridge, and the Mine Peak being over the letter L in "Lomas Bajas."

expresses the meaning than the word "skirt." I arrive at this conclusion from the definitions that I find given to the word in the Spanish lexicons, and from its use by celebrated Spanish writers.

Q. In the sense in which you use the word "skirt," to what part of a hill or *loma* is it to be applied?

A. It is to be applied to the lower or inferior part of the hill or *loma*.

Q. Have you made any translation of the definition of the word "*falda*" given in any lexicon? if yea, please produce that translation.

A. I have made a translation of the definition of the word "*falda*," as laid down in the Royal Dictionary of the Spanish Academy, dedicated to Don Felipe V, and printed at Madrid in the year 1732. Here it is:

"*Falda*. That part of the long dress from the waist down, as the skirt or blouse of women.

"'Queen Mary promptly dismounted, and, raising the edges of her skirt (*falda*) and the sleeves of her dress, drew a hunting-knife from her belt, and with her own hands opened the stag.

"'The great queen was riding on a small ass, with the boy-god (nino dios) in her lap (*falda*).'

"*Falda*. It is very commonly applied to that which drags from the after-part of a dress worn either by a person holding high office, or as a symbol of sorrow by mourners accompanying a funeral.

"'He carried the train (*falda*) of Mary, Queen of Scots, the bride of the Dauphin Francis.'

"*Falda*. By allusion, or metaphorically, is called that part of the hill or mountain which falls or descends from the middle down. LAT. *Montis Radix*.

"'They reached the skirt (*falda*) of a small hill. Naim was a small city situated on the skirt (*falda*) of Mount Hermon.'

"*Perrillo de falda* (lap dog). The small pet dog, so called because women are so much attached to them that they usually keep them in their laps (*faldas*) that they may not hurt themselves.

"'I wager that you do not know why Apelles painted Ceres, the goddess of corn, with a lap dog (*perrillo de faldas*).'"

Q. Please give such examples of the use of the word "*falda*" by Spanish writers as occur to you, and give the translation into English of those passages in which the word is used.

Statement of the case.

A. The following I found some years ago:

The first is from Martin, a Spanish poet.

"Iba congiéndo flores
Y quardándo en la *falda*
Mi ninfa para hacér úna Guirnalda," &c.

The translation of which is:

"My love was gathering flowers, and keeping them in her lap (*falda*) to make a garden."

The second is from Jose de Cadalso, a celebrated Spanish scholar and poet:

"Con pécho humilde y reverente paso
Llegue á la sacra *falda* del Parnaso;
Y como en sueños vi que llamaban
Desde la sacra cumbre, y me alentaban
Ovidio y Taso, a cuyo docto influjo
Mi numen estos versos me produjo."

The translation of which is:

"With humble breast and reverent step I reached the sacred *foot* (*falda*) of Parnassus, and, as in dreams, heard calling me from the sacred summit, Ovid and Tasso, who inspired me, and under whose wise influence my muse produced these verses."

The third is a translation made by Juan de Janrequi, I think in the sixteenth century, from an Italian play. The following is an explanation of these four lines: A romantic young shepherd was very much enamored of a beautiful shepherdess, who, perhaps from a spirit of coquetry, treated him with scorn; the young man took the disappointment so much to heart that he madly threw himself from a neighboring precipice; and the lines of the poet are a description given by an old hermit of the condition and place in which he found the young man:

"Yo me estaba junto a mi cueva, que vecina al valle, y casi al pie del gran collado yace, do forma *falda* su ladera enhiesta."

The translation of which is:

"I was at my cave, which lies near the valley and almost at the foot of the great hill where its steep side forms a (*falda*) *skirt*."

The fourth is from Jovellanos, a poet of the eighteenth century:

"De la Siniestra orrilla un bosque ombrio
Hasta la *falda* del vecino monte
Se extiende; tan ameno y delicioso
Que le hubiera jazgado el gentilisimo
Morada de algun dios, ó a los misterios
De las Silvanas Driadas guadado."

The translation of which is:

"From the left shore shady wood extends as far as the *skirt* of the neighboring mountain, so pleasant and delicious that the pagan world might have devoted it as the dwelling of some God, or to the mysteries of the sylvan Dryads."

The fifth is from a geological report made by Antonio del Castillo, one of the professors in the Mining College of Mexico, in relation to the quicksilver mine of Pedernal, and is as follows:

"La loma del Durazo esta unida por la parte del sur a otros de la misma formacion que ella separadas por hondonadas o bajios de corta estension, y limitadas al oriente por el mismo arroyo que pasa por la *falda* norte de la primera."

The translation of which is:

"The hill of Durazo is united on the part of the south to others of the same formation with it, separated by ravines of short extent, and limited on the east by the same arroyo which flows by the northern skirt of the first."

Cross-examination.

Q. Have you any reason for supposing that the Spanish dictionary mentioned by you—the Royal Dictionary of the Spanish Academy, dedicated to Don Felipe V, and printed at Madrid in the year 1732—is the *identical dictionary from which the native Californians obtained their definition* of the word "*falda*," or any other words in use by them?

A. I have no reason for so supposing.

On the other hand, evidence from other poets, other dictionaries, and other prose writers, tended to prove that if *falda* meant skirt, it meant the edge of the skirt, its extremity as well as its higher folds.

In addition to all this evidence on both sides, of geologists, surveyors, scholars, &c., photography and landscape painting both were largely invoked for the cause of justice; and the judges of this court being unable of course to visit the place, three thousand miles away, which the judge below had actually done, sworn representations, the artists' oaths accompanying their work, were laid before this bench. To exhibit these photographs and landscapes as part of the "case,"

is beyond a reporter's art, as attained to up to this day. The list below, if not giving to the reader an idea of the topography as it existed in nature, will give him some idea of the very special features of the case as it was exhibited in this court, and bring excuse to the reporter if, *without* the reader's having them before him, the narrator has failed to present the "case" in its truest and clearest form; and with those impressions from it which, after all, may have influenced the decision. Here they are, photograph and landscape alike,—the landscapes without their colors:

PHOTOGRAPHS.

Exhibit No. 1, Photographic View, taken near the junction of the two creeks, looking westerly.

Exhibit No. 2, Photographic View, taken one-quarter of a mile below the junction, looking southwesterly.

Exhibit No. 3, Photographic View of the eastern hill of the Lomita, taken near the junction of the two creeks.

Exhibit No. 4, Photographic View, showing part of the valley and Pueblo Hills.

Exhibit No. 5, Photographic View, showing continuation of valley and Pueblo Hills, and part of Mine Ridge.

Exhibit No. 6, Photographic View, taken near the hacienda, looking towards the southwest.

Exhibit No. 7, Photographic View, taken near the hacienda, looking towards the northeast.

LANDSCAPES.

Exhibit No. 1, Landscape View, showing Mine Ridge, a portion of the Pueblo Hills, and the valley between, looking towards the east.

Exhibit No. 2, Landscape View, showing Mine Ridge, a portion of the Pueblo Hills, and the valley between, looking to the west.

Exhibit No. 3, Landscape View, taken from the west bank of the Alamitos, south of the hacienda, looking southerly up the gorge through which the Alamitos flows.

Exhibit No. 4, Landscape View, taken from the same point as No. 3, and looking northerly down the gorge through which the Alamitos flows.

Exhibit No. 5, Landscape View, taken from the east bank of the Alamitos, half a mile above the hacienda, looking up the gorge.

Exhibit No. 6, Landscape View, taken from the south bank of the Arroyo Seco, a short distance above the junction of the two creeks, looking southwesterly.

On this long case the following questions, in effect, now came up for discussion:

1. Did any appeal lie from the "Survey Act?"

2. If so, had the United States, who filed no objections to the survey as made by the Surveyor-General, nor took any appeal below, a right to ask here for a reversal or any modification of the decree?

3. After the two decrees of the District Court itself, and the two decisions made in this court, was the matter of this eastern line open below for such action as was taken on it by the District Court the last time?

4. As an original case and on its merits, what and where were the true east and south boundaries of the tract, the west being settled, and the north run for quantity?

Messrs. Bates, A. G., and Wills, special counsel for the United States, who desired to have the decree reversed, or so modified as to make the Pueblo Hills the north boundary, and to place the league *in* the valley wholly.

I. No appeal lies to any court from the District Court when proceeding under the Survey Act. The act, so far as it grants powers and imposes duties on the District Court, has no reference to the judicial functions of the court as a part of the constitutional judicial system of the United States. All these powers and duties might better in law, and vastly better in fact, be imposed upon some officer, executive and ministerial simply. Congress had no power, under the Constitution, to grant an appeal, if it had wished. The evidence is doubtful that it did wish. The only language used forbids, except under conditions, that which it nowhere grants at all. The only language used is that, "no appeal shall be allowed from the order or decree as aforesaid of the said District Court, unless applied for within six months." Appeals come from implication, if they come at all; and in a matter where the whole subject granted is in derogation of regular judicial functions, the incidents of regular functions are not to be inferred.

II. If an appeal does lie—if the case is properly here—the

United States have a right to come and show the errors of the decree, even though no appeal was taken by *them*. They were parties to the cause in the court below; they are parties here; brought here. No appeal is needed, and if any were needed, it could yet be taken.

III. We are not concluded by either of the decisions of this court so largely quoted in the statement. The decision in the first case was, that the grant was not of the valley as a valley, but of one league in the valley; and that as the valley contained nearly two, the whole of it could not pass. The second was a dismissal of an appeal, because made from an interlocutory, and not from a final, decree. The argument on this point, as also on the effect of the first and second decisions of the District Court itself on its third and last, now appealed from by Fossat, representing Larios, will be enlarged upon by the counsel of Berreyesa, or his representatives, who follow us.

IV. As an original case how stands the law on it?

1. *As to the southern boundary.* The case shows that the ridges are one mountain; the two parts connected with each other by a low ridge running transversely across the valley, if you will call it so—depression *we* style it—which separates them. The testimony of Mr. Veatch is full to this point; that of Mr. Matheson also. Then on the diseño of Larios there is but one ridge; no stream is at its base. On the contrary, the Alamitos* is indicated as coming from *behind* it. It is not enough to say that the diseño is rude or rough. You must show that it is grossly false. Now the Seco on the side of Santa Clara is laid down; the Guadalupe is laid down; the Alamitos is laid down. That is to say, where there are three streams in nature, three streams are put on the diseño meant to represent nature. When, therefore, there are in addition two other places in nature, one with a stream and one without a stream, and you find the diseño representing a place which must be one of them, and may be one just as well as the other, how are you to decide

* Called, on it, the Capitancillos.

which place is meant? In this way only: If a stream is marked on the diseño, then the place which has a stream, in nature, is meant to be designated. If no stream is marked, the other.

The fact that the ridge meant to be designated is called Sierra del Encino, does not counterpoise this argument. If, indeed, there were but one oak in the region—some one oak as much known as Herne's in Windsor Forest—then the Sierra del Encino would be indicative. But oaks grew here on the Mining Ridge as on the other. Nothing can be argued from a nice point of grammar,—the point of singular and plural. Larios was an ignorant man.

Then putting that part of the Larios diseño which represents the east in juxtaposition to that part of the Berreyesa which represents the west, it is a noteworthy fact that the Sierra del Encino in the former corresponds with the Lomas Bajas, or Mining Ridge, of the latter. This is demonstration, for the two grants are twins.

An argument for our view is, moreover, found in the fact that the grant was of the valley alone. Berreyesa, indeed, asked for the valley, "with all the lomas or hills that pertained to it." Larios was less ambitious. His grant says nothing of hills at all, and is for the land called "Los Capitancillos," the name by which the valley was itself familiarly known. The Californians were a primitive and pastoral people. What they most desired were valleys inclosed by hills, so that without fences their cattle could never stray. The mountains themselves were of comparatively little use, if, as we may assume, the valley had pasturage enough. As much valley as possible, and as little mountain as might be, was what Larios wanted and received a grant for. What his representatives claim and get is as much of the mountains as they can, and as little of the valley as possible. Look at the tract as delineated by either the heavy continuous or the light dotted line of the map, at p. 65, and the thing appears. What the purpose of Larios was is obvious by considering where he put his improvements, and where he attempted to sell such provisional rights as he had. This

was at the base of the Pueblo Hills. The controlling force which the position of his house must have in fixing his boundaries is acknowledged by the decrees, and the house is kept in all the locations. But if the location made by the Surveyor-General is retained, as Mr. Black will contend that it must be, who ever saw such a shaped tract in California? The California surveys all go in parallelograms, bodies, and even keep to rectangles as much as practicable. Look at the shape of this tract, as designated by the heavy lines on the map just referred to, and maintain it who can! This court declared when the case was first here, that Larios was to take his land within the three boundaries at his election, under the restrictions established in California. The external or out-boundaries were fixed, but nothing else, and he should have elected rightly.

2. *As respects the eastern line.* This concerns us less. We, indeed, prefer a straight line. We think it clear that the east line, as surveyed originally, is right enough when produced so far only as to give a league *in the valley.* The defence of the eastern necessity of the line we may leave to Mr. Black, accepting his view with the restriction stated,—that it does not pass the Mining Ridge.

Messrs. J. B. Williams and Carlisle, for the representatives of Berreyesa, interested in having the decree confirmed, or left undisturbed.

I. *As to the right of appeal by Fossat.* We are content with the decree as made below. We are content with a dismissal of the case, and a consequent standing of that decree. Herein, and on this first point, therefore, and so far as it aids us, we accept the argument of the counsel who have just concluded.

II. *As respects the right of the United States to ask reversal, they not having appealed.* Our interests and views here coincide with those of Larios, or his representatives. In the defence of the well-founded position, that the United States canot ask a reversal, we may leave our case in the hands of Mr. Black, who follows. In the defence of a good point, no

one will argue more ably. Some other of his positions we shall combat, as not within the category.

III. *How stands the case affected by anything decided here or below? Are we concluded by what that court had done or this one has said?*

When the matter was first before the District Court, the question of the eastern boundary was not considered by it. Its opinion, full on the southern line, says nothing about the other. So far as the case shows, that line was not even in controversy; though it is inferable, perhaps, from the guarded and special language of the *decree*, that a dispute existed in fact. The decree determines the southern boundary, but only designates or describes the eastern line as marked on the diseño of Berreyesa. It said that the L-i-n-d-e-r-o was the boundary between the ranchos. So we say now. The exceptions of Berreyesa are in this same form. But the question remained, *where* did the L-i-n-d-e-r-o touch the Azul Mountain? About that the court said nothing.

The decree was reversed in this court, not on any question of boundary, but because the court below had considered that the whole valley passed as a valley. The case was remanded, with directions "to declare the three external boundaries designated in the grant from the evidence on file, and additional evidence to be taken." On the return of the cause new evidence was taken, and the case again heard. The court, in its second decree, affirmed its former decision with regard to that line, keeping to the language of the grants, and referring to the L-i-n-d-e-r-o again. The decree, as before, had a guarded form. Certainly, it did not declare or show where the L-i-n-d-e-r-o itself would strike the mountains. All that question—the whole question between Larios and Berreyesa—remained just where it was.

From that decree, too, there was an appeal here; but the appeal was simply dismissed as being from a decree not final. No question of merits was decided nor could be.

After being thus remanded, the Survey Act was passed. Berreyesa and others now came in; and a discussion on the eastern line was for the first time in any order.

The court below may or may not have sufficiently explained itself, in its former decree, as respected this eastern line; and by not excluding conclusions, may or may not have guarded sufficiently against the possibility of misapprehension in distant places. Naturally, perhaps, it did not overlay its decree with this sort of matter. But that the court below meant to locate no line specifically but the southern one, and that the eastern one was left upon the basis of the L-i-n-d-e-r-o, whose course remained yet to be settled by survey, will be obvious, we should think, to any one who examines the evidence, the opinion, and the decrees themselves, as taken, delivered, and made at the different times.

Bearing this history of facts in mind, and reading what this court has said by their light, and by its presumable knowledge and recollection of them, we do not conceive that this court has adjudged anything which prevents our considering the case as an original one, though there are, perhaps, expressions in the opinions of a cast somewhat stiff, and slightly difficult to understand, except on a supposition of misapprehension; a matter most natural in so complex and voluminous and novel a kind of case.

Then as an original question:

1. *As to the eastern boundary.* The evidence is that *falda* does not mean base of anything, but does mean the skirt or fold of some waving object. It is a term applied to the person of the other sex, and means often the lap, the loose part of the dress which may be spread out as a lady sits on which an object may lie; but it never means the feet, the shoes. It is a term peculiarly applicable to the graceful curves of this sloping lomita, but philologically inapplicable to its final base. The line we must hold goes over the lomita.

What do we see then in nature and on the diseño? Standing at the junction of the creeks we see in nature, as we look across the valley, the great heights of Mount Umunhum on the west, and the greater heights of Mount Bache on the east. They are the great features of the landscape. The

way in which they raise their lofty heads will be urged as an argument by Mr. Black why the Azul Range, as distinguished from the inferior hills below them, was THE Sierra of the grant. Assuredly they were ever visible over the great landmarks of the valley. The same is true, in a less degree, of the Mining Peak. Now on the diseño of Berreyesa we see the Azul Range plainly delineated. That no one denies. The Mining Range is plainly delineated. That no one denies. On this delineation of the Azul Range we see two elevations just where the lofty peaks should be; and one elevation where the Mining Peak should be. And the L-i-n-d-e-r-o is drawn so as to leave one of those peaks exactly so far to the west, and the others exactly so far to the east. How are you carrying out the purpose of the line when in nature you reverse this whole disposition of the ridge? It may be said, in reply to *us* by counsel who follow us, that the strip *between* Larios and Berreyesa was the only important part of the land; an argument refuted by what we doubt not will be replied to the counsel of the United States, when contending that Larios never had the hills at all; the reply, to wit, that the Mine Ridge had the best pastures of the whole valley, and that *this* was what any occupant of the valley would have especially valued.

The whole argument which we would make is presented in the opinion of the court below. Compelled, as we are, to curtail and mutilate, and so greatly to weaken and injure it, it still expresses our idea. We may abridge it thus:

"The diseño of Berreyesa, which the prefect availed himself of as being the more exact, is drawn with unusual accuracy. On a mere inspection of it the location would seem indisputable. But it unfortunately happened that the draughtsman mistook the true position of the loma situated in the centre of the Cañada, and represented it as situated to the eastward of its real place.

"The question therefore arises, is the direction of this line to be determined by those two calls alone, or should it be controlled by other calls and indications of the diseño of higher dignity, and concerning which a mistake was more improbable.

"It is evident, from the diseño, that the *Cañada de los Capi-*

tancillos was supposed to run in a direction nearly east and west, as the dispute between Larios and Berreyesa only referred to the mode in which the valley should be divided between them. And it was most natural that a line should be adopted dividing the valley in a direction perpendicular to its length. Such a line was accordingly drawn on the diseño, and described in the grants as running towards the south, *i. e.*, nearly at right angles to the general course of the valley.

"The object of Berreyesa was to resist the further encroachments of Larios on lands for which, eight years previously, he (Berreyesa) had obtained a provisional title from Figueroa, while the claim of Larios was derived from a purchase of the house of Galindo, and *he* had, as observed by Berreyesa to the Governor, 'room to extend himself outside of the Cañada,' while the latter 'had absolutely nowhere to enlarge.'

"It is therefore improbable that Larios would have claimed, or Berreyesa assented to, a line which running diagonally in a southeasterly direction across the valley, would take from the latter a large tract of land, not only of the angle of the creek and the *falda*, but also being far to the eastward of Larios' house, and assign to Larios' cattle almost the entire range of the *Lomas Bajas*, expressly solicited by Berreyesa in his petition. It may, at all events, be asserted that had such been the intention of the parties, the universal desire of Californians to bound their ranchos by well-known natural objects would have induced them to fix upon the Alamitos Creek as their common limit, and thus secure a certain and precise boundary nearly coinciding with the imaginary line they are supposed to have adopted.

"The diseño itself affords evidence of the line to which the parties intended to assent. On it the range of the *Lomas Bajas* is distinctly delineated. At the eastern extremity of this range is a hill of greater elevation than the rest, which is turned on the east by the Alamitos. This hill is undoubtedly the Mining Peak or Hill of New Almaden. The Alamitos is represented as issuing through a gorge between it and a mass of hills further to the east, and running across the plain diagonally to the junction with the Seco.

"If on this diseño, the line as claimed by the representatives of Larios, be drawn, it would pass to the eastward of the mining peak, and run in an east-southeast direction, nearly coinciding with the course of the Alamitos. But the line actually marked

by the prefect is different. It is drawn in a nearly southerly direction, and it cuts the range of the *Lomas Bajas* at about one-fifth the entire distance from their western to their eastern extremity, leaving on the left, *i. e.*, on the eastern or Berreyesa side, not only the Mining Hill, but four-fifths of the entire range. Nor does it at all coincide with the course of the Alamitos; but on the contrary, makes with the general course of that stream an angle of perhaps 45°.

"Again, behind or to the south of the *Lomas Bajas*, is represented the range of mountains called *Sierra Azul.* On their western extremity is the peak known as Mount Umunhum; while far to the east, the lofty mountain now called Mount Bache, is distinctly delineated.

"If the line contended for by the claimants be drawn on the diseño, it would run in the direction and over to the eastward of Mount Bache. The line, as drawn by the prefect, strikes the Sierra at a point less than one-sixth of the entire distance between Mounts Umunhum and Bache, leaving five-sixths of the entire range of those hills on the eastern or Berreyesa side.

"It is therefore evident that to treat the call for the *falda*, as determining the course of the entire boundary line, we must sacrifice not only the call for the course of the boundary line as expressed in the grant, but every other indication of the *diseño.* It does not appear that the prefect visited the Cañada before adjusting the dispute. The line was assented to by the parties, who must have been familiar with the natural features of the country. The direction in which their common line should cross the valley—the portions of the disputed tract to be assigned to each—the course of the boundary, whether towards Umunhum, so as to leave the greater part of the *Lomas Bajas* to Berreyesa, or towards Mount Bache, so as to leave nearly the whole range to Justo Larios—whether it was to cross the Alamitos, making a large angle with the general course of that stream, and leaving the gorge through which it debouches into the valley far to the east, or whether it was to run towards the gorge and in a course not far from parallel with that of the Alamitos,—all these have points which we must suppose to have been determined, and on which it is highly improbable that the diseño could have erroneously represented the agreement of the parties.

"The question is not whether the calls for the angle of the

creeks and for the *falda* shall be rejected, for these natural objects were undoubtedly agreed upon as fixing the limits of the two ranchos, but whether we shall allow the subsequent direction of the line to be determined by their relative position, concerning which there was an evident mistake, and give to it, where produced, a course entirely inconsistent with the course specified in the grant, and clearly indicated by natural objects on the diseño.

"If the position of the *falda* was to determine absolutely the course of the boundary beyond, the prefect could hardly have supposed that he had removed all cause of dispute.

"The term 'falda' does not indicate any point on *a hill*, but a part of it. It signifies the slope or *radix montis*. It probably applies, in strictness, only to the lower slope, or that part lying between the plain and a line drawn midway between its slope and its summit, though it seems sometimes to be applied to the entire slope. But giving it the more restricted interpretation, it is insufficient to fix the direction of the line with any certainty. The lomita in question is situated at a comparatively small distance from the angle of the creeks. If the boundary is to be the production of a line drawn from the angle to some point on the *falda*, a variation of the position of the latter of perhaps a few yards will so change the course of the line where produced as to materially alter the dimensions of the tract.

"The boundary, therefore, would still have been left within considerable limits arbitrary and uncertain. If it be said that the point on the *falda* intended to be adopted is shown by the diseño, it may be answered that the diseño also shows, by unmistakable natural objects, the direction of the line, and that its course is to be determined by those indications. Notwithstanding that, the parties erroneously supposed and represented on the diseño that the line so drawn would pass by the eastern base of the hill.

"Compelled, as we are, to resort to the diseño to ascertain the location, we discover the nature of the error into which the parties fell, and discern what was their intention when the line was agreed upon. It was designed to divide the valley between the disputants by a line across or at right angles to its general course. On the north it was to commence at the angle of the creeks. At the south it was to terminate at a point opposite, crossing the *Lomas Bajas* and striking the Sierra at the points

indicated on the diseño. The *falda* of the lomita was also adopted as the western limit of the flat land on the Berreyesa side, and it was supposed erroneously, as now appears, that a straight line could be drawn between the points just mentioned which would cross the eastern base *falda*.

"As that is found to be impossible, it has seemed to me that the call for a straight line should be rejected, and the boundary fixed by drawing a line from the angle of the creeks to the *falda*, and thence across the valley points in the *Lomas Bajas*, and the Sierra, to which the diseño shows it was intended to be drawn."

The court below makes a line not straight. We should ourselves have preferred a straight line *crossing* the loma, as the term *falda*, we think, was used to allow this. The word was used in distinction to the *pie de la loma*, or base of the hill. As in a skirt there is a certain looseness, something wavy, so here the precise place was not designated, except as the diseño of Berreyesa designates it. That renders it certain by showing where it passes through the Mining Ridge. If that diseño be nicely measured, it will be seen that $\frac{82}{100}$ of the whole length lie to the eastward, and $\frac{18}{100}$ to the westward of the L-i-n-d-e-ro. The Mining Ridge having a defined length, the point can be ascertained. However, we have no objection to the line as settled by the court below. It comes to the same result essentially as that we desire.

2. *As to the southern boundary.* Our interests here are identical with those of Larios; and we leave a reply to the Government counsel on this point with counsel who follow.

Mr. Black, with whom was Mr. Cushing, for Fossat, representative of Larios, seeking to reverse the decree, and re-establish the line as run by the Surveyor-General.

I. *The Government doubts and denies the right of any appeal.* When a doubt exists about the right of a citizen to appeal, that doubt is always to be resolved in favor of the right. The right of appeal to the highest judicial tribunal of the country is a sacred right, like that of trial by jury in a common law case, which is never denied upon doubtful

construction. Here it is not even doubtful. One argument is made from the special language of the act as regards appeals. But the appeal is given by implication; and what a statute gives by implication it gives as much as if it gave expressly. The law declares that "no appeal shall be taken, *unless* applied for within six months." Does not that imply that an appeal taken before the expiration of six months is valid and good?* Another argument is, that the duties enjoined by the Survey Act are not judicial at all, but ministerial wholly. Is this clear? The constant, universal, and unhesitating construction given to the law by the District Court, by all the profession in California, by all the counsellors practising in this court, and by this court itself—matters of common knowledge to this court and to the profession—is sufficient to overbalance both arguments; mere doubts, in fact, thrown by the Attorney-General into the other side of the scale.

II. *Can the United States now come here with objections?*

The survey was brought into court under the act of 1860. A monition called on all parties who were interested in it to appear and make objections, if any objections they had. The United States made no objections at all. If the Government had objections to the survey, we had a right to know

* The form of this enactment, it may be noted, presents the same sort of sentence which is seen in the provision of the Constitution of the United States relative to the suspension of the privilege of the writ of habeas corpus. "The privilege, &c., shall not be suspended, *unless* when, in cases of rebellion or invasion, the public safety may require it," &c. The sentence, says Mr. Binney, in commenting on it in a recent fine essay, is elliptical. When the ellipsis is supplied it reads, "The privilege shall not be suspended, unless," &c., *and then it may be suspended.* The clause is a grant of power under the conditions it prescribes. The first member of the sentence prohibits the power in its general or unconditioned state, and the second member reverses the first so far as to authorize it under essential conditions. This is a well-known idiom of our language and of most languages, and is in common use when it is intended to affirm and deny something at the same time in different aspects; and this is such a use as the law takes notice of in the interpretation of statutes. It is the *loquendum ut vulgus*, which is a popular and universal right, and held in respect by the law. (The Privilege of the Writ of Habeas Corpus, Part I, p. 10, and Part III, p. 29.)

them then and in that court, so that if they were true we could obviate them by such a modification of the survey as might seem necessary; so that, if they were false, we might produce evidence to show it; and so that, if the case should ever come into this appellate court, we might have evidence on record which would prove the truth. To change the survey here upon grounds that were concealed from us in the court below, is to condemn the party without a hearing. To hear us in this court upon a record which does not contain the evidence which might have been given in the court below, is no hearing at all. Independent of which it is certain that the Attorney-General has a right to determine whether the Government will proceed. In this case he did determine. He did not proceed; and that concludes the right of the United States.

III. *The question of the lines of this tract is not open as an original question.* It has been settled; settled by the court below, settled by this court, and by both more than once. The decree below stands in full force and unimpeachable by virtue of its own inherent and essential force. Even if the grant had been a floating one, the court decreed that it was for a specific league of which it set out the boundaries. This would end things. When, too, the case was first here, it was declared that the land granted to Larios had boundaries on three sides, which were well defined by objects upon the ground, and that the fourth line was capable of being ascertained as fully as either of the other three by the simple process of a survey. After this all that remains is that we ascertain where those boundaries are. We have but to look at the calls of the grant, and to look at the topography of the place, apply one to the other, and the thing is done. Certainly no intimation dropped from this court on either of the occasions, when the case was here before, that any further judicial act was to be done in the premises. On the contrary, the last opinion says expressly: "The obligations of the United States to this grantee will be performed by the performance of the executive acts which are devolved by the grant on the local authority."

IV. *But how is the matter as an original question?*

1. As to the southern boundary. On this side stands the main Sierra,—the Sierra Azul,—which lifts up its head nearly 4000 feet toward the sky. Of course, this mountain forms the great feature of the landscape. It is visible in every direction for nearly fifty miles. There it stands looming up against the background of the southern sky, and limiting the horizon to every eye that is raised in that direction. Of all natural objects, this is the one least likely to be mistaken for any other. By all distinction it is THE Sierra, if there be more than one Sierra in the case, a matter which we deny; for one ridge is "the Sierra," the other the Lomas Bajas. An attempt has been made to confound the mountain and the low hills together. The only reason ever given for saying that they are one and the same is, that they are connected together by a low ridge running transversely across the valley which divides them.

But does that connection between the hills and the mountain make them one and the same elevation? Such connections between different elevations are so common that it seems to be a law. The Laurel Hill and the Alleghany, two parallel ranges of mountains in Pennsylvania, are connected together by the Negro Mountain Ridge, which runs across the valley between them, and divides the waters of the Monongahela from those of the Alleghany River; but nobody has ever thought that the Laurel Hill and the Alleghany are the same mountain for that reason. The same thing occurs with many mountains.

As it is with elevations of the earth's surface, so it is with bodies of water; they may be connected together without being the same thing. The Atlantic Ocean and the Mediterranean Sea are connected together at the Straits of Gibraltar; but no system of geography teaches us that the island of Sicily is, therefore, an island in the Atlantic. The Golden Gate connects the waters of the Pacific with the Bay of San Francisco; but suppose a county line, or the line of a land grant, calls for the ocean as its terminus, would any surveyor

think he had responded to that call by running to the waters of the bay?

Mr. Veatch, the geologist, himself says that the two ridges and the mountain are "separated," "detached;" and Matheson, the other witness, the surveyor, calls the low hills a "spur, *connected.*" These witnesses use words which are a contradiction of themselves. Connection between two things does not imply identity, but diversity. When a man tells you that two things are one and the same thing, because they are connected by a third thing, he talks that peculiar kind of nonsense which even an intelligent man may talk when he does not know what he is talking about.

Even if it were a misnomer to call this separating space a valley, does that make any difference? The people there understood themselves when they called it so; and for practical purposes it does not matter whether the name was scientifically adjusted to the subject or not. We know what is meant when a person speaks of sunrise and sunset, although it be true, astronomically, that the sun neither rises nor sets. For all the purposes of common life, the whale is called a fish, though natural history tells us that he belongs to another order of animals. If these parties asked for the *Cañada de los Capitancillos*, meaning to include all the land up to the Azul Mountains, and the Governor understood that he was granting all the land to these mountains, it matters not whether, properly, it was all valley land, or all mountain land.

But the fact is that it is a valley, and it is but one valley. It is watered by these two streams, the Alamitos and the Capitancillos, from their sources on each side of the ridge already spoken of, to the point at which they meet and form the Guadalupe River.

Mr. Veatch, a mineralogist, swears that they are geologically one. Does he mean to say that the Sierra Azul is filled with cinnabar? If so, why does the United States make the struggle for the mine? Even if the great range and the small one were one geologically, topographically, and in many other ways, the case of the Government is not helped.

The question is, which or what is the Sierra? Now, Sierra applies only to a range of *mountains;* a mountain chain. Salva, in his Dictionary of the Spanish Academy, defines it, "Prærupti *montes;*" rugged mountains. The term applies specially to a chain of mountain peaks; serrated *heights.* The low hills and the high hills behind may be one body. Still the former may be the "Lomas Bajas," and the latter "the Sierra;" and that is exactly what the diseño of Berreyesa, made at the time of the Larios grant, shows that they were respectively and generally called.

But the counsel of the United States argue that by the *diseño* of Larios the *Sierra del Encino* is delineated on the southern side of the tract, and the Pueblo Hills on the northern; while the *Lomas Bajas* are not laid down at all. What is meant in the nomenclature of that country by the *Sierra del Encino* cannot be a subject of the smallest doubt. The great oak tree on the side of the main elevation proves itself. When Larios called the mountain depicted on his map by the name of *Sierra del Encino*, it was impossible to say that he meant the minor range, which was never called by that name.

But the counsel have "demonstrated" the fact to be otherwise. They take the *diseños* of Larios and Berreyesa, put them together, and by a little pulling and hauling make the *Sierra del Encino*, on one map, nearly fit to *Lomas Bajas* on the other.

Now, if two adjoining tracts of land were both carefully measured by the same person and with the same instruments, and a map of both made upon the same scale, you would expect the different parts to fit one another; but otherwise you would not, and could not, expect any such thing. These two tracts were never measured at all. The maps were made without measurement, by different persons, without concert between them, and without the slightest reference in either to any kind of scale or proportion. The chances that an object delineated upon both would be laid down at places exactly corresponding, do not amount to one in a million.

Then it is said that, in this case, the petition, as well as the grant, was for the valley, and the valley extends to the foot of the low hills; that this is the natural boundary of the valley; and the natural boundary of the valley is the legal boundary of the grant: *ergo*, our limit must be the foot of the low hills, and not the mountain, where we have proved that our line runs. These facts are not true; but assume them to be so, and look at the logic. The proposition means, if it means anything, that the name by which a ranch is called in the grant ought to determine its limits, and not the lines which are expressly given as boundary lines. Let us see how such a rule would work.

All the grants in California, or nearly all, have names. These names are selected arbitrarily, and very often without any regard to the fitness of things. One person calls his *rancho* by Spanish words which signify "a willow grove," because there are willows on a few acres of it at one corner. According to this new doctrine, he can take nothing but the grove, though his lines may include a hundred times as much. Another has a tract that is called "*Los Picos*," because there are several sharp hills in the centre.* Shall he be held to the tops of the hills? Another is named "*Isla de Santa Rosa*," because a river runs through the tract, and in the river is a little island called "Santa Rosa;" but the tract itself is five or six leagues in extent, while the island contains not more than three or four acres. A gentleman known to me is owner of a grant named in the title-papers "*Rio de los Americanos.*" Measuring it by the lines given in the grant, it extends along the bank of the American River four leagues, and has a depth of two leagues. To this he is entitled, if the calls of the grant prevail; but, if the name that the Governor called it by is the only standard, then the bed of the river is all he can take.

The *reductio ad absurdum* is furnished, however, in this very case. The grant issued to Berreyesa is named "*Cañada de los Capitancillos.*" The grant to Larios is for "*Los Capitan-*

* See *supra*, map facing p. 564.

cillos." Berreyesa must, therefore, have the Valley of the Little Captains, while Larios can take nothing but the little captains themselves.

But that which is conclusive on this question of the southern boundary is—

I. That the Mexican Government and both its grantees show clearly what range they meant when they spoke of "the Sierra;" and show, moreover, that they meant the Azul Range, or, as they call it, the "*Cierra* Azul."

II. That they distinctly include the range before it, the Mining Range, as a part of the property owned by the disputants.

The diseño of Berreyesa, in all that concerns the course and termination of the L-i-n-d-e-r-o, was a chart common to Larios, Berreyesa, and the Mexican Government. Now on this the Mining Range is called the Low Hills (Lomas Bajas). The Azul Range is called the *Cierra* Azul! It is the only thing on any map called a Sierra at all. It is "*the* Sierra," therefore, of the case. How irrelative all evidence about geologic or topographic natures in the face of designations given and fixed by the very parties concerned!

Then a reference to the diseño shows that the L-i-n-d-e-r-o is brought over or through the Mining Range *to* the Sierra Azul. This dotted line was meant to divide between Larios and Berreyesa land which, between them, they, and not the Mexican Government, owned. It is absurd to suppose anything else. We must presuppose a grant; whether conditional or other, it matters not. Independently of which the Prefect who drew the line was an agent of the Government. The Governor knew what he did, and ratified his act. And when the line is drawn so as to show that the Mining Range did not belong to the Government, who was interested to claim it if it did, it operates as explanation for every one, and, as respects the Government, for an estoppel also.

2. As to the eastern boundary. I aver that this eastern line, which constitutes one chief subject of dispute, is fixed with a certainty that belongs to no other land boundary in all California. What are the facts? Larios and Berreyesa

lived near to each other, below the foot of the Pueblo Hills, not far from the creek. They cultivated but little land, for the plain reason that they had no land which was fit for cultivation. They lived upon the produce of their flocks, as Job and Abraham and Saul and David. Their wealth consisted in the large flocks of horses and cattle and sheep that roamed over the hills immediately before their residence. Each of them claimed a league of land, but they had no titles which would stand the test of judicial scrutiny. The dividing line between them had never been legally established; they could not prove where it was; neither could assert his right against the other; yet the land that lay between their houses, and upon the hills in front of their houses, was more valuable to them than any other land claimed by either. It was the portion of their land least likely to be given up without a contest. In these circumstances it was the most natural thing in the world that a dispute should arise between them about the division line. Accordingly you find that in the spring of 1842 something like a quarrel did take place. This waked them up to the necessity of having their domains legally defined. Both of them, almost simultaneously, sent in petitions to the Governor, each asking for a grant to himself by the boundary that he claimed. The petitions and the diseños show what was the subject-matter of the controversy. Berreyesa insisted upon a line running directly past the house of Larios, so that Larios could not put his foot out of his own door without becoming a trespasser on the land of Berreyesa. The dispute then was about a narrow strip of land between them, and extending from the Pueblo Hills to the foot of the Sierra. In their circumstances it was worth a struggle.

The history of this line is before us; and it would be one of the strangest events that ever occurred in the history of human affairs if it were true that this line was not, after all, so clearly established as to be indisputable. It ran through a region where natural objects abounded, by which it could be intelligibly described. The parties were perfectly familiar with the whole face of the land. They knew Mount Umun-

hum, the Mine Peak, and every peak—though as yet these reared their heads unnamed by modern names—as I know the fingers on this hand. They desired to define their own boundary with perfect clearness. They invoked the aid of the public authorities to assist them. They were satisfied that they had succeeded. The Prefect who advised them was also convinced that he and they both understood where the line was to be, and so did the Governor. Can it be that they were mistaken? Let us take the description of the line which they agreed upon, and see whether there is any ambiguity about it.

The beginning-point fixed upon is the junction of the two creeks. About that fact there has never been any dispute. What was the course of it? They said it should run from the starting-point *southward.* The legal meaning of "southward" is due south, if there be nothing else to control it. But a natural object was called for, the eastern base of a small hill—loma or lomita—which rises, not far from the forks of the creek, from the midst of the surrounding level land of the valley. The call for a south line and for the eastern base of that hill happen to be precisely consistent. They declared that this south line, running past the eastern base of the hill, should go straight to its terminus without angle, crook, or bend. It remains that we ascertain what the terminus is. Before them, on the course of the south line, lay the green hills upon which their cattle were feeding at that moment; and in the blue distance behind the hills rose the Azul Mountains, barren, rugged, and bare, two thousand feet higher than the hills. To say that they did not know the difference between their own pasture-grounds on the hills and the barren mountain beyond the hills, is sufficiently preposterous. It is still more absurd to suppose that they would voluntarily exclude their pasture from the grants they were asking for, and leave the hills vacant, so that the Governor might grant them the next day to some body else, who would drive their cattle down upon the dusty plain, where every horn and hoof of them would starve in a week.

This description, considered alone, without reference to the map, makes the line too clear for doubt. They did intend to start at the forks of the creek, to run southward past the eastern base of the loma or lomita, and onward by a straight line over the hills to the foot of the main Sierra.

But the Prefect knew very well that a mere verbal description, which reaches the mind only through the ear, is always liable to perversion. He determined, therefore, that he would leave it to no quibbling argument upon the meaning of words; he would submit it to the more faithful sense of sight; it should be an ocular demonstration. He took the map which had been prepared by Berreyesa, and on which every object referred to in the description of the line was carefully, though rudely, laid down and marked in such a manner as to make it certain what was meant by it. There was the *Sierra Azul*, the *lomas bajas*, the *loma*, or *lomita*, and the watercourses, with the name of each object written under or over it. The Prefect took this map and drew across it a dotted line, beginning at the forks of the creek, and going straight past the eastern base of the *lomita*, over the hills to the foot of the mountain. He referred in his report to this map of Berreyesa with the dotted line upon it, and made it a part of his report. It is referred to in both the grants as showing where the true line is.

Every survey, official and unofficial, public and private, has concurred. All agree that the line starts at the spot, is on the course, and terminates at the place where we say it does. No surveyor, with the grants and the diseños in his hand, could fail to find the place of beginning; no one could miss seeing the eastern base of the lomita; nor was it possible for human perversity not to perceive that the terminus of the line was the foot of the great Sierra. The line was marked by monuments which could not and would not be trifled with. The blue mountains, the green hills, and the rolling streams testified to it with a voice which no sophistry could obscure and no perjury could contradict.

On the other side of the question, the principal name that

is used is Mr. Lewis, assisted by some of the pastoral and amatory poets of old Spain. You cannot read the testimony of Mr. Lewis without perceiving that he is a man of considerable ability, and of skill in his profession as a draftsman. He has great talents; great, especially, for confusing that which is plain. He was a professional surveyor; and willing to sell his talents to anybody that would pay the price for them. This man was employed for years in doing everything that a surveyor and a draftsman could do, except going upon the ground, running the line in dispute, and saying whether it was at the right place or the wrong one. For months he has been kept running over the hills, measuring every height and chaining every hollow, and making maps and diagrams of all the ranches for fifteen miles around. At one time you hear of him at the top of Mount Umunhum, four thousand feet up toward the sky. The next thing you know, he is down in some dark hollow, measuring away at something else, but always as far as he can possibly get from the line in dispute. One day he is off ten miles to the east of Berreyesa, and then again he is surveying a rancho somewhere north of the Pueblo Hills, clean out of sight of this region.

But Mr. Lewis is not enough. The poets of Spain come to his aid. Refreshing no doubt it is to find ourselves in the poetic literature of that renowned, romantic land. It will enrich a report and encourage a reader. I shall not, however, go into the profundities of Castilian lore; the more as it is shown that neither Larios, Berreyesa, nor the Prefect probably, had the Spanish dictionary, dedicated to Don Philip V, and printed at Madrid in the year 1732, near them when they settled the L-i-n-d-e-r-o. It is not likely either that they were better acquainted with Martin, Cadalso, or even Jovellanos, charming poets though they all be. Admit that *falda* does mean skirt. What then? What does skirt mean? The great lexicographer of our language, Dr. Johnson, gives us one of its meanings: "Edge, margin, border, *extreme* part." What is the edge or extreme part of a hill but its base? Richardson says:

"SKIRT, from *Scyran*, to cut, to dissolve, to separate. The part where the continuity is separated; a separate part or portion; the edge, the border, the bound or boundary."

Illustrations which he gives are these:

"The water's edge *skirted* with precipices."—*Anson's Voyages.*

"The *skirt* or outer part of the island . . . . is woody."—*Dampier's Voyages.*

"Mighty winds,
To sweep the *skirt* of some far-spreading wood
Of ancient growth."—*Cowper's Task.*

But I am not going into these curiosities of etymology; "the science where consonants signify little, and vowels nothing at all." The question has slightly to do with these. It is a question of intent, nor wholly even of that, but largely one of law.

Assuming the authority of both—of Mr. Lewis and of the pastoral poets—the District Court made the decree we seek to reverse. The opinion has been partially read. The first noticeable thing in it is, that it concedes to us every fact which we have ever asserted with reference to the division line. The court admit that the true beginning of it is at the forks of the creek; that it runs thence southward by the eastern base of the *lomita.* It also admits, that the call of the grant is for a straight line upon that course up to the mountain. Why, then, did it not follow the call as the Surveyor-General had done before, as the court itself had done in former adjudications?

The court say, that when Berreyesa and Larios agreed to that line, they intended it to run, not south, but perpendicularly to the general direction of the valley. I deny this utterly. In their agreement before the Prefect, and in the grants which both afterwards accepted, they declared their intention that it should run south, and not a word is said about perpendicular. But the intention thus expressed by themselves is disregarded, and a different intention imputed to them, without evidence. It is remarkable, too, that the court, after assuming without evidence that their intention was to make a perpendicular line, does not order the line to

be run according to this assumption. It directs the line to be carried southward to the base of the *lomita*, then makes an angle, and runs fifty-four degrees west for a certain distance, where it makes another angle, and then goes thirty-four degrees west of south to the mountain. Neither of these lines is perpendicular to the course of the valley; for certainly the valley cannot have three perpendiculars.

The court below commits another error of fact when it declares that the position of the *lomita* was misunderstood by the parties. If there is one thing in this case more striking than another, it is the remarkable accuracy with which the agreement and the grants defined the relative position of that little hill and the beginning-point of the line.

The court below thinks, and in this it is followed by Mr. Carlisle and Mr. Williams, that it can see in the shape of the Sierra Azul, as drawn upon the diseño of Berreyesa, the different portions of the mountain as existing in nature. The court assumes that certain parts of it, which are larger than other parts of it, are intended for Mount Bache and Mount Umunhum, and proposes that the line shall be run so as to strike the mountain at the place where it terminates on the map of Berreyesa, assuming that it knows where that place is. Now, no one can cast even a careless glance upon the figure which Berreyesa called by the name of Sierra Azul, without seeing that it can bear no sort of resemblance to the natural mountain itself. It was not intended to be a picture of the mountain. If one part is higher or lower than the other it was mere accident. All the reasoning upon which this hypothesis proceeds, is based upon the assumption that the different objects delineated upon the map are laid down in their proper proportions to one another, and that the different parts of the same object are also duly proportioned. Admit that assumption to be false, and the whole argument falls. The assumption *is* false. There is no pretence of proportion about the map. Here is a fact which sets it in a very striking light. The house of Berreyesa is proved to be exactly thirty feet wide, yet it occupies upon the map one-fifth of the space of the whole valley. If the

valley is proportioned to the house, it is only one hundred and fifty feet wide. If you take the valley to be, as it is at that place, nearly a mile wide, and the house to be laid down in proper proportion, then that house covers about two hundred acres of ground; and if it be high in proportion to its width, it is ten times as high as all the pyramids in Egypt, piled upon one another. The same logic that proves this to be Mount Umunhum, and that to be Mount Bache, would have shown with equal certainty that Berreyesa lived in a structure so vast that all the men in America could not have put it up in half a century.

But suppose that one or both of the parties, at the time they made that agreement, had actually believed that a straight line, run upon the course which they agreed to, would strike the mountain at a different place, would that be a reason for setting aside the agreement and disregarding the grants, after the acquiescence of all parties for twenty years? Certainly not. If a surveyor had gone upon the ground, and had run that line, when the grants were not more than a month old, and Larios had said that he was disappointed in the "outcome" of the line he agreed upon, could any officer run it contrary to the grant for that reason? No. The answer would be, "Your agreement has been executed; the grants have been made to you and to your neighbor both,—to you for the land on one side, to him for the land on the other side,—and it is now too late to repent."

But this map of Berreyesa does show conclusively that both he and Larios understood perfectly that the straight line which they bargained for would run where it does run, east of the ridge, and east of the mine. The ridge divides the waters of the Capitancillos from those of the Alamitos. The mine is near that ridge. The Alamitos Creek is laid down on Berreyesa's map. The division line, the line in controversy, as laid down on the diseño itself, runs across the Alamitos Creek, the whole of which is east of the mine, not across the Capitancillos, which is west of it. If the parties were familiar, as everybody admits that they were, with

the ground, then the line must have been intended by them to run very nearly, if not exactly, where it does. This fact, showing the place where they intended to cut the creek, is as conclusive upon the subject as any fact of that nature can be, and is absolutely without contradiction.

To reverse this decree is a legal necessity, and you cannot do that without restoring the division-line to the place where the Surveyor-General located it. There is no other place for it. You cannot find, in all this record, any other description of that line which it is possible for you to follow. If you take the exceptions of the Berreyesa party themselves, you find them describing the Surveyor-General's line as the true one; nor is there a spark of evidence which would justify any court in adopting another.

May it please the court, reverting to the question of the southern line, I have to say that in *it* the honor of the United States is deeply concerned. The land we are claiming never belonged to this Government. It was private property, under a grant made long before our war with Mexico. When the treaty of Guadalupe Hidalgo came to be ratified—at the very moment when Mexico was feeling the sorest pressure that could be applied to her by the force of our armies and the diplomacy of our statesmen—she utterly refused to cede her public property in California, unless upon the express condition that all private titles should be faithfully protected. We made the promise. The gentleman sits on this bench who was then our minister there.* With his own right hand he pledged the sacred honor of this nation that the United States would stand over the grantees of Mexico, and keep them safe in the enjoyment of their property. The pledge was not only that the Government itself would abstain from all disturbance of them, but that every blow aimed at their rights, come from what quarter it might, should be caught upon the broad shield of our blessed Constitution and our equal laws.

* Clifford, J.

It was by this assurance, thus solemnly given, that we won the reluctant consent of Mexico to part with California. It gave us a domain of more than imperial grandeur. Besides the vast extent of that country, it has natural advantages such as no other can boast. Its valleys teem with unbounded fertility, and its mountains are filled with inexhaustible treasures of mineral wealth. The navigable rivers run hundreds of miles into the interior, and the coast is indented with the most capacious harbors in the world. The climate is more healthful than any other on the globe; men can labor longer with less fatigue. The vegetation is more vigorous and the products more abundant; the face of the earth is more varied, and the sky bends over it with a lovelier blue. Everything in it is made upon a scale of magnificence which a man living in such a common-place region as ours can scarcely dream of—

> "Which his eye must see,
> To know how beautiful this world can be."

That was what we gained by the promise to protect men in the situation of Justo Larios, their children, their alienees, and others deriving title through them. It is impossible that, in this nation, they will ever be plundered in the face of such a pledge.

Mr. Justice NELSON delivered the opinion of the court.

This case has already been twice before the court.* It was very ably and elaborately argued at the bar on both occasions, and fully considered by the court. There is very little, if anything, left that is new to be considered or decided upon the present argument.

The main question in contestation in the two preceding arguments, and which has again been ably and elaborately presented, is that involved in the settlement of the southern boundary of the grant, whether or not the foot of the Sierra, the mountain range, or the *Lomas Bajas*, a range of low hills north of it, constituted this southern boundary. The Board

* United States *v.* Fossat, 20 Howard, 413; Same *v.* Same, 21 Id. 445.

of Commissioners adopted the Sierra, and its decree, in this respect, was confirmed by the District Court. On an appeal to this court the same line was fully recognized.

The court, after referring to the lines of the grant to Larios, and to the Sierra, as described in the grant to Berreyesa, the west line of which was a line in common between the two ranches, as agreed upon between the parties previous to the issue of either grant by the Governor, say, "The southern, western, and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which those limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call to ascertain it. The grant itself furnishes no other criterion for determining that boundary than the limitation of quantity, as expressed in the third condition." The decree of the District Court was reversed, for the reason that it confirmed to the claimant a larger quantity of land than was embraced in the grant, and the cause was remitted to that court to enter a decree in conformity with the opinion. As it became necessary to remand the cause for the purpose of locating upon the ground the quantity as limited by the above decision, authority was given to the District Court to fix the boundaries from the evidence on file, and such other evidence as might be produced before it. On filing the mandate in the District Court, the counsel for the United States applied for liberty to furnish further evidence, which application was granted. Several witnesses were examined accordingly, their testimony relating chiefly to the southern boundary of the tract, as described in the grant. The court had suspended the entry of the decree, in pursuance of the mandate, until after this evidence was furnished. The decree was filed and entered October 18, 1858. It reaffirmed the Sierra, or mountain range, as the southern boundary, and directed the line to be so drawn as to include the bottom and low lands along the base of this Sierra, and declared the eastern line to be a straight line commencing at the junction of the Arroyo Seco and the Arroyo de Alamitos, and thence

running southward to the aforesaid Sierra, or mountain range, passing by the eastern point of the small hill situated in the centre of the cañada, which was designated in the grants to Larios and Berreyesa, being the same line agreed upon between them as a division-line, and which is delineated by a dotted line on the diseño or map in the expediente of Berreyesa. It declares also the western boundary to be the Arroyo Seco, which is the continuation of a stream known as the Arroyo Capitancillos, and the northern boundary to be a line or lines located, at the election of the grantee, or his assigns, under the restrictions established for the location and survey of private land claims in California, in such manner that, between the northern, southern, eastern, and western lines, there shall be contained one league of land, and no more.

The decree then fixes the western line of Fossat, which is a line between him and the Guadalupe Mining Company, that owns one-fourth of the league granted to Larios, and confirms to Fossat the remaining three-fourths within the lines above declared.

This decree was appealed from by the United States to this court.* The court dismissed the appeal as prematurely brought, the decree below not being a final decree.

In the opinion dismissing the appeal, it is said, after referring to the case when previously before us,† "The court had determined that the grant under which the plaintiff claimed land in California was valid for one league, to be taken within the southern, western, and eastern boundaries designated therein, at the election of the grantee and his assigns, and adds, the District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made. From the decree, in this form, the United States have appealed."

The court then answers the objections taken to the motion

* United States *v.* Fossat, 21 Howard, 445.

† Reported 20 Howard, 413

to dismiss, which were, that the inquiries and decrees of the Board of Land Commissioners and of the District Court could relate only to the question of the validity of the claim, and not to questions of location, extent, and boundary, and that the District Court had gone in its decree to the full limit of its jurisdiction. These objections, after a full consideration of the acts of Congress, of adjudged cases, and of the principles upon which the court was bound to proceed, were overruled; and the court observe that, in addition to the questions upon the validity of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim; and that, in affirming a claim to land under the Spanish or Mexican grants to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of these governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm ownership and possession of land of definite boundaries rightfully attach to the grantee. And in closing the opinion, it is observed that, "After the authenticity of the grant is ascertained in this court, and a reference has been made to the District Court to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice."

It will be seen, from this opinion, that the reasons for the conclusion that the decree of the District Court was not a final one, were, that the land granted had not been located on the ground by fixed and definite boundaries. A survey of the tract was indispensable in order to locate the northern boundary. That boundary was not given in the descriptive calls of the grant, and depended upon the limitation of the quantity; and until the survey of the three lines given, namely, the eastern, southern, and western, and the three-fourths of a league of land located within them, the northern

boundary could not be ascertained or fixed. The location of this line was an essential step to be taken on the part of the District Court, in fulfilment of the duty enjoined by the mandate of this court. In the interpretation of that mandate, this court, in its opinion,* observes, "The District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made." That had not been done.

On the filing of the mandate of dismissal of the appeal in the District Court, an order was made directing the Surveyor-General to proceed and survey the land confirmed in conformity with the decree as entered in that court, and which, as we have seen, was entered on the 18th October, 1858. That survey was made and is found in the record. It was approved by the Surveyor-General 18th December, 1860, and filed in the court below 22d January, 1861. We have also the testimony of Hays, the deputy surveyor, who surveyed the lines on the ground, and constructed the map; also of Conway, a clerk in the office, who assisted him, and of Mandeville, the Surveyor-General, who approved of the map, showing that the survey and map were made in strict conformity with the boundaries of the tract as given in the decree, of which they had a copy, and followed as their guide.

This survey having been made in conformity with the decree of the District Court, entered in pursuance of our mandate, would, doubtless, have closed this controversy, had it not been for the act of Congress passed 14th June, 1860, after the entry of the decree in the District Court, but before the survey of the tract by the Surveyor-General. The act purports to be an act to regulate the jurisdiction of the District Courts of the United States in California, in regard to the survey and location of confirmed private land claims. It authorizes the court to allow intervenors, not parties to the record, to appear and contest the survey, or in the words

* 21 Howard, 447.

of the act, "to show the true and proper location of the claim," and for that purpose to produce evidence before the court, and directs that, "on the proofs and allegations, the court shall render judgment thereon." Any party dissatisfied with the decision may appeal to this court within the period of six months.

Under this act several parties intervened, and much testimony was furnished to the court in relation to the survey and location of the tract by the Surveyor-General, and which is found in the record, embracing some two hundred and twenty pages. And on the 16th November, 1861, the court entered an order reforming the survey, as to the eastern line. Instead of adopting the eastern line of the survey, which had been located as directed in its decree, and which was a straight line from the point of beginning to the termination at the Sierra (the southern boundary), passing by the eastern point or base of the low hill in the centre of the cañada, the court directed that, from the base of the low hill, the line south should be deflected fifty-five degrees west, until it reached a given point or object, and from thence south thirty-four degrees west till it reached the Sierra, or mountain range. Instead of a straight line for the eastern boundary, three lines were directed to be run, at considerable angles to each other, between the starting-point and the termination. This direction of the court not only reformed the survey of the tract as made by the Surveyor-General, but reformed the decree itself of the court, entered on the 18th October, 1858, in pursuance of which the survey had been made. The court assumed that the survey and location of the tract was not to be governed by the decree, but, on the contrary, that it was open to the court to revise, alter, and change it at discretion, and to require the Surveyor-General to conform his survey and location to any new or amended decree; for, certainly, if it was competent to change this eastern line from that settled in the decree, it was equally competent for it to change every other line or boundary as there described and fixed.

Now, it must be remembered, that this decree of the Dis-

trict Court designating with great exactness this eastern line, with such exactness that the Surveyor-General had no difficulty in its location, was entered in pursuance of, and in accordance with, the mandate of this court, and by which that court was instructed at the time of the dismissal of the appeal, that the three external lines declared in it were in conformity with the opinion of this court; and that the other line—the north line—only, remained to be completed by a survey to be made, and that this line was to be governed by quantity, which quantity had been previously determined.

This radical change, therefore, of the eastern line of the tract, involves something more than a change by the court of its own decree; it is the change of a decree entered in conformity with the mandate of this court. But we do not intend to place any particular stress upon this view, for we hold that it is not competent for the court to depart from its own decree in the exercise of the power conferred by the act of the 14th June, 1860. The duty enjoined is not a rehearing of the decree on its merits, it is to execute it, to fix the lines on the ground in conformity with the decree entered in the case. The decree is not only the foundation of the validity of the grant, but of the proceedings in the survey and location of land confirmed. But, independently of this view, which we regard as conclusive, and even if the question was an open one, this alteration is wholly unsustainable. Indeed, the learned counsel for the appellees did not undertake to sustain it on the argument. The fact was admitted that the line was a straight one between the two termini.

An attempt, however, was made to sustain the termination of the line at the same point on the Sierra, or southern boundary, consistent with the line being run straight from the point of starting. This is sought to be accomplished by disregarding one of the descriptive calls in the line, a natural object, namely, the eastern base of the low hill, an object which must have been visible to the eyes of both Larios and Berreyesa at the time they agreed upon the settlement of the line as their common boundary. But even this departure from the grant will not answer the purpose. There is

still the difficulty of getting at the point of termination at the foot of the Sierra. That point or corner must first be ascertained before a straight line can be extended to it from the junction of the two creeks, the starting-point. The only description in the grant by which this point of termination can be ascertained is by running a line from the junction of the two creeks past the eastern base of the low hill southward to the Sierra. It is the extension of this line, in the manner described, by which this corner on the Sierra is reached and identified. Any one seeking to ascertain it without the use of these means, will find himself without compass or guide.

Now, this corner the learned counsel for the appellees propose to fix arbitrarily or by conjecture, and then by drawing a line from the junction of the two creeks to it, a straight line is obtained, and by this process of ascertaining the corner at the Sierra, it is made easy to select the one reached by the crooked line of the court below. But then, the line, as is admitted, instead of passing by the eastern base of the low hill, would cut it not far from or even west of its centre.

The court below, as is apparent, yielded to this argument, so far as respected the arbitrary selection of the corner at the Sierra, but refused to depart from the call in the line for the eastern point of the low hill. Hence, the crooked line between that point and the termination. The crooked line has the advantage over the straight one of the learned counsel, as it observes one of the principal calls in the grant. Theirs observes none of them except the starting-point.

There are two objections to this view, either of which is fatal.

The first, the point selected at the foot of the Sierra for a corner, is arbitrary and conjectural, and in contradiction to the clear description in the grant. And, second, it disregards one of the principal and most controlling calls in it, the eastern base of the low hill.

Our conclusion upon this branch of the case is, first, that the court erred in departing from the eastern boundary, as

specifically described and fixed in the decree of the 18th October, 1858. And, second, that irrespective of that decree, the line in the survey and location approved by the Surveyor-General, 18th December, 1860, is the true eastern line of the land confirmed.

The only party that appealed from this order or decree of the District Court, in respect to the survey and location, as appears from the record, is the present claimant. He insists upon the correctness of the first survey by the Surveyor-General, and that the alteration by the court of the eastern line, and consequently of the other lines made necessary by this change, are erroneous.

The United States did not appeal. They are, however, a party to the record as appellees, and appeared by counsel on the argument in this court, and took objections to the survey and location, mainly on the ground that the proceedings under the act of 1860 were not judicial, but purely executive and ministerial, and, as a consequence, that the appeal from the order or decree of the District Court, regulating the survey and location, ought not to be entertained; that the courts could only determine the validity of the grant, leaving its survey and location to the Executive Department of the Government. In other words, that the act of 1860 was unconstitutional and void. We need only refer to the opinion of this court, in the present case, the second time it was before us, as presenting a conclusive refutation of these several positions. The fundamental error in the argument is, in assuming that the survey and location of the land confirmed are not peoceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court, and as much within its competency, as the hearing of the cause and the rendition of its judgment; as much so as the execution of any other judgment or decree rendered by the court.

This power has been exercised by the court ever since the

Spanish and French land claims were placed under its jurisdiction, as may be seen by the cases referred to in the opinion of the court in this case, when last before us,* and in many others to be found in the reports. The powers of the Surveyor-General under these acts were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way affect his powers. They remained the same as before.

The first act of Congress, March 2d, 1805,† amended March 3d, 1806, establishing a Board of Commissioners to settle private French and Spanish land claims, under the Louisiana treaty, provided for a survey of the confirmed tract by the Surveyor-General, under the direction of the commissioners.

And the act of 26th March, 1824, the first act which placed these land claims under the jurisdiction of the United States District Courts, provided that a copy of the decree of the confirmed claim should be delivered to the Surveyor-General, and that he should cause the land specified in the decree to be surveyed, and which survey, being presented to the Commissioner of the Land Office by the claimant, entitled him to a patent. Under this act and other similar acts, the cases referred to in 21 Howard arose, and in which this court entertained appeals from decrees in the District Courts upon the survey and location of confirmed claims. The 13th section of the act of 1851 corresponds substantially with the above provision of the act of 1824. It makes it the duty of the Surveyor-General to cause all confirmed claims to be accurately surveyed, and provides that the claimant, on presenting a copy of the decree of confirmation and a plat of survey to the General Land Office, a patent shall issue. It also confers upon this officer the powers of the registers and receivers, under the 5th section of the act of March 3d, 1831,‡ which relates simply to the case of interfering confirmed claims.

* 21 Howard, 445.

† 2 Stat. at Large, p. 441; §§ 6, 7.

‡ 4 Stat. at Large, 494.

The duty of the Surveyor-General, under all these acts, is to survey and locate the confirmed tract, in conformity with the decree. It is the only guide which is furnished to him; and one of the first instructions from the Land Office is as follows: "In the survey of finally confirmed claims you must be strictly governed by the decree of confirmation; and when the terms of such decree are specific, they must be exactly observed in fixing the locality of and surveying the claim." This instruction was given under the act of 1851, and in relation to the private land claims of California; and it was in accordance with this instruction that the survey of the present claim was made and approved by the Surveyor-General, 20th December, 1860, and filed in the court below 22d January following, and which was reformed by the court by the alteration of the eastern line, as already explained. Those who are desirous of putting the Land Office above the decrees of the courts, should at least be satisfied with this instruction of the department, if not with the decrees.

It has been argued, that the lines of the tract, as given in the *grant*, were out-boundaries, like the case of Fremont and others which have been before the court, and embraced a larger area of land than the one square league, and that the survey and location should not have been controlled by these lines as specific boundaries.

The first answer to this objection is, admitting it to be true, it can have no influence upon the judgment to be given by this court. These lines have been adjudicated and settled, and incorporated in the decree of the District Court, and which decree was entered in pursuance of the mandate of this court, and no appeal has been taken from that decree. It is said, however, that the decree was not in conformity with the mandate. If so, the party aggrieved should have appealed, and this court would have corrected the error. This is common learning, and needs no authority.

The error, it would seem, was not discovered until the survey; but this affords no reason for violating established law. The more natural conclusion, we think, is that the

omission to appeal was the result of a conviction the decree was right. It was entered after much testimony taken in respect to it, and full argument on behalf of the very parties who now set up this pretext.

The second answer to the objection is, that the lines in the grant are not out-boundaries in the sense of the cases referred to.

This court said, when the case was first before it, "The southern, western, and eastern boundaries of the land granted to Larios are well defined, and the objects exist by which these limits can be ascertained. There is no call in the grant for a northern boundary, nor is there any reference to the diseño for any natural object, or other descriptive call to ascertain it. The grant furnishes no other criterion for determining that boundary than the limitation of the quantity as expressed in the third condition." And the same opinion is substantially expressed by the court when before it the second time. The court say: "The District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made." It should be remembered this was said of the decree now in question, which was then before the court. The observations were made in express reference to it.

But, independently of this, and looking at the question as an original one, there can be no reasonable doubt about it. The eastern line was in dispute between the two adjoining rancheros (Larios and Berreyesa), and which was carried before the public authorities for settlement, and there finally adjusted by the agreement of the parties. A line could hardly be made more specific. A boundary settled and fixed after litigation by the adjoining owners. The western boundary is a well-known natural object, the Arroyo Seco—a creek. The southern, the Sierra, or mountain range; and no boundary on the north. The grant was of quantity, and of necessity this boundary must be determined by the limitation of that quantity between the lines given.

It is true, in the second condition of the grant it is said, the judge who shall give possession of the land shall have it measured in conformity to law, leaving the *sobrante*, the surplus, to the nation. But this is a formal condition, to be found, for abundant caution, in every Mexican grant. There is no *sobrante* here, nor could the judge have measured the grant according to the law or ordinance in a way to have any. Aside, therefore, from the lines being fixed and specific according to the opinion of this court, and of the decree of the court below in pursuance of it, there could be no reasonable doubt upon the question, if an original one.

Much has been said on the argument in respect to the first locations and residences of the claimants on the low lands outside of this northern boundary, and as to the duty of the court to so locate this boundary as to include these possessions. But the answer to these suggestions is obvious. At the time these claimants took possession of the tract, they supposed they were entitled to a larger quantity of land than one league,—nearly two leagues,—which would have carried this line over and beyond these possessions. But this court cut down the quantity to one league, and hence these possessions are, with the exception of the old house of Larios, necessarily excluded. It is also said that sales were made to third persons in the valley outside of the line, and that their title should be protected. But they are not complaining of the survey or location as made in pursuance of the decree. Some of them appeared before the District Court, and filed objections to it, but have since withdrawn and abandoned them. We do not refer to these objections as entitled to any particular weight or importance, but because the explanations are at hand, for we place the decision of the case upon the ground that the boundaries of the tract have been settled by the final decree of a court of competent jurisdiction, and until that decision is got rid of, there is an end of the controversy.

OUR CONCLUSION is that the order or decree of the court below, of the 16th November, 1861, which set aside the sur-

vey of the tract approved by the Surveyor-General, 18th December, 1860, and which order or decree was directed to be filed *nunc pro tunc*, as of the 31st October, 1861, and, also, the order or decree of the 16th November, 1861, confirming the new survey, which was filed in court by the Surveyor-General on 11th of that month, be reversed and annulled, and that the cause be remitted to the court below, with directions to that court to enter a decree confirming the survey of the Surveyor-General, approved 18th December, 1860, and filed in court 22d January following.

The only objection that can be made to this survey is, that the tract is not located in a compact body. A comparatively small strip or tongue of land is extended from the main body along the eastern line north to the junction of the two creeks, with a view to reach the starting-point of the description in the grant. This was unnecessary, as we have seen, for the cutting down of the quantity to a league necessarily carried the north line further south than originally supposed. This northern line might have been closed with the eastern direct, instead of adopting the divergence north to the junction of the two creeks. But the quantity of land embraced in this strip is unimportant, is of no interest to any one except the Government, and scarcely any to it, as, if corrected, an equal quantity must be taken to make out the quantity in the grant from some other part of the public lands. Besides, the Government has not appealed.

To remit the case with directions that a new survey be made in conformity with the decree, and for the purpose of correcting this small error, would occasion delay and expense, and benefit no one.

The truth is, since the determination that the southern boundary of the tract was the Sierra, and not the Lomas Bajas, and that the eastern was a straight line, its direction southward to be controlled by the eastern base of the low hills, there is nothing left of this controversy worth contending for—scarcely merit enough to make it respectable.

DECREE REVERSED and the cause remitted, with directions

to enter a decree confirming the survey approved by Surveyor-General, 18th December, 1860.

Mr. Justice CLIFFORD dissenting.

I concur in the opinion that the true division-line between the rancho of Justo Larios and that of José Reyes Berreyesa is a straight line, and consequently that the decree in question should be reversed, but I dissent altogether from the directions given to the court below and from the reasons assigned in support of those directions. Some brief reference to the title-papers and to the facts and circumstances of the case is indispensable in order to a clear understanding of the nature of the controversy and of the grounds of my dissent from the views expressed in the opinion pronounced in behalf of a majority of the court.

I. Appellant, in his original petition to the commissioners appointed under the act of the 3d of March, 1851, prayed for the confirmation of his title to an undivided interest of three-fourths in a certain tract of land lying in the County of Santa Clara, in the State of California, and known as the Cañada de los Capitancillos, which, as he alleged, was contained within certain natural boundaries. When he presented the petition, he filed with it copies of the expediente and of the original grant under which he claimed, and his representation was that he held the title to the tract through certain mesne conveyances therein mentioned and described. Referring to the expediente, it will be seen that it consists of the petition of Justo Larios, the original donee of the tract, addressed to the Governor, together with the diseño and the usual marginal decree and the concession or *vista la peticion* and the titulo or original grant. Provisional grant of the land it seems had been made at some early period by the Ayuntamiento of the Pueblo of San José Guadalupe to one Leandro Galindo, who built a house on the premises and lived there for many years prior to the grant of Justo Larios, or to any application by him for the same. House of the occupant was north of the highway and pretty close to the southern base of the Pueblo Hills. Ori-

ginal claimant, Justo Larios, in his petition to the Governor, dated at Monterey, on the sixteenth day of June, 1842, represented that he had purchased from the owner of the house all the right he had to the land by virtue of that provisional concession. Such provisional concessions, it is known, were often made, and that it frequently became necessary for a subsequent applicant for a grant of the same tract to purchase the improvements made by the occupant as a means of facilitating his own application. Petitioner describes the tract as a place known by the name of the Cañada de los Capitancillos, and states that the limits of said tract are from the boundaries of Santa Clara to the corral, called the corral of the deceased Macario. Decree of concession recites that Justo Larios is the owner in full property of a part of the land called Cañada de los Capitancillos, bounded by the Sierra, by the Arroyo Seco, on the side of Santa Clara, and by the rancho of the citizen José Reyes Berreyesa, which has for boundary a line commencing at the angle formed by the junction of the Arroyo Seco and the Arroyo de los Alamitos, thence southward to the Sierra, passing the eastern base of the small hill situated in the centre of the cañada.

II. Attention to the description given of the cañada, as contained in the concession, will show, especially when it is taken in connection with the language of the petition, that all of the boundaries of that part not previously granted are either expressly given, or so clearly indicated, as to amount to the same thing, and to leave no room for doubt as to the intention of the granting power. All will agree, I suppose, that the course of the Arroyo Seco, on the side of the church property called Santa Clara, was well known. Properties of that description were usually well defined, and there is not the slightest pretence of evidence in the case to show that this line was ever in dispute. West line of the tract is, therefore, fixed beyond peradventure. East line of it, as agreed on all sides, is the west line of the rancho of José Reyes Berreyesa. Controversy arose at one time between the original proprietors of those ranchos as to that division-line;

but it was duly settled by competent authority. Nothing need be added upon that subject, as I agree that the line should be a straight one, as assumed in the opinion of the court; but I insist that it commences at the angle formed by the junction of the Arroyo Seco and the Arroyo de los Alamitos, and runs south to the Sierra, wherever that may be. Beginning is at the angle formed by the junction of those two Arroyos, and that angle, as all must agree, is north of the house built by Leandro Galindo, and close to the base of the Pueblo Hills, on the northern side of the cañada. Larios purchased that house and the adjacent improvements, and was living in the house when he presented his petition to the Governor, and when the grant was made. He asked for the valley, alleging that he had occupied it "since the year 1836;" and it was part of the valley which was granted to him, as will presently more fully appear. Rancho of José Reyes Berreyesa lies east of this tract, and of course the west line of that rancho is the east line of the claim under consideration. Grant to José Reyes Berreyesa is the elder grant, and as the tract in question is bounded on that rancho, it is both proper and necessary to refer to the title-papers in that case, and to look at the actual location of that grant upon the land, to aid in the solution of the present controversy. Grantee, in that case, became possessed of a part of the same cañada or valley, in the year 1834, under a grant from Governor Figueroa, and he continued to occupy it with his family until 1842, and perhaps later. During that year he complained to the Governor that his neighbor, Justo Larios, had disturbed his possessions, and prayed that there might be granted to him two sitios of the valley, extending from the house of Justo Larios to the matadero or slaughter-house, erected by him at the easterly end of the valley, "with all the hills that belong to the cañada." Commissioners confirmed his claim for one league, and on appeal the decree was confirmed by the District Court. Appeal was thereupon taken to this court, and this court held that the concession and titulo described a parcel of land included within natural boundaries, but that the conditions of the grant con-

fined it to a single league in quantity, and affirmed the decree of the District Court, ordering "the land to be located according to the description, and *within the boundaries* set out in the original grant, and delineated on the map contained in the expediente."*

III. All, or nearly all, the improvements made by the claimant in that case also were north of the *camino* or highway, and close to the Pueblo Hills on the northern side of the valley. He built two houses, and they were and are both situated nearly as far north as the angle formed by the junction of the before-mentioned arroyos. Northern boundary of the cañada, therefore, was evidently understood by the grantees of both these ranchos to be, what it is in truth and faith, the southern base of the Pueblo Hills. Southern boundary of the cañada is described as the Sierra, and much effort is expended in the attempt to prove that by the word Sierra is meant the Sierra Azul, or the main Sierra. Be that as it may, still, in my view of the case, the opinion of the court is clearly founded in error.

But I deny that the cañada, or valley, as described in the title-papers, and as understood either by the respective petitioners, or by the granting power, extended southwardly beyond what are called the Lomas Bajas, or low hills. Those hills, or certain portions of them, are seventeen hundred feet above the level of the Bay of San Francisco, and might well have been regarded by the petitioners and the Governor as the northern base of the main Sierra. Evidence shows that there is no table-land between those hills and the main Sierra, which is called the Sierra Azul, and that they are only separated from the higher range by a narrow, broken, irregular gorge, which forms the bed of the Arroyo de los Capitancillos, through which tumble the waters of that stream on their way from their source in the highlands to the southern skirt of the valley below, which takes its name from the name of the arroyo by which it is watered. Party then interested asked for the *sobrante* of the cañada lying

* United States *v.* Heirs of Berreyesa, 23 Howard, 499.

between the Arroyo Seco, on the side of Santa Clara, and the rancho of José Reyes Berreyesa; but the Governor refused to make the grant in that form, but limited it to one *sitio de ganada mayor*, or to one league of a larger size.

IV. Application was for the *sobrante* of the cañada; but if the quantity of the table-land was insufficient to meet the requirement of the grant, then there would be some show of reason for giving the document a more liberal interpretation, so as to include within the boundaries the quantity granted. No such difficulty, however, arises in the case, because, in any view taken of the subject, the quantity included within the out-boundaries is more than double the quantity to which the claimant is entitled.

Stripped of all side issues, therefore, the only question is, whether the grant which was for the lands of the valley shall be located there or upon the mountain, which is the southern boundary of the valley where the land lies for which the petitioner asked when he made his application to the Governor.

V. Suppose it were otherwise, and that the main Sierra, or Sierra Azul, is really the southern boundary of the valley, still I maintain that the directions given to the court below to enter a decree confirming the survey of the twentieth of December, 1860, are plainly and clearly erroneous. Operation of those directions, when they are carried into effect, will be to locate the principal portion of the claim upon the *Lomas Bajas*, and to exclude all the table lands except the narrow strip called in the opinion of the court a tongue, which is more than a mile in length, and only from twenty to thirty rods in width, and borders on the west line of the adjacent rancho. Survey apparently was commenced at the main Sierra on the line of the rancho of José Reyes Berreyesa, and runs northwardly on that line entirely across the valley to the angle formed by the junction of the Arroyo Seco and the Arroyo de los Alamitos, whereas it should have been commenced at the angle formed by those two arroyos, and run north for quantity, so as to have included the valley for which the petitioner asked when he applied to the Go-

vernor for the grant. Having determined to commence south and run north for quantity, it became necessary to make that narrow strip or tongue, else one of two things would follow which must be avoided. Either the tract would not include the house of the claimant, or it would exceed the quantity of one league if it included the quicksilver mine. Apparently it was a *sine quâ non* that it should include the mine, and it was doubtless thought desirable that it should also include the house of the claimant, because it must have been known that the usages and customs of the country required it in the location of such grants.

Besides the recital of the concession is, that the rancho of José Reyes Berreyesa has for boundary a line commencing at the angle of the two arroyos before mentioned, and it may be that it was thought proper to have some regard to that recital. But it would not do to take more than a narrow strip of the valley, because if more was taken, either the mine must be excluded or the quantity would be too great, and hence all the residue of the table lands must be excluded. Boundaries in the grant are the same as those given in the concession, and consequently are subject to the same observations. Second condition of the grant is, that the donee shall solicit the proper judge to give him juridical possession in virtue of the decree, by whom *the boundaries shall be measured out;* and he shall put on the boundaries, in addition to the landmarks, some fruit trees or useful forest trees. Third condition describes the land as one league of the larger size, and the requirement is that the judge who shall give the possession shall have the land measured in conformity to law, leaving the surplus which remained to the nation. Land commissioners confirmed the claim for one league, but on appeal taken by the claimant to the District Court that decree was reversed, and a decree entered confirming the claim as one for the whole tract with specific boundaries. Whereupon an appeal was taken to this court, and this court reversed that decree, and decided that the claim was for one league of land, to be taken within the southern, western, and eastern boundaries designated therein,

and which was to be located at the election of the grantee or his assigns, under the restrictions established for the location and survey of private land claims in California, by the Executive department of the Government. Plainly this court then decided that the grant in this case was not one by specific boundaries, but was a grant by quantity, to wit, for one league of land. And the court go on to say that the external boundaries designated in the grant may be declared by the District Court from the evidence on file, and from such other evidence as may be produced before it, and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee. Nothing can be plainer, I think, than the fact that it was the out-boundaries of the cañada that this court authorized the District Court to declare. Decree of the District Court then under revision declared the grant to be one of specific boundaries, and assumed to fix them, but this court reversed that decree and declared that the grant was not one of specific boundaries, but a grant for one league of land, and expressly declared that it was to be taken within the three boundaries named, and was to be located at the election of the grantee or his assigns, *under the restrictions established for the location and survey of private land claims in California, by the Executive department of the Government.**

VI. Where there are no guides in the title-papers, and the claimant has made no improvement, nor done any act, as by sale of a part, or otherwise, to influence the decision as to the location, the regulations of the Executive department, as a general rule, allow the claimant an election as to the location within the external or out-boundaries of the tract or place described within the grant, subject to the qualification that he must take the land in a compact form, and as far as practicable, leave the residue in the same condition. But where the title-papers furnish a guide, or where he has built a house, or made other improvements on the claim, or where he has sold a part of his claim, very different rules

* United States *v.* Fossat, 20 Howard, 427.

prevail. Locations under such circumstances are made to conform as near as may be to the intent of the granting power as indicated in the title-papers; always, however, subject to the qualification that it must include the improvements of the claimant, and, as far as is consistent with the public interest, be made to conform to the parts conveyed, so that the location may be in one body, and leave the public lands in the same condition. Reference undoubtedly was made by the court to these rules, when it is said that the location must be made under the restrictions established by the Executive department of the Government. These suggestions are sufficient, I think, to demonstrate beyond cavil, that the boundaries mentioned in the opinion of the court in that case, were the external boundaries, and that it was those boundaries which were to be fixed by the District Court, and not the specific boundaries of the claim, else there would have been nothing to which the restrictions established by the Executive department of the Government could be applied. Taking this view of the opinion in that case, it is clear and consistent, and if it had been followed the case would have been free from all embarrassment. Grant of claimant was declared to be a grant by quantity, to be located within certain out-boundaries, three of which were already ascertained, and it was left to the District Court to ascertain the fourth from the evidence on file, and such other evidence as might be taken by the parties, but the survey and location were to be made under the rules and regulations of the land department. Mandate of this court was that the decree of the District Court should be reversed, and that the cause be remanded with directions to enter a decree in the case in conformity to the opinion of this court. Opinion of this court was, as before stated, that an interest equal to three-fourths of the land granted should be confirmed to the claimant, and that the District Court should ascertain the northern boundary of the cañada, and when that was done, that the land department should make the survey and location. Cause was remanded; but the District Court, instead of following the mandate of this court, on the

eighteenth of October, 1858, entered a decree defining the specific boundaries of the claim.

VII. Appeal was taken to this court by the United States, but this court dismissed the appeal, holding that it was improvidently taken, and remanded the case for further proceedings to be had therein, in conformity to the opinion of this court. Decision in effect was that this court had no jurisdiction of the case, and hence the opinion of the court upon any matter connected with the merits of the controversy can hardly be regarded as authority; but it is not necessary to decide that point, as the court, in express terms, reaffirm what had been decided in the first case. Both decisions of this court in this case, therefore, show that the grant is one by quantity, to be located within the boundaries of the cañada, and I entertain no manner of doubt that such is the true construction of the grant. Such a claim should be surveyed and located under the rules and regulations of the Executive department, whether it be made by the Land Office or by the courts. Location as decided in the opinion of the court in this case will be in violation of every one of those rules and regulations, and will also be diametrically opposed to the opinions of this court in the two cases to which reference has already been made. These propositions, as it seems to me, are not refuted in the opinion just pronounced, even if they are not impliedly admitted; but the suggestion is that the District Court, in the decree of the eighteenth of October, 1858, decided that the grant was one with specific boundaries, and proceeded to fix them in the decree, and that the decree then entered is in full force and unreversed, and that inasmuch as the appeal taken by the United States was dismissed and no new appeal was taken, the decree is binding on this court, although it was contrary to the mandate of this court given in the same cause. Considering the peculiar nature of the jurisdiction in this class of cases, I cannot admit that doctrine. Proceedings in this class of cases are very different from the proceedings in suits at common law. Where the grant is of a tract by specific boundaries, there would be some force in the argument, because in

that class of cases it is incumbent upon the court not only to determine the question of confirmation, but also, if it be decided to confirm the claim, to determine the boundaries of the grant as a part of the original adjudication.

VIII. Such, however, is not the rule, and never was where the claim is what is called a floating claim, or where the grant is one by quantity, to be located within certain outboundaries, embracing a larger tract than the grant. All the courts have to do in such cases is to decide the question of confirmation, and leave the location to the Executive department of the Government. Attention, however, is called to the act of the fourteenth of June, 1860; but the answer to that reference is, that the provisions of that act have nothing to do with the decree of the District Court, entered on the eighteenth of October, 1858, nearly two years before the act was passed. Opinion of the court undertakes to vindicate the directions given in the cause, not upon the ground that the provisions of that act apply in the case, but upon the ground that the prior decree of the District Court had the effect to determine the controversy, and really that no further survey and location are necessary. Questions of this magnitude cannot be evaded, and ought not to be under any circumstances. Having given the subject all the consideration in my power, I am of the opinion that all that part of the decree of the District Court, rendered on the eighteenth of October, 1858, which attempts and professes to fix the boundaries of the claim in this case, was *coram non judice*, and utterly void. Reluctant as I am to differ from the majority of the court on this occasion, still I have much satisfaction in reaching that conclusion; because, if twenty millions of property must pass from the United States to those who have no pretence of title to it, I am not willing to cast the blame of such a monstrous result upon the office of the Attorney-General, or to place my decision in such a cause upon a mere technicality. Patient and thorough investigation has convinced me that the title to the quicksilver mine is in the United States, and it shall never pass into other hands by my vote while that convic-

tion remains, although I may stand alone. If this great wrong must be done, I would that it could have been done upon some other ground; for it seems that, in the opinion of the court, the case has been pending six years since it was finally and conclusively decided, which is an anomaly, perhaps, never before witnessed in a judicial tribunal. In my view of the case, the decree of the court should be reversed, and the cause remanded, with directions to order a new survey under the rules and regulations of the Executive department of the Government.

LOWBER *v.* BANGS.

A stipulation in a charter-party that the chartered vessel, then in distant seas, would proceed from one port named (where it was expected that she would be) to another port named (where the charterer meant to load her), "*with all possible despatch*," is a warranty that she will so proceed; and goes to the root of the contract. It is not a representation simply that she will so proceed, but a condition precedent to a right of recovery. Accordingly, if a vessel go to a port out of the direct course, the charterer may throw up the charter-party.

Ex. gr. A vessel, while on a voyage to Melbourne, was chartered at Boston for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manilla, which is out of the direct course between Melbourne and Calcutta, and did not arrive at Calcutta either directly or as soon as the parties had contemplated. The defendants refused to load; and upon suit to recover damages for a breach of the charter-party, it was held that the charterers might rightly claim to be discharged.

BANGS & SON being owners of the ship Mary Bangs, then at sea, on her passage from New York to Melbourne, chartered her at Boston, on the 4th June, 1858, to Lowber, who was there, for a voyage from Calcutta to Philadelphia, &c. The charter-party contained the following clauses:

"Ship to proceed from Melbourne to Calcutta *with all possible despatch*. It is understood that the 'Mary Bangs' is now on her

passage from New York to Melbourne (sailed 3d day May last); that the owners will use the most direct means to forward instructions to the master, with copy of this charter, ordering it to be fulfilled; *but should it so happen that the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter will be void.*"

No provision, it will be observed, was made for the case of the vessel's having *left* Melbourne *un*engaged, or, indeed, for anything but for her arriving at Melbourne, and her engagement before receiving the instructions promised by Bangs & Son, to be sent. The vessel reached Melbourne on the 7th of August; she discharged her cargo, and was ready to sail on the 7th of September. She waited for the mail until the 16th of that month. It was due there on the 5th of September, but by an accident did not arrive until the 14th of October. The voyage from Melbourne to Calcutta, at that time of the year, usually consumed from forty-five to sixty-days. Had the vessel proceeded to Calcutta direct, she ought to have reached there before the middle of November. *She went, however, to Manilla*, much out of the direct course from Melbourne to Calcutta, and arrived there on the 16th of November. She left Manilla on the 24th of January, and arrived at Calcutta on the 26th of February, *more than three months after the time at which she ought to have arrived, if she had gone there directly from Melbourne.* The owners addressed to the master five letters, of different dates, advising him of the charter-party, and directed them to Melbourne. The charterers, on the 23d of June, despatched an agent to Calcutta, who arrived there on the 25th of August. As soon as he learned that the vessel had not come direct from Melbourne, he declined loading her under the charter-party. Freights, it may be added, had largely fallen between the date when the charter-party was made, and that of the vessel's arrival at Calcutta; and, also, that after the arrival of the Mary Bangs, and after she was ready and had offered to receive a cargo, the charterers engaged another vessel, of about the same tonnage, to take her place,

Argument for the owners.

and loaded her with a cargo purchased after the arrival of the Mary Bangs, with funds provided for *her*. The case thus showed that the object of the voyage had not been frustrated.

On error from the Massachusetts Circuit, where the case had come before the court as a case stated, the question presented for the determination of this court was, whether the fact that the ship proceeded from Melbourne to *Manilla* and *thence* to Calcutta, instead of going to Calcutta from Melbourne directly, gave the charterers a right to avoid the charter-party; in other words, whether the clause, "ship to proceed from Melbourne to Calcutta with all possible despatch," did or did not make a condition precedent; whether, in short, it constituted a warranty, or merely a representation? The court below considered that it was not a condition precedent, but an independent stipulation, which gave the charterers a claim for damages on failure of performance by the owners, but did not give them the right to avoid the contract; the object of the voyage not having been wholly frustrated. Judgment was given below accordingly.

Mr. Curtis, for the owners.

1. The meaning of the clause is, that the owners would have the vessel at Calcutta "seasonably." She was so there, as is proved by the charterers having got another vessel after the arrival and loaded *her*. The voyage was not frustrated, nor was even inconvenience felt. The charterers threw up their charter only because freights had greatly fallen, and it was for their interest to do so. The argument which gives to the expression in question its severest meaning is unreasonable. If the master, after receiving his instructions at Melbourne, had stopped unnecessarily for but an hour, had gone to see a friend, had sailed by any but the shortest possible line, had not kept under the utmost press of sail, the charter would be void. The ship would not have proceeded from Melbourne to Calcutta with "*all possible* despatch." The argument makes the obligation to sail dependent, not on the receipt of the instructions, but on her

actual ability, at the moment, to sail. Who, on this construction of the instrument, could settle whether the contract had or had not been complied with? It might be confidently affirmed, that on this interpretation of such words no contract containing them ever had been, or ever would be, fulfilled. The more strict you make the construction, the more difficult you make it to be practically settled. You are also drawing within its scope things of no real effect. Can it be supposed that reasonable men, making a contract reaching over half the globe, and having before their eyes the contingencies which were certain to occur in distant seas and ports, could have thus contracted? Why give to a practical instrument a construction so impracticable?

2. It has been decided, in a large number of English cases, that such clauses as "ship to proceed with all convenient speed," or "in a reasonable time," and similar clauses, are not, in charter-parties, conditions precedent, but are merely independent stipulations; and unless the alleged breach goes to the whole root and consideration, it only gives a claim for damages. In *Tarrabochia* v. *Hickie*,* the charter contained a provision, that the vessel should "sail with all convenient speed." The jury found, in an action for refusing to load, that the vessel did not sail with all convenient speed; but the court held that this was no excuse for a refusal to load, because it did not appear that the object of the voyage was wholly frustrated by the breach of the stipulation. In *Dimech* v. *Corlett*,† the vessel was described as now at anchor in the port of Malta; and it was agreed that "she, being tight, stanch, and strong, and properly manned, and every way fitted for the voyage, should, with all convenient speed, proceed in ballast to Alexandria, in Egypt." The ship was not then finished, and did not get ready to sail for more than a month. *Held*, that the failure to sail "with all convenient speed" was no answer to an action for a refusal to load, because the charterer had not shown that the object of the charter-party was frustrated

* 1 Hurlstone & Norman, 183. † 12 Moore, Privy Council, 199.

by the delay; it not being "shown that the charterer had taken up any other vessel or declined any cargoes, or in any way altered his position, in consequence of the delay." In *Clipsham* v. *Vertue*,* it was held, on demurrer, that a failure to perform a stipulation in a charter-party, to sail "within a reasonable time," was no answer to an action for not loading; it not being alleged that the purpose of the voyage was frustrated. In *Freeman* v. *Taylor*,† the charter contained a stipulation to proceed from the Cape of Good Hope to Bombay "with all convenient speed." The master wilfully deviated, and went to Mauritius, and caused a delay of six weeks. The court directed the jury to find whether the deviation deprived the defendant of the benefit of the contract.

In some cases, it has been held in England that a stipulation in a charter to sail on or before *a day certain* was a condition precedent; and such stipulations were distinguished from those containing the words, "all convenient speed," "within a reasonable time," and "with all possible despatch."‡ Such was Baron Pollock's idea in *Tarrabochia* v. *Hickie*; but there appears to be no decision in which a clause similar to that in this case has been held to be a condition.

Mr. S. Bartlett, contra.

1. The contract is explicit and clear. "Ship to proceed *from Melbourne*,"—not from Manilla, or any other port in the Eastern seas, where she might at any time be found. "With *all possible* despatch;" that is to say, direct from Melbourne to Calcutta. Do these words leave a doubt that both parties contemplated that the contract should apply only to a vessel *at* Melbourne? How could the owners have been willing to bind themselves and their ship by a contract which should take effect after she left Melbourne, wheresoever notice reached the master, without making some provision in that

* 5 Adolphus & Ellis, N. S. 265. † 8 Bingham, 124.

‡ Glaholm *v.* Hays, 2 Manning & Granger, 257; Ollive *v.* Booker, 1 Exchequer, 416.

Argument for the charterers.

contract for a probable or possible state of things which might involve them in severe loss? How could the charterers have been willing, without making some limitation of time, to bind themselves to keep an agent and funds at Calcutta, ready to load a ship under a contract to take effect when notice should reach the master, it may be, in distant seas, and pending or after intermediate voyages?

2. How stands the case on authority? In *Graves* v. *Legg*,* the plaintiffs contracted to import and sell the defendant wools, to be laid down in certain ports of England. The contract recited that it was "to be deliverable at Odessa during August next, *to be shipped with all despatch*, the names of the vessels to be declared as soon as the wools were shipped." The breach relied on in defence, as a condition precedent, was that the plaintiff did not notify to the defendant the name of the vessel in which the wool was shipped as soon as it was shipped. The defendant threw up the contract. In the argument and judgment the effect of the clause "to be shipped with all despatch," as a condition precedent, and forming part of the same clause, was discussed, and the requisition to give notice of the names of the vessels, held to be a condition,—on the ground, among other things, that the terms "to be shipped with all despatch," in the same clause, clearly constituted a condition precedent. Thus Parke, B., asks, "Could the plaintiff contend that the shipping the wools with all despatch is not a condition precedent?" and the counsel for the plaintiff substantially admitted that it was. In its judgment, the court say the giving notice of the names of the ships "was a condition precedent, quite as much, indeed, as the shipping of the goods at Odessa, with all despatch, after the end of August."

Cases have been cited on the other side, where charter-parties have provided that the ship should sail with "all convenient speed," and in which the provision has been held not to be a condition precedent, entitling the charterer to

* 9 Exchequer, 709.

repudiate the contract. The reason is that stated in some of those cases, viz., that "what is a convenient speed or reasonable time, must always be a subject of contention. Where terms are so lax and ambiguous as to lead to a difference of opinion, then the stipulation is not a condition precedent." In the present case, the words "all possible despatch," are not equivalent to "reasonable time," and leave no ambiguity as to the intention of the parties, as is shown by the above case of *Graves* v. *Legg*.

The other side relies apparently on the supposed doctrine, that whether a stipulation in a charter-party constitutes a condition precedent or not, may be determined by proof that its violation had or had not the effect to frustrate the voyage, and that, as in this case, the charterers do not show that the voyage was frustrated, they are to be charged. It is not to be denied that some of the cases cited by Mr. Curtis assert the principle as stated. But the conflict in the cases, and the obvious unsoundness of the doctrine, has led to its revision in the Exchequer Chamber, in *Behn* v. *Burness*.* That case will be found to review the preceding cases, and to establish the following propositions:

1st. That whether a descriptive statement in a written instrument is a mere representation, and so "not an integral part of the contract" (unless fraudulently made), or whether it is a substantive part of the contract, is a question of construction by the court.

2d. That the previous cases turn upon very nice distinctions, but that the true doctrine, as established by principle as well as authority, is, that, "generally speaking, if such descriptive statement was intended to be a substantive part of a contract, it is to be regarded as a condition, on failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, provided it has not been partially executed in his favor."

3d. That if a party voluntarily receives the benefit of a partial execution, "he cannot afterwards treat the descriptive

* 8 Law Times, 207, April, 1863.

Reply for the owners.

statement as a condition, but only as an agreement, for breach of which he may bring an action to recover damages."

4th. That the doctrine of some of the cases relied on by the defendant in error, that a descriptive statement of this kind "may be regarded as a mere representation, if the object of the charter-party be still practicable, but may be construed as a warranty, if that object turns out to be frustrated," is unsound, "because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of events which may afterwards occur."

Mr. Bartlett referred also to *Glaholm* v. *Hays*,* *Oliver* v. *Fielden*,† *Crookewit* v. *Fletcher*,‡ and to *Ollive* v. *Booker*;§ reading from and relying upon them.

Reply: The case of *Behn* v. *Burness*, in the Exchequer Chamber, does not apply. There the words, "now in the port of Amsterdam," in a charter-party, were held to be a condition. The court, however, did not question the decisions in *Tarrabochia* v. *Hickie*, *Dimech* v. *Corlett*, and *Clipsham* v. *Vertue*, or question any other cases in which it was held that a stipulation that a vessel will sail with all convenient speed, or within a reasonable time, is only an agreement, and not a condition. The court held only that there was a distinction between "stipulations that some future thing shall be done, or shall happen," and "statements in a contract, descriptive of the subject-matter of it, or of some material incident thereof." The decision was based upon the ground that the statement that the vessel "was now in the port of Amsterdam," was of a definite fact at the date of the contract, and was not a stipulation as to the future. In the charter-party of the Mary Bangs, the clause "ship to proceed from Melbourne to Calcutta with all possible despatch," is merely a stipulation that a future thing should be done, and cannot, according to any of the principles stated

* 2 Manning and Granger, 257.
† 4 Exchequer, 135.
‡ 1 Hurlstone & Norman, 912.
§ 1 Exchequer, 416.

in the opinion in *Behn* v. *Burness*, in the Exchequer Chamber, amount to a condition.

Mr. Justice SWAYNE delivered the opinion of the court.

The question is, whether it was a condition precedent, that the ship should proceed directly from Melbourne to Calcutta; or, in other words, whether these clauses constitute a warranty, or are merely a representation.

"The construction to be put upon contracts of this sort depends upon the intention of the parties, to be gathered from the language of the individual instrument. Whether particular stipulations are to be considered conditions precedent, or not, must, in all cases, solely depend upon that intention, as it is gathered from the instrument itself."* "All mercantile contracts ought to be construed according to their plain meaning, to men of sense and understanding, and not according to forced and refined constructions, which are intelligible only to lawyers, and scarcely to them."† "The rule has been established, by a long series of adjudications in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense, to each particular case, and to which intention, when once discovered, all technical forms of expression must give way; and one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie* v. *Atkinson*,‡ to be this: that when mutual covenants go to the whole consideration, on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, then a remedy lies in the covenant to recover damages for the breach of it, but it is not a condition precedent."§

* Seegur *v.* Duthie, 8 Common Bench, N. S., 63.

† Crookewit *v.* Fletcher, 1 Hurlstone & Norman, 912.

‡ 10 East, 295.

§ Stavers *v.* Curling, 3 Bingham's New Cases, 355

Opinion of the court.

Rules have been elaborately laid down, and discussed in many cases, for determining the legal character of covenants, and their relations to each other; but all the leading authorities concur in sustaining these propositions.

Contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy.*

This charter-party bears date on the 4th day of June, 1858. The vessel was then on her way to Melbourne. The agreed facts warrant the conclusion, that the owner believed confidently that she would reach Melbourne in advance of the mail, which would carry to her master advice of the charter-party. It was also probable that she might engage her freight before the master could receive the advice. On the other hand, it was improbable that she would have discharged her cargo and have left Melbourne before the mail arrived. Hence, no provision was made by the owners for any other contingency than that she should have become engaged. In that event, they were not to be bound; and the charterers required it to be stipulated, simply, that if not engaged, she should proceed with all possible despatch from Melbourne to Calcutta.

Promptitude in the fulfilment of engagements is the life of commercial success. The state of the market at home and abroad, the solvency of houses, the rates of exchange and of freight, and various other circumstances which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business. The result of a voyage may depend upon the day the vessel arrives at her port of destination, and the time of her arrival may be controlled by the day of her departure from the port whence she sailed. We cannot forget these considerations in our search for the meaning of this contract. That

* Simpson *v.* Henderson et al., 1 Moody & Malkin (22 English Common Law), 313; Hasbrook *v.* Paddock, 1 Barbour S. C. 635; French *v.* Carhart, 1 Comstock, 105.

the parties could have intended that when the vessel left Melbourne she might wander in any direction over the Indian seas, and that whenever and wherever she should receive intelligence of the contract, she might proceed to Calcutta and claim its fulfilment by the charterers, strikes us as incredible. So to hold, we think, would be to make a new contract for the parties, and not to execute the one they have made. We cannot give any other construction to the language, "the ship to proceed from Melbourne to Calcutta with all possible despatch," than that she was to proceed direct from one place to the other, and that to this extent, *at least*, time was intended to be made of the essence of the contract. We lay out of view the state of things at Calcutta when the vessel arrived there. To allow that to control our conclusion, would be to make the construction of the contract depend, not upon the intention of the parties when it was entered into, but upon the accidents of the future.

We will now advert to the authorities to which our attention has been directed. *Tarrabochia* v. *Hickie*, *Dimech* v. *Corlett*, *Clipsham* v. *Vertue*, and *Freeman* v. *Taylor*, are in point for the defendants in error, and seem to sustain the views of their counsel. In these cases it was held, that unless the delay was so great as to frustrate the object of the charterers in making the contract, it was not material to the rights of the parties. In two of them the delay was produced by the deviation of the vessel from the direct course to the port where she was to receive her lading.

The authorities relied upon in behalf of the plaintiffs in error are equally cogent. In *Glaholm* v. *Hays*, the language of the charter-party was, "the vessel to sail from England on or before the 4th day of February next." This was held to be a condition precedent. Chief Justice Tindal said this language imported the same thing as if it had been "conditioned to sail," or "warranted to sail on or before such a day." In *Oliver* v. *Fielden et al.*, the contract, as set out in the declaration, was that "the ship called the Lydia, ... then on the stocks at Quebec, to be launched and ready to receive cargo in all the month of May, 1848, and guaranteed

by the owners to sail in all June, A. D. 1848," &c., should be loaded by the factors of the charterers, &c. It was held that the readiness to receive a cargo *in all May* was a warranty, and that in an action for not loading the vessel, a plea stating that the ship was not ready to receive a cargo "in all May," was good on general demurrer. Pollock, Chief Baron, said, "The stipulation as to the vessel being ready to receive a cargo in May is not mere description, but part of the contract, and forms a condition precedent to the plaintiff's right to recover." *Crookewit* v. *Fletcher* presented the same point, and was ruled in the same way. In *Ollive* v. *Booker*, the vessel was described as "now at sea, having sailed three weeks ago, or thereabouts." It was held, that the time at which the vessel sailed was material, and that the statement in the charter-party amounted to a warranty.

The most recent and most important authority brought to our notice is *Behn* v. *Burness*. It was agreed by the charter-party, in that case, that the ship then "in the port of Amsterdam . . . should, with all possible despatch, proceed to Newport, in Monmouthshire," and there take in cargo. At the date of the contract the ship was not at Amsterdam, but at another place sixty-two miles distant from there. Being detained by contrary winds, she did not reach Amsterdam until the 23d of October. She discharged her cargo as speedily as possible, and proceeded direct to Newport, where she arrived on the 1st of December. The defendant refused to load her. The plaintiff sued for damages, and the defendant pleaded that the ship was not at Amsterdam at the time of the making of the contract. The Queen's Bench ruled in favor of the plaintiff, and he recovered. The defendant took the case, by a writ of error, to the Court of Exchequer, and that court reversed the judgment of the Queen's Bench. The opinion of the reversing court is characterized by force and clearness, and the leading authorities on the subject are examined. The court say: "We feel a difficulty in acceding to the suggestion that appears to have been, to some extent, sanctioned by high authority (see *Dimech* v. *Corlett*), that a statement of this kind in a charter-party, which may

be regarded as a mere representation, if the object of the charter-party be *still practicable*, may be construed as a warranty, if that object turns out to be frustrated, because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterwards occur." Referring to *Freeman* v. *Taylor*, *Tarrabochia* v. *Hickie*, and *Dimech* v. *Corlett*, they say: "But the court did not, we apprehend, intend to say that the frustration of the voyage would convert a stipulation into a condition, if it were not originally intended to be one." They evidently felt embarrassed by the prior adjudications, which take a different view of the subject, and an effort is made to reconcile them with the decision they were about to pronounce. Here we have no such embarrassment, and we think we shall settle wisely the important principles of commercial law involved in this controversy by following the case of *Behn* v. *Burness*.

Upon reason, principle, and authority, we are of opinion that the stipulation before us is a condition precedent, and not a mere representation, nor an independent covenant, and that it goes to the entire root of the contract.

JUDGMENT REVERSED, and the cause remanded for further proceedings, in conformity to this opinion.

Mr. Justice CLIFFORD, dissenting.

I am not able to concur in the judgment of the court in this case, and inasmuch as the questions presented for decision are of general importance, I think it proper to state the reasons for my dissent.

Present defendants, as the owners of the ship Mary Bangs, brought the suit in the court below to recover damages of the charterers for refusing to load the ship as they had covenanted and agreed to do.

Charterers resided in Philadelphia, and the owners of the ship resided in Boston. Charter-party was executed by the defendants at Philadelphia, on the ninth day of June, 1858, and was received by the plaintiffs in Boston on the eleventh

of the same month. Contract was for a voyage from Calcutta to Philadelphia, New York, or Boston, one port only, at charterers' option; but they were to give the necessary orders upon the subject before the ship sailed from Calcutta. When the contract was made the ship was "on her passage from New York to Melbourne," as appears by the introductory recitals of the charter-party.

Voyage is described, as before mentioned, and immediately following that description is the clause which gives rise to the controversy. "Ship to proceed from Melbourne to Calcutta with all possible despatch." Owners engaged, among other things, that the vessel should be kept seaworthy, and be provided with men and provisions, and with every requisite during the voyage. On the other hand, the charterers engaged to load the ship, and to provide, as part of the cargo, *sufficient saltpetre for ballast*, and what broken stowage the master might require, so that the ship might be loaded full and in a safe and seaworthy manner, and to reasonable draft. Price to be paid for the charter was thirteen dollars per customary ton for whole packages, and half price for broken stowage. Forty running lay days were allowed for loading the ship, and the charterers agreed to pay ninety dollars demurrage for every day the ship should be detained beyond that time, if the detention was by their fault or that of their agent.

Recitals of the charter-party also show that the vessel sailed from New York, on her passage to Melbourne, on the third day of May, prior to the date of the charter, and the parties agree that such a voyage usually occupied from ninety to one hundred and thirty days, and that it would usually require from two to seven weeks for the vessel to discharge her cargo and get ready to sail. Terms of the charter-party required that the owners should use the most direct means to forward instruction to the master, with a copy of the charter, ordering it to be fulfilled, and the agreed statement shows that on the same day they received the charter-party from Philadelphia they complied with that stipulation.

First instructions were sent by a sailing vessel; but they also sent similar instructions by the overland mail, and in various other ways. Copies of the same instructions were also sent to Singapore and Batavia; and in fact the parties agree that there were no more direct means for forwarding instructions than such as were used by the owners. Steamer carrying the overland mail, which left England in July, 1858, broke down, and the consequence was that the instructions sent to Melbourne did not arrive there so early by a month as was expected by the parties. Vessel arrived at Melbourne on the seventh day of August, 1858, and her cargo was all discharged and she was ready to sail in thirty days after her arrival. Master waited for the mail until the sixteenth of September, but none arrived, and then he sailed for Manilla, seeking business.

Instructions reached the master at Manilla, and on the receipt of the same the master got his vessel ready and sailed for Calcutta to fulfil the charter. Record shows that the vessel arrived there on the twenty-sixth day of February following, and that the master on the same day called on the agent of the charterers, and he declined to load the ship.

I. Two principal positions are assumed by the defendants, to show that the owners of the vessel ought not to prevail upon the merits.

1. They insist that, by the true construction of the charter-party, it was a condition precedent to the covenant or promise to load the vessel, that when the master received the instructions to fulfil the charter the vessel should be found at Melbourne disengaged, and that she should proceed direct from there with all possible despatch to the port specified in the charter.

2. Secondly, they insist that the long period which elapsed before the vessel arrived at Calcutta, although the delay was without fault either of the master or owners, discharged them as charterers from any obligation to furnish a cargo.

Nothing can be more certain than the fact that the two questions presented involve widely different considerations. Obviously, one is purely a question of construction, and must

be determined from the language of the charter-party when applied to the subject-matter, and considered in view of the surrounding circumstances as they existed at the time it was executed; while the other is a mixed question of law and fact, depending in a great measure upon the evidence exhibited in the record. Looking at the subject in that light, it is manifest that any commingling of the question is wholly inadmissible, and can only promote misconception and lead to confusion.

Province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances contemporaneous with the instrument.*

General rule is, that the terms of a contract are to be understood in their plain, ordinary, and popular sense, unless they have, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense; but courts of justice are not denied the same light and information the parties enjoyed when the contract was executed. On the contrary, they may acquaint themselves with the persons and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.†

Substance of the first proposition of the defendants is, that the clause, "ship to proceed from Melbourne to Calcutta, with all possible despatch," amounts to a warranty that the ship, when the instructions with the charter should be received by the master, would be found at Melbourne, and that inasmuch as she had left that port before the instructions arrived, and did not proceed from that port direct to the port of lading, they are discharged from all obliga-

* Barreda et al. *v.* Silsbee et al., 21 Howard, 161.

† Shore *v.* Wilson, 9 Clark & Finnelly, 569; Clayton *v.* Grayson, 4 Neville & Manning, 606; Addison on Contracts, 846.

tions under the charter-party. Consequence of the breach of a covenant or promise on one side, which is a condition precedent, undoubtedly is that the proof of the fact is a sufficient excuse for the entire disregard of all the dependent covenants or promises by the other party. Such a construction of a charter-party is never favored by courts of justice. Whether or not a particular covenant by one party be a condition precedent, the breach of which will dispense with the performance of the contract by the other, says Lord Tenterden, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them; but an intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed.*

Speaking of this subject, Mr. Parsons, in the last edition of his valuable Treatise on Maritime Law, says that the doctrine of dependent covenants, as at common law, sometimes works great hardship, if not injustice, but adds, that as applied to contracts relating to shipping it is seldom laid down without a distinct and adequate reference to the intention of the parties *and the actual justice of the case.* Indeed, it may almost be said, remarks the same learned author, that there is a presumption of law, for there is certainly a strong disposition of the courts, against such a construction of a covenant or promise as will make it a condition precedent. Reason for the rule, as suggested by the same commentator, is that the construction which disconnects the promises and obliges each party to satisfy the other for so much of his promises as he has kept, saving his right to indemnity for any promises which are broken, will, in the vast majority of cases, do justice, complete justice, to both parties.†

Charter-parties, it should be remembered, are commercial instruments, subject to the rules applicable to commercial contracts, where the rule of construction, as universally acknowledged, is that it shall be liberal, agreeably to the

* Abbott on Shipping (Ed. 1854), 368.
† 1 Parsons's Maritime Law, 272.

intention of the parties, and conformable to the usages of trade in general, and to the particular trade to which the contract relates.*

Intention unquestionably is the primary consideration, and when that is ascertained, under the rules already suggested, all artificial forms of expression, as was well said in *Stevens* v. *Curting*,† must give way. Applying these rules to the present case, it is clear, beyond controversy, that the views of the defendants cannot be sustained. Suppose it were otherwise, however, and that the construction and meaning of the charter-party, instead of being controlled by those liberal and equitable rules, to which reference has been made, and which have been followed for centuries in all commercial jurisdictions, must be determined by the application of the sternest technicalities ever applied in a common law court to a building or other construction contract, still, I am of the opinion that the clause in question cannot be construed to be a condition precedent without doing violence to the language employed by the parties, when rightly applied to the subject-matter of the contract, and justly compared with other parts of the same instrument.

The purpose of the contract was to let and hire the ship for a voyage from Calcutta to a port in the United States. Defendants had no merchandise on hand, and they had not sent out any agent to make the purchases. Time, frequently a long time, is required to purchase large cargoes in that market. Adventure was to be undertaken in a distant port which would involve great expense, and that expense would be greatly increased if the vessel or vessels were sent from the ports of the United States without a profitable outward cargo. Preference, therefore, was given by the charterers to vessels navigating in those seas. They accordingly applied to the plaintiffs; but both parties knew that it was impossible to foreknow on what precise day the vessel would arrive at her port of destination, or how long it would take

* Abbott on Shipping, 352. † 3 Bingham's New Cases, 355.

her to unload and get ready to sail, or the precise length of time that would be required for the voyage to Calcutta. All these matters were known to be involved in uncertainty, and it is equally obvious that they knew that the owners might not be able to forward the instructions to the master before he would arrive at Melbourne, discharge his vessel, and sail seeking business. Knowing these uncertainties, the parties incorporated into the instrument two special provisions to protect their respective interests, which was all they could safely do without incurring the hazard of defeating the main purpose they had in view.

1. Owners of the ship stipulated to use the most direct means to forward instructions to the master, with a copy of the charter, ordering it to be fulfilled, which was obviously inserted for the benefit of the charterers. Object of the provision was to insure, if possible, prompt notice to the master. But it might happen that the means of transmitting intelligence to him in that distant sea would fail until after he had sailed from the port of destination, and had engaged his ship, and in that event the owners, unless their interests were also protected by some suitable provision, would be liable at law to the defendants, or the last charterers, in damages.

2. Special provision was accordingly made, that if it happened that the ship should arrive at Melbourne before the instructions, and the master should have engaged the ship before receiving them, the charter should be null.

Both of these provisions are plainly dependent covenants, and they show to a demonstration, as was well said by Erle, Ch. J., in *Seeger* v. *Duthie*,* that the parties, when they intended to make a condition precedent, or a dependent covenant, knew how to carry that intention into effect. But they made no stipulation as to the time when the ship should arrive at Melbourne, nor as to the day when the cargo should be discharged, nor the day she should sail to fulfil the contract, nor the day when she should arrive at Calcutta. Stipu-

* 8 J. Scott, N. S., 65.

lations upon the several matters mentioned, if made, might defeat the object in view, which both parties desired to avoid, and looking at the surrounding circumstances, it is quite clear that if they had been inserted they would have been of no special importance to the defendants. They had chartered two other vessels to be employed in the same commercial adventure. When this charter was executed they had purchased no merchandise at Calcutta, and the agent they afterwards appointed to make the purchases for the three vessels was still in the United States. Charters for the other two vessels were executed about the same time as that of the Mary Bangs, and the agreed statement shows that one of them at that time was on a voyage from Liverpool to Calcutta, and the other was at Callao waiting orders. Attending circumstances negative the assumption that the interests of the charterers required anything more than ordinary expedition, and there is not a word in the charter-party to favor that view, outside of the clause under consideration.

Some stress is laid, in the opinion of the court, upon the words, "with all possible despatch," and the argument is, that they must have the same effect as a stipulation for a day certain. Covenant that the ship shall be at or sail from a certain place on a certain day, and there to receive cargo, says Mr. Parsons, is a condition precedent, and if she is not there on that day the freighter is discharged from all obligation to load her, as the condition, in that state of the case, is not fulfilled.* Such was the case of *Glaholm* v. *Hays*,† decided in 1841, and referred to in the opinion of the court.

Contract, in that case, was as follows: "the vessel to sail from England on or before the fourth day of February next;" and it was held, and well held, that the clause was a condition precedent. Where, also, there is a definite statement of a material existing fact, as that "the ship is now in the port of Amsterdam," the better opinion is, that it is a

* 1 Parsons' Maritime Law, 271. † 2 Manning & Granger, 257.

warranty, and not a mere representation, and consequently is synonymous with precedent condition. Decision of the Exchequer Chamber, in *Behn* v. *Burness*,* is to that effect, and I have no doubt it is correct. Question presented on the charter-party, say the court in that case, is confined to the statement *of a definite fact*, and they add that if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition, unless we can find in the contract itself, or the surrounding circumstances, reason for thinking that the parties did not so intend. But where the stipulation as to time is not of a day certain, or where the statement relied on is not of an existing fact, or is expressed in indefinite terms, the rule is otherwise by all the authorities. Take, for example, the case of *Constable* v. *Cloberie*,† which is an early case upon the subject. Covenant was to sail with the first wind, and the covenant was not performed; but the court held that the covenant was not a condition precedent.

Material clause of the charter-party in *Bornman* v. *Tooke*,‡ was "to sail with the first favorable wind direct to the port of Portsmouth;" but the ship deviated, and unnecessarily entered another harbor, where she was detained several weeks, by means whereof the charterer was put to additional expense for insurance upon the cargo. Held, that the covenant to sail, as above, was not a condition precedent, and that the deviation could not be given in evidence in bar of the action.

Origin of the true criterion by which to determine whether a particular covenant is to constitute a condition precedent or not, is to be found in the case of *Boone* v. *Eyre*,§ which was decided by Lord Mansfield. Where mutual covenants go to the whole of the consideration on both sides, said the judge, they are mutual conditions, the one precedent to the other. But where they go only to a part, as where a breach may be paid for in damages, there the defendant has

* 8 Law Times, N. S., 207.

‡ 1 Campbell, 376.

† Palmer, 397.

§ 1 H. Blackstone, 273.

a remedy on the contract, and shall not plead it as a condition precedent. Same rule was laid down by Lord Ellenborough in *Ritche* v. *Atkinson*,* decided twenty years later. Stipulation, in that case, was that the ship should, "with all convenient speed, sail and proceed" to a certain port, and there take on board a complete cargo, and therewith proceed to another port and deliver the same, and the evidence showed that she did not bring home more than half what she could have carried. Judgment was that the covenant was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rates, subject to the right of the freighter to recover damages for such short delivery.

Ruling of Lord Ellenborough in *Havelock* v. *Giddes et al.*,† is to the same effect. Covenant of the owner in that case was, that he would "forthwith at his own expense make the ship tight and strong," and it appeared that the owner was in default. Decision was that the covenant was not a condition precedent, but merely gave the charterers a right in a counter action to such damages as they could prove they had sustained from the neglect. Subsequently the same question was presented for a third time to the same court in *Davidson* v. *Gwynn*,‡ and it was ruled in the same way. Particular phrase in that case was, "to sail with the first convoy," and the master neglected to do as directed. Seriatim opinions were delivered by the judges, and they all held that it was not a condition precedent, but a distinct covenant, for a breach of which the party injured might be compensated in damages. Nonperformance on one side, in order to justify the conclusion that the stipulation requiring it is a condition precedent, must go to the entire substance of the contract, and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side. Proof of the breach of an express or im-

* 10 East, 295. † 10 East, 555. ‡ 12 East, 381.

plied covenant on one side is not sufficient, not even if it is attended with some loss and damage to the other, because if it does not go to the whole consideration, and the loss can be compensated in damages, the construction must be that the stipulation is independent, and the losing party, under such circumstances, is not absolved from performance on his part.*

Repeated decisions confirm this rule, and indeed it may almost be said that it is universally approved. Reference will now be made to some of the more modern cases decided in the courts of the parent country. Excuse for that course, if any be needed, will be found in the opinion of the court, which assumes that those cited by the defendants are inconsistent with those cited by the plaintiffs, which in my judgment is error. Plaintiffs refer to *Freeman* v. *Taylor*,† which is regarded as a leading case.

Terms of the charter-party were that the ship should proceed to the Cape of Good Hope, and having there discharged cargo, should "proceed with all convenient despatch to Bombay," where the freighter engaged to put on board a cargo of cotton for England. Master, instead of conforming to the stipulation, wilfully deviated, causing a delay of six weeks, and in consequence of the deviation the agent of the defendants refused to load the vessel. Case was tried before Tindal, Chief Justice, and he charged the jury that, inasmuch as the freighter might bring his action against the owner and recover damages for any ordinary deviation, he could not for such a deviation put an end to the contract; but if the deviation was so long and unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end, and he left it to the jury to decide whether the delay was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract.

* Mill-dam Foundry *v.* Hovey, 21 Pickering, 439; Bennet *v.* Pixley, 7 Johnson, 249; Smith's Mercantile Law (6th London ed.), 312, 324.

† 8 Bingham, 124.

Rule *nisi*, to set aside the verdict, was granted, but the whole court held that the instructions were right. Precisely the same views were expressed by Lord Denman and his associates in *Clipsham* v. *Vertue et al.*,* which is admitted to be in point for the plaintiffs. Stipulation in the charter was to load and "*forthwith proceed* to the port of destination." Delay ensued and the charterers refused to load. Suit was brought by the owners, and the defendants pleaded that the vessel did not arrive at the port of lading until after an unreasonable delay. Plaintiffs demurred, and the plea was held bad because it did not show that the delay frustrated the voyage.

Reliance is placed by the defendants upon the case of *Oliver* v. *Fielden et al.*,† which was decided in 1849, by Pollock, C. B., and his associates. Essential clause of the charter-party, dated the 28th of March, 1848, was that the ship, then on the stocks at Quebec, should "be launched and ready to receive cargo in all May" next following the date of the charter. Action was by the owners for a refusal to load. Plea that "the ship was not launched and ready to receive cargo in all May," as stipulated. Demurrer by plaintiff and joinder by defendants.

Court held that the readiness to receive cargo in all May was a condition precedent. Beyond question the ruling was correct upon the ground that a definite limitation of time is precisely equivalent in principle to a day certain. Pleadings, therefore, presented a case where the condition precedent was clearly and unambiguously expressed. Authorities cited by the court furnish indubitable evidence that such was the view taken of the case at the time of the decision. They cited *Glaholm* v. *Hays*,‡ and *Olive* v. *Booker*,§ where the decision turned upon a statement material in character and of an existing definite fact.

Statement was that the vessel is "now at sea, having sailed three weeks ago, or thereabouts," which was a mate-

* 5 Adolphus & Ellis, N. S., 265.
† 4 Exchequer, 135.
‡ 2 Manning & Granger, 257.
§ 1 Id. 416.

rial statement and wholly untrue, and the court held that it was a warranty, and it is not possible to see how it could have been held otherwise. Unless I am greatly mistaken, these explanations are sufficient to show that the case of *Oliver* v. *Fielden et al.*, and the cases therein referred to by the court, run entirely clear of the question involved in this case. Should further confirmation of the proposition, however, be needed, it will be found in the case of *Terrabochia* v. *Hickie*,* decided in 1856, by the same court which seven years previously decided the case of *Oliver* v. *Fielden et al.*, on which the defendants rely.

Provision of the charter-party was, that the ship "being tight, stanch, and strong, and every way fitted for the voyage, should, *with all possible speed*, sail and proceed" to a certain port, and there load a full and complete cargo in the customary manner. Breach alleged was, that the defendants made default in loading the agreed cargo. Second plea was, that the ship did not, with convenient speed, or in a reasonable time in that behalf, sail or proceed to the port of lading, insomuch that by reason thereof the object of the charter-party and of the voyage was wholly frustrated. Issue was joined and the parties went to trial. Jury found—

1. That the vessel did not proceed with reasonable speed and diligence.

2. That the whole object of the voyage was not thereby defeated.

3. That the vessel was not fitted for her voyage when she sailed for the port of lading, but that she was so fitted when she arrived at that port.

Verdict was entered for the defendant, with leave to the plaintiff to move to enter a verdict in his favor. Rule to show cause was accordingly granted, and the questions were fully argued. Separate opinions were given by Pollock, C. B., and his associates, and they unanimously decided that the stipulation referred to was not a condition precedent. Opinion of the Chief Baron is a very able one, going over

* 1 Hurlstone & Norman, 183.

the whole ground and reviewing the principles involved in all the preceding cases. All of the cases decided prior to 1857, when the judgment was given for the plaintiff, were cited at the argument, and it does not appear to have even occurred to the learned Baron that he was guilty of any inconsistency in pronouncing the judgment.

Special reference was made to the remark of Maule, J., in *Glaholm* v. *Hays*,* that if the covenant to sail on a day certain was a condition precedent, then it might be said that a covenant to sail in a reasonable time should be held to have the same effect; and the answer to the suggestion, if such the remark can be called, was that the distinction between the two cases was obvious, which in my judgment is a sufficient answer to every argument of the kind.†

Repetition of the explanation as to what the distinction is, it seems to me, is unnecessary, as it has already been stated in language as clear as I can employ. Same distinction is explained by Erle, Ch. J., in *Seeger* v. *Duthie*,‡ in a manner entirely satisfactory. Principle of the distinction, as explained in the case of *Dimech* v. *Cortlett*,§ is that a contract that a thing shall be done on a day named is in itself certain and defined, because it excludes all consideration of future circumstances; and the same remark is equally applicable to a positive statement of a definite existing fact, if it is material to the object of the instrument. But a contract that the thing shall be done with all convenient speed, say the court, necessarily admits a consideration of all the future circumstances; and different minds may plausibly enough come to different conclusions as to what is "all convenient speed." Execution of the charter-party in that case was at Malta. Clauses to be noticed are as follows:

1. That the ship is "now at anchor in this port."

2. That she shall, "with all convenient speed, proceed in ballast to Alexandria, in Egypt, and there load a full cargo."

* 2 Manning & Granger, 263.

† Same *v.* Same, 38 English Law & Equity, 339; Hurst *v.* Usborne, 18 C. B., 144.

‡ 8 J. Scott, N. S., 64.

§ 12 Moore, Privy Council, 228.

Report of the case shows that she was neither at anchor in port nor entirely coppered, but was then in a dry-dock undergoing repairs. Failure to furnish the cargo was the ground of the action, and the decision in the colonial court was against the owner, who prosecuted the appeal. Questions were fully argued, and all the authorities of a date prior to the judgment, which was pronounced in 1858, were reviewed. Conclusion was that neither of the stipulations was a condition precedent, but the decision in respect to the first one turned upon the question of intention, as collected from the whole instrument. Ruling on the second point was undoubtedly correct. Opinion was given by Sir John T. Coleridge. He first stated the propositions submitted by the plaintiff, which were that the failing to sail within a reasonable time or with convenient speed was no answer to the action on the contract, and that the case was governed by the general law of mercantile contracts. Having stated the propositions he proceeds to say: "We agree to both parts of the argument. Parties," said the judge, "have not in this case expressly stated for themselves in the charter-party that unless the vessel sailed by a specified day the charter-party should be at an end, and courts ought to be slow to make such a stipulation for them." Court of Exchequer also recognized the same distinction in the case of *Crookewit* v. *Fletcher et al.*,* decided in 1857. Words of the charter-party were, ship "now in Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next," and the court held, on the authority of *Glaholm* v. *Hays*, *Olive* v. *Booker*, and *Oliver* v. *Fielden et al.*, that the stipulation as to sailing on the day named was a condition precedent, but the court expressly say, "We entirely agree with the judgment of the Lord Chief Baron, in *Terrabochia* v. *Hickie*, who clearly points out the distinction between a stipulation to sail on a particular day and any general stipulation as to sailing 'in a convenient time,' *or other words of the same description.*"†

* 40 English Law and Equity, 415.

† Same *v.* Same, 1 Hurlstone & Norman, 912.

Some answer ought to be given to this long and unbroken course of judicial decisions almost unparalleled for their ability and consistency in any other branch of commercial law. Attempt is made to furnish an answer, and what is it?

1. Suggestion is made that the phrase, "with all possible despatch," is more intensified than any of the expressions found in the cases cited by the plaintiffs. Shadowy as the theory appears, still it deserves to be examined on account of the source from which it is suggested. None will pretend, I suppose, that the phrase "with all possible despatch" is more intensified than the phrase "as soon as possible," which is one of daily use; and yet it was held, in the case of *Atwood et al.* v. *Pomeroy*,* decided in 1856, that the latter phrase means within a reasonable time, regard being had to the surrounding circumstances; and it is not believed that there is a decision to the contrary in any jurisdiction where our language is spoken. Considered in the light of that decision, it is obvious that the suggestion is entirely unsubstantial and without merit. Another suggestion is that the contract was not to attach at all, unless the master received the instruction before he sailed. But the parties inserted no such stipulation into the charter-party, and I think that courts of justice ought to be slow to make such a stipulation for them.†

They provided that if the ship happened to arrive at the port of discharge before the instructions, *and the master should have engaged his ship before receiving them*, the charter should be null, but they made no other provision for the termination of the charter, and it is confidently believed that the suggestion is utterly inconsistent, not only with the intent of the parties, but with the whole scope and purpose of the instrument. Suppose the vessel had sailed direct for Calcutta, and the day after the vessel left the wharf at the port of discharge she had met the British steamer and the master had received his instructions, or suppose the ship, instead

* 1 J. Scott, N. S., 110.

† Dimech *v.* Cortlett, 12 Moore, Privy Council, 227

of being met on the day after she sailed, had proceeded on her voyage and touched at Singapore or Batavia, and the master had received his instructions at one or the other of those places, or suppose the ship, instead of touching at one of those ports, had proceeded direct to Calcutta, and on her arrival there the master had met his instructions and had immediately tendered the ship, under the charter-party, all would agree, I think, that it would be impossible to hold, if the defendants had refused to load, that they would not have been liable on the covenants of the charter-party. Would any one pretend, in the case last supposed, that if the master, instead of tendering the ship, had refused to fulfil the charter, that the owners would not have been liable? I think not, and yet, if they would have been liable in the case supposed, it can only be upon the ground that the clause in question is not a condition precedent, because the proposition concedes that the charter attached, notwithstanding the ship had sailed.

Defendants also suggested at the argument that the case of *Graves* v. *Legg*,* decided in 1854, was inconsistent with the rights of the plaintiffs to recover; but I think not, for several reasons.

1. Because it has no application to the case, being an action upon an ordinary written agreement, and not upon a charter-party.

2. Because, if it were inconsistent with the cases cited for the plaintiffs, the later cases ought to be regarded as furnishing the true rule.

3. Because the decision is perfectly consistent with the earlier and later cases to which reference has been made.

Agreement of plaintiff was to sell to the defendant certain merchandise, to be shipped with all despatch, "*and the names of the vessels to be declared as soon as the goods were shipped.*" Names of the vessels were not notified to the defendants, and they refused to accept the goods. Held that the provision in the contract that the names of the vessels should be

* 9 Exchequer, 709.

declared as soon as the goods were shipped was a condition precedent to the obligation of the defendants to accept and pay for the goods. Judgment was delivered by Parke, B., and he approved the rule laid down in *Boone* v. *Eyre*, as the criterion for determining whether a particular covenant is independent or a condition.

Result of my examination is that I find no inconsistency between the cases cited by the defendants and those cited by the plaintiffs. Supposed difference consists *only* in the application, and therefore is unreal. Doubts were expressed in *Behn* v. *Burness*, whether the first point ruled in *Dimech* v. *Cortlett* was correct, but the court finally came to the conclusion that their decision did "not at all conflict" with the decision of the Privy Council, even on that point. First point decided, it will be remembered, was that the statement that the ship is "now at anchor in this port" was not a warranty, which has no application whatever in this case. Second point decided in that case, which is the one applicable here, was not questioned either by the bar or the bench, and is undoubted law.* For these reasons I am of the opinion that the clause in question is not a condition precedent.

II. Second objection is that the delay which ensued before the vessel arrived at Calcutta discharged the charterers from all obligation to furnish a cargo. Moral wrong is not imputed to the plaintiffs, and it is quite clear on the facts that perfect justice is done to both parties by regarding the provision as an independent stipulation. Contrary conclusion is a great hardship, as the master acted in good faith, and employed his best exertions, after he received his instructions, to fulfil the charter. Granting that the provision is not a condition precedent, then the rule is that unless the deviation was of such a nature and description as to frustrate the voyage or to deprive the freighter of the benefit of his contract, he is not discharged from the obligation, but is remitted to his claim in damages for any injury he may have

* Adams *v.* Royal Company, 5 C. B. N. S. 492.

sustained.* Applying that rule to the case it is quite obvious what the result ought to be.

Agent of the defendants arrived at Calcutta on the twenty-fifth of August, and remained there till the twenty-third of January following. Names of the other vessels were the J. P. Wheeler and the William Cummings. Former arrived on the fourth of November, and the latter on the first of the following month. When the William Cummings arrived the agent had purchased, of *certain articles*, enough for two ships, but he had not purchased *any saltpetre for ballast.* Part of the merchandise so purchased was intended for the Mary Bangs, but it was all sent by the other two vessels. Plaintiffs' ship arrived, as before stated, and the agent of the defendants refused to load her. Freight at that time had fallen for such a voyage to five or six dollars. Under those circumstances the agent refused to load the ship, but he immediately chartered another vessel of about the same tonnage to take her place, and loaded the vessel so chartered with the funds provided to purchase a cargo for the Mary Bangs, and the parties agree that the whole cargo was purchased after the vessel of the plaintiffs arrived.

Defendants do not venture to suggest that they have suffered any injury, and it is clear that the construction here assumed would, in the language of Mr. Parsons, "do justice, complete justice, to both parties." Unless the instructions were received by the master before the vessel sailed seeking business it must have been understood by the defendants that some delay would necessarily ensue in the departure of the vessel; and if, in that contingency, they had been unwilling to accept the contract, the reasonable presumption is that they would have insisted that some more specific provision upon the subject should have been inserted in the charter-party. They understood the nature and effect of a condition precedent, and if they had intended that the contract

* Freeman *v.* Taylor, 8 Bingham, 124; Clipsham *v.* Vertue, 5 Adolphus & Ellis, N. S., 265; Seegar *v.* Duthie, 8 J. Scott, N. S., 45; Terrabochia *v.* Hickie, 1 Hurlstone & Norman, 183; Dimech *v.* Cortlett, 12 Moore, Privy Council, 227.

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should be null in case the vessel sailed before the master received advices, it must be assumed that they would have said so, "in clear and unambiguous terms."

The truth is, they intended no such thing, but the theory here adopted speaks the true intent and meaning of the contract.

Pursuant to these views I think the judgment should be affirmed.

NELSON, J., also dissented.

EX PARTE FLEMING.

A party asking this court for a mandamus to an inferior court to make a rule on one of its ministerial officers, as the marshal, must show clearly his interest in the matter which he presents as the ground of his application.

THE La Crosse and Milwaukie Railroad Company, a railroad company of Wisconsin, had mortgaged its road and other property to secure certain negotiable bonds which it had issued. The bonds not being paid, a bill of foreclosure was filed in the *District* Court of the United States for the Wisconsin district, the only Federal court then in that State, and which court had at that time Circuit Court powers. The railroad, &c., was sold by the marshal, who reported his sale to the District Court. The sale was confirmed by that court and the purchaser placed in possession.

About the time, however, when this report and confirmation was made, Congress passed certain acts establishing a *Circuit* Court for the Wisconsin district, transferring to the new tribunal, with *certain reservations and limitations*, the powers which had previously been exercised by the District Court. The extent, however, of the reservations and limitations above referred to was a matter not absolutely above question. However, this court, in a case decided at the last

term, in reference to a part of the same suit now brought forward, had adjudged that the reservations and limitations were not of as extensive operation as was then contended by counsel that they were, and that certain orders made by the *District* Court in this same proceeding were void; the right to make them having passed by the acts of Congress to the new tribunal.*

In this state of enactments and decision on them, one Fleming, conceiving that the right to confirm or set aside the sale above mentioned, had also passed to the Circuit Court, petitioned *that* court for an order on the marshal to report to *it* the sale which had been made by that officer under the decree of the District Court.

He set forth in his petition that he was the equitable owner of certain of the bonds (describing them by number), to secure which the company had made its mortgage; which bonds he showed that he had bought of one H. G. Weed.

It appeared, however, by documents which he annexed to his petition and referred to, that when the La Crosse and Milwaukie Railroad was about to be sold under the decree of foreclosure, a number of its creditors formed themselves into a consociation, with a view of buying it in, and of reorganizing the road with a new name, that of the Milwaukie and St. Paul Railway. These creditors, acting for themselves and all who should become "assentents," and making in writing a scheme of reorganization, to which other creditors might assent,—appointed certain persons, Seymour and others, to act as agents and trustees in the whole matter of all persons who chose to deliver their bonds to *them* for use in the contemplated purchase. This scheme of reorganization made Seymour and the others agents of all the "assentents," giving them power "to do any and all things which they deem for the benefit of the holders as fully as they might do if personally present;" and authorizing them "in relation to all matters, exigencies and things not herein

* Bronson *v.* La Crosse Railroad Company, 1 Wallace, 405, where the acts of Congress, &c., may be seen.

specifically provided for to exercise a liberal discretion, except to oblige us personally for the payment of money."

Weed was an "assentent," and deposited his bonds, getting in return a certificate of interest in the embryo Milwaukie and St. Paul Railway Company. The La Crosse and Milwaukie was sold under the decree of foreclosure. The agents, &c., purchased it, and it was now reorganized as the St. Paul and Minnesota Railway Company; the managers of that company being put, on confirmation of the sale, into possession of the road. All this, as it was to be collected from Fleming's petition and the documents annexed to it, was *prior* to his purchase of the bonds from Weed. In fact, the date of his purchase, as stated by him (September 26, 1863), was after the marshal's sale and the confirmation by the District Court.

Being dissatisfied with the sale as made by the marshal and confirmed by the District Court, Fleming petitioned the *Circuit* Court for the order as already mentioned. That court refused the order.

Mr. Carpenter, counsel of Fleming, now moved *this* court for a mandamus to the judges of the Circuit Court, commanding them to make such a rule on the marshal as had been prayed for and refused. The application to this court set forth that the marshal had sold, or pretended to sell, property belonging to another road, and not decreed to be sold, and that the *District* Court had pretended to confirm the same; but alleged that the District Court had no jurisdiction over the cause for any purpose whatever, the cause having been transferred to the Circuit Court; that the pretended confirmation of the sale was void; that the sale remained, therefore, in law unconfirmed; and that no steps could be taken to complete the foreclosure of the mortgage and protect the rights of the petitioner as a holder of bonds secured by the mortgage, except by having said sale reported, as it ought to be, to the Circuit Court.

Mr. Cowdrey, as amicus curiæ, submitted a brief, suggest-

ing that no proper interest was shown in Fleming to have what he asked for even if he had merits in fact; and arguing that, for various reasons which he set forth, no merits could exist; a matter, however, this last one, which the court, disposing of the case *in limine*, did not touch.

Mr. Justice MILLER delivered its opinion.

The petitioner does not show that he has such an interest in the matter as would justify the court to permit him to interfere. He describes himself as equitable owner of certain bonds made by the La Crosse and Milwaukie Railroad Company. These bonds were secured by a mortgage; and it was in a suit brought to foreclose that mortgage that the sale was had of which he complains. The owner of these bonds, while the foreclosure proceedings were in progress, was Weed, who had deposited them with the agents of a company, which proposed to use them in buying the said road, at the sale under the decree of foreclosure. These agents were invested by Weed with an absolute and full power to use the bonds in any manner, so that no money was required of Weed towards the purchase. The sale was made, and the road purchased as proposed. These bonds were used in the purchase. The sale was confirmed by the District Court and the purchasers placed in possession. Long after all this was done, as the petitioner alleges, by purchase from Weed he became the equitable owner of the bonds. Who was the legal owner, and what were the relative rights of the equitable and legal owners, or how any one could be the owner when the bond had been cancelled or absorbed in paying for the road, we are not informed.

We deem it sufficient to say that the petitioner, who had no interest in the matter at the time of the sale and confirmation, shows no right now to disturb what the parties who *were* interested have acquiesced in.

MOTION OVERRULED.

* See *supra*, p. 609, Minnesota Company *v.* St. Paul Company.

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